

**THE LAW COMMISSION**

**CONSENTS TO PROSECUTION**

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## ABBREVIATIONS

In this paper we use the following abbreviations:

*Blackstone*: *Blackstone's Criminal Practice* (1998 ed, editor-in-chief P Murphy)

the consultation paper: *Consents to Prosecution* (1997): Consultation Paper No 149

the Convention: the European Convention on Human Rights

the CPS: the Crown Prosecution Service

the DPP: the Director of Public Prosecutions

the DTI: the Department of Trade and Industry

the Franks Committee: the Departmental Committee on section 2 of the Official Secrets Act 1911 (Chairman: Lord Franks)

the Franks Report: the report of the Franks Committee (September 1972) Cmnd 5104

the Glidewell Report: the Review of the Crown Prosecution Service (1998) Cmnd 3960 (Chairman: Sir Iain Glidewell)

the Home Office memorandum to the Franks Committee: further memorandum by the Home Office on the control of prosecutions by the Attorney General and the Director of Public Prosecutions (April 1972) to the Franks Committee

the Philips Commission: the Royal Commission on Criminal Procedure (Chairman: Sir Cyril Philips)

the Philips Report: the report of the Philips Commission (January 1981) Cmnd 8092

the Phillimore Committee: the Committee on Contempt of Court (Chairman: the Rt Hon Lord Justice Phillimore OBE)

the Phillimore Report: the report of the Phillimore Committee (December 1974) Cmnd 5794

the POA 1879: the Prosecution of Offences Act 1879

the POA 1979: the Prosecution of Offences Act 1979

the POA 1985: the Prosecution of Offences Act 1985

the SFO: the Serious Fraud Office

# ***EXECUTIVE SUMMARY***

- 1 This report recommends reforms designed to rationalise one of the procedural mechanisms used to control the prosecution process – the requirement in respect of certain offences that, as a condition precedent to the institution of criminal proceedings, the consent of either a Law Officer or the Director of Public Prosecutions (DPP) is obtained. We are concerned only with those offences which require the consent of a Law Officer or the DPP and *no other authority*, as the provisions which require the consent of others tend to do so for specific reasons such as the involvement of a technical element.<sup>1</sup>
- 2 There is a wide-ranging list of offences which require the consent of a Law Officer or the DPP before a prosecution can be instituted<sup>2</sup> but it seems clear that “some of the restrictions have been arbitrarily imposed”.<sup>3</sup> There are “anomalies and even absurdities”<sup>4</sup> amongst the list. A proliferation of statutes containing consent requirements has made “substantial inroads into the much-acclaimed principle of the ordinary individual’s right to set the criminal law in motion”<sup>5</sup>; a right we refer to as the “fundamental principle”.
- 3 The need for consent to the institution of criminal proceedings has to be considered in light of the other existing measures for controlling prosecutions (the power of the Attorney-General to terminate proceedings by entering a *nolle prosequi*,<sup>6</sup> his power to prevent vexatious litigants from commencing proceedings,<sup>7</sup> and the powers of the DPP to take over and discontinue proceedings)<sup>8</sup>. We identify the harm caused by an unfettered right of private prosecution<sup>9</sup> and point out that consent provisions are capable of operating to prevent harm that may be caused by the *institution* of inappropriate criminal proceedings, before the DPP can stop them.<sup>10</sup> We conclude that in certain circumstances consent provisions are justifiable to prevent harm that may be caused by the *institution* of inappropriate proceedings even though they may be terminated.<sup>11</sup>

<sup>1</sup> Para 1.16 below and Consultation Paper No 149, para 1.14.

<sup>2</sup> See Appendix A.

<sup>3</sup> Philips Report, para 7.56.

<sup>4</sup> Select Committee on Obscene Publications, 1958, HC 123-1, App I, p 23, para 2.

<sup>5</sup> J L J Edwards, *The Law Officers and the Crown* (1964) p 397.

<sup>6</sup> Para 2.17 below.

<sup>7</sup> Para 2.18 below, by Order of the High Court, a “criminal or all proceedings Order”.

