

CRITERIA FOR PROSECUTION

Memorandum of
THE LAW OFFICERS OF THE UNITED KINGDOM**Introduction**

The United Kingdom contains three different prosecution systems but two of these, those in England and Wales and Northern Ireland, have strong similarities. The first part of this memorandum is concerned with the position in England and Wales and the second part with that in Scotland. In Northern Ireland all prosecutions are under the control of the Director of Public Prosecutions for Northern Ireland.

England and Wales

2. Historically any citizen could initiate criminal proceedings. Indeed, where a police officer prosecutes he is exercising this historical right of any citizen. However, the term "private prosecution" is now reserved for those prosecutions which are brought by a citizen and not by or on behalf of any officer of the Crown.

3. By far the largest number of prosecutions are brought by the police. A police officer will take the decision to prosecute and unless it is a simple summary offence which the officer can present in court himself, he will send the papers to solicitors who will prepare for trial and, where appropriate, instruct counsel. The majority of police forces have their own prosecuting solicitors departments but a minority still use private firms of solicitors.

4. The Office of Director of Public Prosecutions was established by the Prosecution of Offences Act 1879 which gave the Director the duty "under the superintendence of the Attorney-General, to institute, undertake, or carry on such criminal proceedings... and to give such advice and assistance to chief officers of police, clerks to justices and other persons... as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney-General". The regulations specify the offences which have to be reported by the police to the Director. In general, the most serious offences and those which raise the greatest legal problems have to be referred to the Director. The fact that an offence has to be reported to the Director does not, in itself, rule out the possibility of a private prosecution. For example, some years ago the Director decided that there was insufficient evidence to justify a prosecution against a man suspected of committing a particular murder. Subsequently, the parents of the victim instituted proceedings against that man and when the magistrates committed him for trial on a charge of murder, the Director thought it right to take over the proceedings and present the evidence at the trial.

5. There are some offences which are subject to special statutory controls on prosecution. These fall into two classes - those which can only be prosecuted by or with the consent of the Director of Public Prosecutions and those, a smaller class, which can only be prosecuted by or with the consent of the Attorney-General. Examples of the latter class are offences under the Official Secrets Acts and offences of corruption. In practice, where the Attorney-General considers that there should be a prosecution he gives his consent and the proceedings are brought by the Director.

6. Over the years the Director of Public Prosecutions has established criteria which are applied by his staff in taking the decision whether or not to prosecute. Until recently the police have not received advice about the criteria which they should adopt in taking decisions.

7. The Royal Commission on Criminal Procedure, which reported in 1981, recommended that the police should continue to have the discretion whether to initiate proceedings but that once that decision has been taken the case should be dealt with by a statutorily based prosecution service which should have complete discretion whether to alter or drop charges. The Commission recommended that there should be a "Crown Prosecutor" for every police force area and that he should be accountable to a police and prosecutions authority which would replace the existing police authority and be similarly constituted.

8. The Government recognised that there was a strong case for establishing a prosecution service independent of the police in some form but questioned whether it was appropriate to

have a scheme organised on a local basis subject to some form of local control. The Government has appointed a Working Party on Prosecution Arrangements to advise Ministers on what would be the best model for the organisation of an independent prosecution service on a national, local or regional basis. The Government announced that, having accepted the case for an independent prosecution service, three interim steps would be taken in that direction in the light of the Royal Commission's Report. The first of these was that the Attorney-General would give to all who prosecute on behalf of the public some guidance on criteria for prosecution which will be closely in accordance with the spirit of the Royal Commission's recommendations. The second, was that the Director of Public Prosecutions would, with the approval of the Attorney-General, ask chief officers of police to consult him in every case in which the chief officer wishes to continue criminal proceedings contrary to the advice of the solicitor having conduct of the proceedings. Thirdly, the Government would continue to encourage the establishment of prosecuting solicitors departments for those areas where they do not at present exist.

9. All these steps have been taken. The guidance on criteria for prosecution, which has been sent to all police forces, appears as Annex 1.

Scotland

10. There are many differences in procedural law between Scotland and the rest of the United Kingdom, the most important in this context being that in Scotland, the police have no right to institute criminal proceedings. The position is currently regulated by section 17(1)(b) of the Police (Scotland) Act 1967 which states:-

"it shall be the duty of the constables of a police force... where an offence has been committed (whether within or outwith the police area for which the police force is maintained) to take all such lawful measure, and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice."