<sup>8</sup> Paras 2.19 – 2.20 below.

<sup>9</sup> Para 5.14 – 5.24 below.

<sup>10</sup> Para 5.27 below.

<sup>11</sup> *Ibid.*

- 4 We recommend a reformed *offence-structured* consents regime because it is wholly impractical for a consent requirement to depend on the circumstances of the defendant.<sup>12</sup>
- 5 We establish guiding principles for determining whether or not a consent provision should attach to any particular offence.<sup>13</sup> We conclude that it is only justifiable to include consent requirements in three categories of case and we recommend that consent provisions should be used to control the prosecution of offences in each of those categories.<sup>14</sup> The task of putting those principles into effect is a matter for the relevant government department which is better placed than we are to say whether a particular consent provision can be justified.
- 6 The three categories of offences for which we recommend a consent provision are as follows:
- i) where it is very likely that a defendant will reasonably contend that prosecution for a particular offence would violate his or her Convention rights;<sup>15</sup>
  - ii) those which involve the national security or have some international element.<sup>16</sup> Offences would be regarded as involving some “international element” if they
    - a) are related to the international obligations of the State;
    - b) involve measures that were introduced to combat international terrorism;
    - c) involve measures introducing response to international conflict; or
    - d) have a bearing on international relations;<sup>17</sup>
  - iii) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.<sup>18</sup>

<sup>12</sup> Para 5.34 below (Recommendation 3).

<sup>13</sup> Paras 6.37, 6.46 and 6.52 below.

<sup>14</sup> *Ibid* and paras 6.53 – 6.54 below.

<sup>15</sup> Those rights and freedoms guaranteed under the European Convention on Human Rights which are given further effect in domestic law by the Human Rights Bill, due to receive the Royal Assent in November, 1998. See paras 6.21 – 6.39 below. It is thus very likely that by the time this report is published the Bill will have become, or be about to become, law. Our recommendation on this issue is made in anticipation of that event but it is not conditional upon the Bill becoming law. We believe that, independently of this Bill, our recommendation is justified in light of our Treaty obligations under the Convention (Recommendation 11).

<sup>16</sup> See paras 6.40 – 6.46 below (Recommendation 12).

<sup>17</sup> Para 6.46 below.

<sup>18</sup> See paras 6.47 – 6.52 below (Recommendation 13).



- 7 The ambit of category 7(i) above is wider than was provisionally proposed. Since our consultation paper was issued, the Human Rights Bill has been published. After considering the extent of this category further, we have decided to make our recommendation in respect of *all* Convention rights which are given further effect in domestic law by the Human Rights Bill,<sup>19</sup> rather than just the freedom of expression as provisionally proposed. This is because we can see no reason in principle why freedom of expression should be valued more highly than any other Convention right. We do not anticipate that very many offences will attract a consent provision as a result of the enlargement of this category for the reasons that we give in our report.<sup>20</sup>
- 8 An example of an offence that would fall within category 7(iii) above might well be the proposed new offence of misuse of public office<sup>21</sup> for which a private prosecution could be brought against a candidate just before an election. The powers of the DPP to take over proceedings and to discontinue them might not be able to be exercised until after the election, by which time substantial damage could have been done.
- 9 We consider but reject the idea that consent requirements could properly be used to prevent prosecutions that were considered to be inappropriate in respect of each of the following other categories of case:
- cases of evidential weakness,<sup>22</sup>
  - imprecise offences,<sup>23</sup>
  - offences attracting vexatious and trivial prosecutions,<sup>24</sup> and
  - cases which fail to take into account mitigating factors.<sup>25</sup>
- 10 We consider whether consent requirements should be used to control prosecutions of individuals whose working lives are likely to be substantially damaged if prosecuted, though subsequently acquitted, of an offence particularly harmful to their position. In particular we examine the position of doctors and manslaughter. We conclude that these are not cases the prosecution of which should be controlled by a consent requirement.<sup>26</sup>

<sup>19</sup> See n 15 above.

<sup>20</sup> Paras 6.25 – 6.36 below.