Sections 9 and 293 of the Criminal Procedure (Scotland) Act 1975 give the Lord Advocate (chief public prosecutor) power to issue instructions to chief constables of police forces with regard to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed and it is the duty of the chief constable to comply with any such instructions.

11. Public Prosecutors in Scotland have virtually the monopoly of the discretion whether or not to institute criminal proceedings. Police have a duty to report cases to the Prosecutor where there appears to be sufficient evidence unless otherwise directed. There is close liaison between police and Prosecutor, which enables the police to appreciate the level of criminality required by the Prosecutor to justify proceedings. As a result the police do not report very trivial cases to the Prosecutor, but deal with such cases themselves by way of warning. Where the police do report a case to the Prosecutor they cannot insist he raises proceedings. This situation appears to have resulted from the fact that there was a system of Public Prosecution established in Scotland long before the introduction of police forces by the passing of various local Acts at the beginning of the 19th century. While the police play no part in the decision whether or not criminal proceedings should be taken in respect of crimes or offences reported by them to the Public Prosecutor, in practice the views of the police officer reporting a case may be taken into account by the Prosecutor in reaching a decision. Similarly where agencies other than the police report cases to the Prosecutor recommendations may be made but the Prosecutor cannot be forced to raise proceedings.

12. In the standard work Criminal Procedure according to The Law of Scotland by Renton and Brown (4th Edition),¹ the factors which ought to be borne in mind by prosecutors in Scotland in considering whether, in any particular case criminal proceedings should be raised are listed as follows:-

- (i) Whether the facts disclosed in the information constitute either a crime according to the common law of Scotland, or a contravention of an Act of Parliament which extends to that country.
- (ii) Whether there is sufficient evidence in support of these facts to justify the institution of criminal proceedings.
- (iii) Whether the act or omission charged is of sufficient importance to be made the subject of a criminal prosecution.

- (iv) Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged.
- (v) Whether there is sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him.
- (vi) Whether the case is more suitable for trial in the civil court, in the respect that the facts raise a question of a civil right.

(The above criteria also appear in the first edition of Renton and Brown dating from 1909).

13. Should the information before the Prosecutor appear to warrant criminal proceedings, these must be taken in a court having jurisdiction to try the offence and, in the event of conviction, to impose an adequate punishment.

14. A defect in jurisdiction is a fatal nullity and a Prosecutor should not institute proceedings unless his court has jurisdiction to try the case.

15. Although the Scottish criminal justice system adopts an adversarial approach in trying criminal cases, a system of public prosecution operates within this framework and the private citizen has a very limited right to raise criminal proceedings. This is in contrast to the position in England where the private citizen has a much less restricted right to prosecute.

16. The Lord Advocate is responsible for and directs all public prosecutors in Scotland. His deputy is the Solicitor-General for Scotland. The Lord Advocate and the Solicitor-General are known as the Law Officers of the Crown, are appointed by the Queen on the recommendation of the Prime Minister² and demit office on a change of Government. The Law Officers are accountable to Parliament for their actions. They are assisted in their day-to-day non-political duties by 12 Advocates Depute, known collectively as Crown Counsel.

17. At a local level, public prosecutions are conducted by Procurators Fiscal. They have autonomy within their area in considering charges for proceedings and prosecuting crimes and offences at summary level subject to any general directions issued by the Lord Advocate. Procurators Fiscal cannot take any proceedings on indictment without obtaining the prior approval of Crown Counsel since all such proceedings are at the instance of the Lord Advocate.

18. In considering reports alleging the commission of minor crimes and offences Procurators Fiscal may decide to issue a warning to the accused person in appropriate cases. In May 1979 the Lord Advocate issued guidelines to Procurators Fiscal to assist them in deciding which cases merited the issue of a warning rather than the institution of criminal proceedings or required more than the mere marking of a case "no proceedings". This instruction was issued to standardise warning procedures which had been practised by various Procurators Fiscal for many years. As a result of controversy in the media following the issue of these instructions, the guidelines were debated in Parliament by the Scottish Grand Committee.³ In the light of this debate and experience gained revised instructions were issued to Procurators Fiscal in July 1980 and these have received extensive publicity. The issue of a warning letter to an alleged offender is considered the appropriate method of dealing with a case where there appears to be sufficient evidence that the person concerned has committed a minor crime but the case is not so trivial as to merit no action. Warnings therefore are an alternative to prosecution and are issued in cases where the Procurator Fiscal might otherwise be disposed to prosecute. In considering whether or not to administer a warning Procurators Fiscal should have regard to the following:-