<sup>21</sup> Para 6.51 below.

<sup>22</sup> Para 5.45 below (Recommendation 5).

<sup>23</sup> Paras 6.3 – 6.7 below (Recommendation 7).

<sup>24</sup> Paras 6.8 – 6.17 below (Recommendations 8 and 9).

<sup>25</sup> Paras 6.18 – 6.20 below (Recommendation 10).

<sup>26</sup> Paras 5.36 – 5.42 below (Recommendation 4).

- 11 In the consultation paper<sup>27</sup> we asked whether consent provisions may be justified for those offences in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution. We have concluded that we should not pursue our provisional proposal which was in favour of such use of consent provisions.<sup>28</sup>
- 12 We recommend that all provisions requiring the consent of the Law Officers or the DPP before the prosecution of any offence other than those which fall into one or more of the above three categories (set out in paragraph seven) should be dispensed with.<sup>29</sup>
- 13 At present it is a matter of chance whether the DPP is notified of private prosecutions. We recommend automatic notification of private prosecutions to the CPS (the Crown Prosecution Service, of which the DPP is the head), save where the DPP has licensed an organisation or person to bring criminal proceedings without such notification.<sup>30</sup> We make our recommendation because of the importance we attach to the right of the DPP to take over proceedings and discontinue them; this right can only be exercised if the DPP knows of the prosecution. Such notification would not create any duty on the DPP to take over the conduct of proceedings, but the power to take them over would remain under section 6(2) of the POA 1985.<sup>31</sup>
- 14 Finally we make recommendations pertaining to the exercise of the authority to give consent:
- i) The category of offences involving national security or some international element should exclusively require the consent of the Attorney-General who is best placed to make the decision and is democratically accountable for that decision. Other consents should be given by the DPP.<sup>32</sup>
  - ii) Provision should be made to enable, in appropriate cases, a transfer of authority to make consent decisions from the Law Officers to the DPP, to be effected by delegated legislation.<sup>33</sup>
  - iii) The powers of consent of the DPP should only be delegable to the Head of Central Casework and no longer be capable of being exercised on behalf of the DPP by any CPS lawyer.<sup>34</sup>

<sup>27</sup> Consultation Paper No 149, paras 6.47 – 6.51 and para 8.12.

<sup>28</sup> Paras 5.46 – 5.51 below (Recommendation 6).

<sup>29</sup> Para 6.54 below (Recommendation 14).

<sup>30</sup> Paras 7.2 - 7.9 below (Recommendation 15).

<sup>31</sup> See para 7.9 below.

<sup>32</sup> Para 7.13 below (Recommendation 16).

<sup>33</sup> Para 7.27 below (Recommendation 17).

<sup>34</sup> Paras 7.28 – 7.35 below. Note, we have identified the Head of Central Casework as the appropriate person, in light of the recommendations of the Glidewell Report that the Head

of Central Casework would be answerable to a Senior Director, Central Operations, who would directly support the DPP in the legal responsibilities of office (Recommendation 18).