- (i) In no case should a warning be administered unless the Procurator Fiscal has in his possession sufficient evidence which would in his opinion justify him in taking proceedings in court.
- (ii) A warning may be administered whether or not the accused person is alleged to have admitted or denied the offence or made no statement to the police.
- (iii) If the Procurator Fiscal gives a warning he will be regarded as having decided not to take court proceedings in respect of the case. Accordingly no warning will be administered on the understanding that if it is not accepted, the Procurator Fiscal will take proceedings in court.
- (iv) Any warning should avoid giving the impression that the Procurator Fiscal is adjudicating on the guilt or innocence of the person concerned.

Such warnings are normally sent to alleged offenders in writing but in exceptional cases Procurators Fiscal may administer verbal warnings.

19. As is indicated above where a warning is issued no criminal proceedings can be taken at a later date in respect of the same offence.

20. Where the Prosecutor has decided not to take proceedings he may be able to raise proceedings at a later date for example if further information comes to light so long as he has not intimated to the accused or publicly that he is to take no proceedings. In cases where the Prosecutor institutes criminal proceedings he may abandon the proceedings at any stage thereafter. The initial decision whether or not to institute criminal proceedings is usually taken by the Prosecutor solely on the information supplied to him by the reporting agency which in over 90 per cent of cases is the police. In some instances, the Prosecutor may make further inquiries of his own or request further information from the reporting agency before reaching his decision.

21. Once criminal proceedings are instituted the Prosecutor may come into possession of other information from a variety of sources, principally from the accused or his legal representative. As a result of this further information the Prosecutor may be disposed to review his original decision. The decision whether to prosecute is therefore a continuing one.

22. In the so-called "Glasgow rape case", the Prosecutor Fiscal at Glasgow, on receipt of information from the police, raised proceedings against four youths for rape and attempted murder. On reporting the case to Crown Counsel they, in the exercise of their responsibility as independent prosecutors, indicted 3 of these youths, on one charge of rape and one charge of assault to severe injury, permanent disfigurement and danger to life. The case was put out for a sitting of the High Court in Glasgow in June 1981. When the victim appeared it was apparent that she was not in a fit state to give evidence, and on the instructions of Crown Counsel she was examined by a consultant psychiatrist. The psychiatrist was of the opinion that the woman's medical history since the events complained of was such that a court appearance at that time to give evidence would be detrimental to her health and carried a hazard of suicide both before and after the trial, whatever the result. The case was therefore not proceeded with and thereafter the decision had to be taken whether the trial should be further postponed, or whether the Crown should proceed with the whole, or part, of the indictment in the absence of the woman's evidence or whether the case should be dropped altogether. Crown Counsel decided to take no further proceedings principally because of the likely effect on the health of the woman and also in the light of the information available that the prospect of improvement in the woman's health to alter the situation was not sufficient to justify keeping the proceedings alive any further.⁴

23. This decision received great publicity in the media in January 1982 and was debated in both Houses of Parliament on 21 January 1982. Because Crown Counsel's decision had been intimated to the accused, the Crown was barred from instituting fresh proceedings against the youths. In the event the woman recovered sufficiently for another psychiatrist to say in March 1982 that she was probably fit to give evidence. The woman applied to the High Court of Justiciary and was granted authority to proceed with a private prosecution which took place in May 1982 in the High Court at Edinburgh when one of the accused was convicted of rape and assault and sentenced to 12 years' detention and the other two accused were convicted of indecent assault and had sentence deferred in their cases for one year. This case represented the first successful High Court private prosecution in Scotland since 1909. A number of minor offences may still be prosecuted by private prosecutors but an ordinary citizen may only institute a private prosecution in the High Court when given authority by the Court and this authority is granted extremely infrequently since the Lord Advocate in exercising his duties seeks to act in the public interest.