# **THE LAW COMMISSION**

**Item 11 of the Sixth Programme of Law Reform: Criminal Law**

## **CONSENTS TO PROSECUTION**

*To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain*

### **PART I**

## **INTRODUCTION AND SUMMARY OF PRINCIPAL RECOMMENDATIONS**

### **BACKGROUND TO THIS REPORT**

- 1.1 In this report, we make recommendations for the reform of one of the procedural mechanisms used to control the prosecution process, namely the requirement in respect of certain offences of the consent of the Law Officers (the Attorney-General or the Solicitor-General) or the Director of Public Prosecutions (“the DPP”) as a condition precedent to the institution of criminal proceedings. We have been very conscious of the constitutional gravity of consent provisions because they not only fetter the right of private prosecution but they also inevitably impose an administrative burden on senior officials and cause delay within the criminal justice system.
- 1.2 We began this project because we believed that the consents regime is an important subject which requires urgent review, and the responses that we have received on consultation fortify this belief. Lord Justice Brooke, for example, said: “I certainly agree very strongly that the Consent regime needs to be rationalised and put on a principled footing, and the Commission has set out an unanswerable case in this regard”.
- 1.3 The first reason why we hold this belief is that the Royal Commission on Criminal Procedure (“the Philips Commission”) under the chairmanship of Sir Cyril Philips, commented on the wide-ranging list of Acts which included a consent provision and suggested that “some of the restrictions ha[d] been arbitrarily imposed”.<sup>1</sup> In the course of the work devising the proposals which eventually led to the Prosecution of Offences Act 1985, the Commission, having noted that the DPP said in evidence to the Commission that “the time was ripe for some rationalisation of the restrictions”,<sup>2</sup> took the view that the creation of the Crown Prosecution Service (“the CPS”) provided the apposite moment for reviewing the consents regime. Since then there has been a proliferation of consents provisions.<sup>3</sup>

<sup>1</sup> Philips Report, para 7.56.

<sup>2</sup> The Philips Report recommended that rationalisation should not be delayed: para 7.57.

<sup>3</sup> See Appendix A for some illustrations.

- 1.4 Second, former Law Officers, who have had much experience in the way it operates, have criticised the consents system. Lord Simon of Glaisdale, a former Solicitor-General and a Law Lord, in his speech during the Second Reading of the Prosecution of Offences Bill in 1984, criticised the use of consent provisions as an erosion of the fundamental right to bring a private prosecution and referred to the list of offences requiring prior consent as “an absolute hotchpotch”.<sup>4</sup> The former Attorney-General, Sir Reginald Manningham-Buller QC MP, later Viscount Dilhorne LC,<sup>5</sup> considered the regime to be “full of anomalies and even absurdities”.<sup>6</sup> This criticism has been repeated by a leading academic expert on this subject, Professor Edwards,<sup>7</sup> who explained in 1964 that the proliferation of consents had made “substantial inroads into the much acclaimed principle of the ordinary individual’s right to set the criminal law in motion .... It is difficult to escape the unpalatable conclusion that the fundamental principle as to private prosecutions has become so eroded by legislation that the vaunted image of this right as one of the cornerstones of our constitution is no longer justified”.<sup>8</sup>
- 1.5 Third, the nature of the consents regime means that it is open to criticism on the grounds that it may cause delay in criminal proceedings and impose an administrative burden on senior officials. Both of these features are unacceptable if the consent provisions in a particular case can no longer be justified.
- 1.6 Fourth, Parliament, when considering new proposed criminal legislation, has given very little consideration to the matter of the principles governing whether consent should be required, and if so, by whom it should be given. Traditionally, the consent provisions appear towards the end of a Bill and therefore avoid detailed scrutiny at the Committee Stage. There appears to be little prospect in the near future of a general discussion of the principles justifying the insertion of consent provisions. If a body such as this Commission does not look into them, it is difficult to see how they will be considered.
- 1.7 Finally, when drafting proposals for reform, this Commission frequently has to consider whether consent provisions should be introduced for our new offences.<sup>9</sup> This is a problem that will continue to present itself when we consider recommending new offences and it seems desirable that we should have a principled approach. The best way of achieving this is to have a specific project examining consents. We believed, as has proved to be the case, that we would benefit greatly from the responses that we received on consultation and that they would enable us to make cogent and considered recommendations.

<sup>4</sup> *Hansard* (HC) 29 November 1984, vol 457, col 1050.

<sup>5</sup> Whose formulation in 1958 of the underlying principles of the consents regime in a memorandum to the Select Committee on Obscene Publications, 1958, HC 123-1, App I, pp 23 – 24 (referred to at para 3.30 below) has been regarded as a “classic exposition”: J L J Edwards, *The Attorney-General, Politics and Public Interest* (1984) p 26.

<sup>6</sup> Select Committee on Obscene Publications, 1958 HC 123-1, App I, p 23, para 2.

<sup>7</sup> Author of *The Law Officers of the Crown* (1964) and *The Attorney-General, Politics and the Public Interest* (1984).

<sup>8</sup> *The Law Officers of the Crown* (1964) p 397.

<sup>9</sup> For example, see *Legislating the Criminal Code: Corruption* (1998) Law Com No 248, paras 7.16 – 7.26.

- 1.8 The importance of this project has been increased by two significant developments. First, the Government has published and introduced its Human Rights Bill<sup>10</sup> and second Sir Iain Glidewell's Committee has reported on its review of the CPS.<sup>11</sup>
- 1.9 There has been a previous effort to rationalise the consent procedure. After the report of a working party, set up under the auspices of the Law Officers Department and the DPP in 1979, a Consents to Prosecution Bill was introduced into Parliament. It would have had the effect of transferring functions from the Attorney-General to the DPP. The Bill lapsed and failed to reach the statute book because a General Election was called and Parliament was dissolved before the Bill had completed its passage through Parliament.

#### **THE AMBIT OF THIS PROJECT**

- 1.10 Our initial examination of the consents regime led us to the conclusion that the criticisms had substance, and we decided to see if and how there should be reform. We must stress that we have not been concerned with the question of whether there should be private prosecutions. We proceeded upon the basis that there are private prosecutions, but we received thoughtful comments on the desirability of retaining the right of private prosecution to which we refer later.<sup>12</sup> In any event, even if there were no private prosecutions, it would still be necessary to decide whether we should have a consents regime for public prosecutions and how it should operate, including whose consent should be required.
- 1.11 The obvious starting point for this project was to attempt to identify those Acts which contain provisions that require the consent of either a Law Officer or the DPP to the institution of proceedings. They are set out in Appendix A, although we acknowledge that there may be omissions. It was apparent to us that there was much justification for the criticism of the consents regime as "an absolute hotchpotch".<sup>13</sup>
- 1.12 As we said in the consultation paper,<sup>14</sup> we believe that the main long-term aim of this project must be the effective reform of the consents regime and that this is best achieved by identifying, first, whether or not a requirement of the consent of the Law Officers or the DPP was *ever* justified and, second, if it was, the principles for determining whether or not a consent provision should be included or retained in any particular legislation. The objective of this project is to identify guiding principles rather than to offer schedules of offences in regard to which, for example, a consent provision should be dispensed with.
- 1.13 An additional reason for our taking such an approach is that in the case of many statutory provisions we have been unable to discern the basis upon which consent was required. In many cases the parliamentary debates do not allude to it, and, in

<sup>10</sup> See para 1.21 – 1.22 below.

<sup>11</sup> See para 1.18 – 1.20 below.

<sup>12</sup> See paras 5.7 and 5.10 – 5.13 below.

<sup>13</sup> See para 1.4 and n 4 above.

<sup>14</sup> At para 1.9.

the absence of guidance, it would be dangerous for us to try to guess. In any event, the circumstances might have changed since the legislation was passed. We do not know and could not ascertain without a lengthy consultation exercise whether a consent provision is in fact required in the light of the criteria suggested by us.

- 1.14 We therefore see the main objective of this project as being to produce recommendations based on guiding principles<sup>15</sup> and we have been assured by those in government who will make the selection, that once these have been identified it will be possible without difficulty to decide whether consent will be needed for specific offences. The task of putting those recommendations into effect is a matter for the relevant Government Department. Unusually, therefore, we are not publishing a draft Bill to accompany this report.
- 1.15 This Commission will also be greatly assisted by having an agreed and established set of guidelines for determining whether consent should be required for prosecution of any offence that we are considering recommending. We therefore hope that both Parliament and the Commission will be assisted by our *principled* approach to the issue of consents, thereby bringing to an end the present ad hoc, unprincipled and rather chaotic way in which consents have been dealt with in the past and continue to be dealt with.
- 1.16 We must stress that in this paper we are only concerned with the consent of either or one of the Law Officers or of the DPP and *no other authority*. As we explained in the consultation paper,<sup>16</sup> we have made this decision on the grounds that the consents provisions requiring the consent of other officers tend to be included for specific reasons, such as the fact that particular statutes involve some technical element or the material offence is only of concern to the designated officer.<sup>17</sup> The powers of the full range of designated authorities would therefore involve a multiplicity of quite separate issues and would distract attention from the major issue.
- 1.17 We received a large number of very helpful responses to the consultation paper and we are grateful to those who took the time and trouble to respond. We were particularly pleased that two former Law Officers, Lord Archer of Sandwell QC,<sup>18</sup> and Sir Nicholas Lyell QC, MP<sup>19</sup> and two former Directors of Public Prosecutions, Sir Thomas Hetherington,<sup>20</sup> and Sir Allan Green QC,<sup>21</sup> did so. We are also grateful