24. The debate on 21 January in Parliament to some extent dealt with a report of a statement said to have been made to the press by the then Solicitor-General for Scotland. That part of the debate does not affect the present issue. The general position remains unchanged in that the Public Prosecutor at whatever level has the duty to decide in the first place whether or not to prosecute and thereafter whether or not to continue the proceedings until there is a judicial determination of the case.
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25. In a recent study carried out into the use of discretion whether or not to prosecute by Procurators Fiscal⁵ it was found that Procurators Fiscal exercised their discretion not to prosecute in only 8 per cent of cases. The reason why Procurators Fiscal were found to exercise their discretion not to prosecute comparatively rarely was considered to be due to some extent to the lack of alternatives to prosecution open to place whether or not to prosecute and thereafter whether or not to continue the proceedings until there is a judicial determination of the case.

25. In a recent study carried out into the use of discretion whether or not to prosecute by Procurators Fiscal⁵ it was found that Procurators Fiscal exercised their discretion not to prosecute in only 8 per cent of cases. The reason why Procurators Fiscal were found to be due to some extent to the lack of alternatives to prosecution open to Procurators Fiscal. (The research was carried out prior to issue of the Lord Advocate's instruction on warnings). It was found in fact that the Procurator Fiscal's discretion was much more freely exercised later in the proceedings to negotiate pleas and avoid trial. Recently the whole question of alternatives to prosecution has been considered by a Departmental Committee headed by Lord Stewart. Their first Report⁶ published in December 1980 considered motoring offences and has resulted in the enactment of provisions in Part III of the Transport Act 1982 which give Procurators Fiscal power to offer fixed penalties to offenders in respect of minor motoring offences in lieu of court proceedings. The second Report of the Committee, due out later this year, will consider more generally what alternatives to prosecution could be implemented to deal with minor matters at present dealt with by summary prosecutions.

26. In conclusion the criteria adopted by Prosecutors in Scotland in deciding whether or not to institute criminal proceedings are of long-standing and generally known and understood by members of the public. In recent years alternatives to prosecution have been more widely used and other alternatives such as fixed penalties have become available. As the system in Scotland is operated in the public interest Parliament has been involved as a forum of debate when important prosecutorial decisions have been questioned or procedures have been revised.

FOOTNOTES

1. 4th Edition edited by Gerald H Gordon and published by W Green and Son Ltd Edinburgh, 1972, page 19.
2. Criminal Procedure in Scotland and France by A V Sheehan. HMSO 1975, page 109.
3. Parliamentary Debates 22 January 1980.
4. Hansard Volume 16, 21 January 1982, Columns 423-34.
5. Prosecution in the Public Interest by Moody and Tombs, Scottish Academic Press 1982.
6. The Motorist and Fixed Penalties Cmnd 8027.

ANNEX I

CRITERIA FOR PROSECUTION

Introduction

1. Of all the decisions which have to be made by those with responsibility for the conduct of criminal cases, by far the most important is the initial one as to whether or not a charge should be preferred. Naturally the degree of importance depends to some extent on

the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty man is not prosecuted, he may go on to cause untold further harm; yet if an innocent man is prosecuted, he and his family may be seriously affected even if the offence is comparatively minor and he is ultimately acquitted.

2. Hence whenever there is some room for doubt as to whether the evidence is sufficient, every effort must be made to ensure that the decision is reached dispassionately after due deliberation and by a person experienced in weighing the available evidence.

3. Sometimes, of course, a degree of haste is inevitable if there is a danger that the suspect will disappear, commit further offences, interfere with vital witnesses or otherwise impede the investigation.

Sufficiency of evidence

4. When considering the institution or continuation of criminal proceedings, the first question to be determined by the prosecutor is whether evidence is sufficient to justify a prosecution. The Director of Public Prosecutions does not support the proposition that a bare prima facie case is enough, but rather applies the test of whether there is a reasonable prospect of a conviction; or, put another way, whether a conviction is more likely than an acquittal before an impartial jury properly directed in accordance with the law.

5. An even higher standard is set 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 might be seen as casting 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.

6. In such cases the Director of Public Prosecutions is hesitant to prosecute unless he thinks the prospects of a conviction are high. He also tends to adopt a similar high standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave.

7. In reaching his decision as to sufficiency of evidence, the Director considers such factors as: availability, credit and credibility of witnesses and their likely impression on a jury; the admissibility of any admissions, if necessary having regard to the age and intelligence of the defendant; the reliability of any identification; and will draw on his experience to evaluate how strong the case is likely to be when presented in Court.

Public Interest

8. Having satisfied himself that the evidence itself can justify proceedings, the prosecutor must then consider whether the public interest requires a prosecution. There are some who feel that, where the evidence is sufficient, proceedings ought to follow; but the Director of Public Prosecutions prefers the view expressed in a House of Commons debate by Lord Shawcross when he was Attorney-General, and subsequently endorsed by his successors:-

"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."

He continued by saying that regard must be had 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 affecting public policy".

9. The factors which can properly lead to a decision not to prosecute will vary from case to case, but broadly speaking, the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution, for example, a caution. The most common factors, and the attitude of the Director of Public Prosecutions towards them are:-

(a) Likely Penalty

When the circumstances of an offence, especially if triable on indictment, are not particularly serious, and the probable penalty on conviction would only be a conditional or absolute discharge, it would not normally be in the public interest to prosecute.

(b) Staleness

Regard must be had not only to the date when the last known offence was committed, but also the length of time which is likely to elapse before the matter can be brought to trial. The Director is slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. Less regard is paid to staleness, however, if it has been contributed to by the proposed defendant himself, or the complexity of the case has necessitated lengthy police investigation.

(c) Youth

The stigma of a conviction can cause irreparable harm to the future prospects of a young person, and careful consideration should be given to the possibility of dealing with him or her by means of a caution. Regard must be had to previous character, parental attitude and likelihood of the offence being repeated.

(d) Old age and infirmity

(i) The older or more infirm the offender, the more reluctant is the Director of Public Prosecutions to prosecute unless there is a real possibility of repetition or the offence is of such gravity that it is impossible to overlook. In general, it seems right not to prosecute whenever a Court is likely to pay such regard to the age of infirmity of the offender as to induce it to impose only a nominal penalty, although there may be exceptional circumstances, such as where the accused still holds a position of some importance, when proceedings are required in the public interest regardless of what penalty may be imposed.

(ii) One must of course also consider whether the accused is likely to be fit enough to stand his trial. For this purpose the Director of Public Prosecutions sometimes obtains from the defence solicitor any medical reports which have been made on his client and may arrange, through him, for an independent medical examination.

(e) Mental illness or stress

(i) The defence solicitor, knowing that the police are investigating his client's conduct, may sometimes send to the Director of Public Prosecutions a psychiatric report to the effect that the accused is suffering from some form of mental illness and that the strain of criminal proceedings will lead to a considerable and permanent worsening of his condition. This is nearly as worrying as, say, a report that the accused has a weak heart and that the shock of prosecution may be fatal.

(ii) Once again, the Director of Public Prosecutions will normally try to arrange for an independent examination and will in any event give anxious consideration to such reports as he may receive. This is a difficult field because in some instances the accused may have become mentally disturbed or depressed by the mere fact that his misconduct has been discovered and the Director of Public Prosecution is sometimes dubious about a prognosis that criminal proceedings will adversely affect his condition to a significant extent.

(iii) The Director of Public Prosecutions does not normally think it is right to pay much regard to evidence of mental instability which is not coupled with a prognosis as to the adverse effect of proceedings, as such instability may increase the likelihood that the offence will be repeated. The accused's mental state will, of course, be relevant in considering any issue of mens rea or fitness to plead.

(f) Sexual offences

Where the girl or youth has been a willing party to the offence the Director of Public Prosecutions takes into account her or his age, the relative age of the parties and whether or not there was any element of seduction or corruption.

(g) Complainant's attitude

In some cases, the Director of Public Prosecutions thinks it is proper to have regard to the attitude of a complainant who may have gone to the police in the heat of the moment - as in many husband/wife assault cases - but later expresses a wish that no action be taken. Usually in such circumstances he would not prosecute unless there was suspicion that the change of heart was actuated by fear or the offence was of some gravity. The Director of Public Prosecutions' attitude would be the same in the case of, for example, a comparatively minor theft or criminal damage if the owner of the property expressed a wish that there should be no prosecution.

10. Finally if, having weighed such of the above factors as may appertain to the case, the Director of Public Prosecutions is still in doubt as to whether proceedings are called for, he would throw into the scales the good or bad character of the accused, the attitude of the local community and any information about the prevalence of the particular offence in the area or nationally. Should doubt still remain, the Director of Public Prosecutions considers that the scales should normally be tipped in favour of prosecution as if the balance is so even, it could properly be said that the final arbiter must be the Court.