<sup>15</sup> See Parts V and VI below.

<sup>16</sup> At para 1.14.

<sup>17</sup> For example under s 193 of the Trade Union and Labour Relations (Consolidation) Act 1992, an employer is under a duty to notify the Secretary of State of multiple redundancies and, under s 194, failure to give such notice is an offence. Section 194(2) states that proceedings for such an offence can be instituted only by or with the consent of the Secretary of State or by an authorised officer.

<sup>18</sup> Solicitor-General from 1975 to 1979.

<sup>19</sup> Solicitor-General from 1987 to 1992 and Attorney-General from 1992 to 1997.

<sup>20</sup> The Director of Public Prosecutions from 1977 to 1987.

<sup>21</sup> The Director of Public Prosecutions from 1987 to 1991.

for the encouragement we have received from the present Law Officers and the Legal Secretariat to the Law Officers.

#### **MAJOR DEVELOPMENTS SINCE THE PUBLICATION OF THE CONSULTATION PAPER**

- 1.18 In the consultation paper,<sup>22</sup> we pointed out that the Attorney-General had set up a review of the Crown Prosecution Service under the chairmanship of Sir Iain Glidewell.<sup>23</sup> In June 1998 the report was published.<sup>24</sup> It was far-reaching and made a number of recommendations relevant to the present project.
- 1.19 First, the Glidewell Committee recommended the devolution of as much responsibility and accountability as possible to the Chief Crown Prosecutor in each of the 42 areas.<sup>25</sup> Second, it is envisaged that the DPP will be mainly concerned with the very considerable legal responsibilities of that office and it is proposed that the DPP will be directly supported in that work by a senior Director, Central Operations. (A Chief Executive, also directly responsible to the DPP, would be in charge of the administration of the organisation.) One of the people responsible to the Director, Central Operations, would be the Head of Central Casework. Central Casework, one of three divisions of legal operations envisaged at headquarters, would deal with the most serious, difficult and sensitive work, thus fulfilling what would have been the role of the former DPP's department if it had still existed.<sup>26</sup> We believe that the DPP should only be able to delegate responsibility for consent decisions to the Head of Central Casework, as that person will be well equipped to perform this function and able to ensure that uniform criteria are adopted throughout the country. Third, the Glidewell Committee made certain recommendations for changes in the CPS Code so that the approach to discontinuance should be that a prosecution will usually take place unless there are public interest factors tending against prosecution which outweigh those tending in favour.<sup>27</sup>
- 1.20 The Government accepts the thrust of the Glidewell Report's proposals for the reordering of CPS priorities to focus more on the core business of prosecuting, for greater separation of management from legal work, greater autonomy for the prosecuting areas and better prospects for staff. The appointment of the new Chief Executive was announced on 1 June, 1998. Other recommendations relating to the more detailed internal management of the CPS were said to be for the Chief Executive to consider as one of his first tasks.<sup>28</sup>

<sup>22</sup> At para 2.13, n 28.

<sup>23</sup> A retired judge of the Court of Appeal.

<sup>24</sup> The Review of the Crown Prosecution Service (1998) Cm 3960, referred to hereafter as "the Glidewell Report".

<sup>25</sup> The Glidewell Report, ch 10, paras 12 – 15, recommendation 42.

<sup>26</sup> The Glidewell Report, ch 10, paras 29 and 31.

<sup>27</sup> The Glidewell Report, ch 4, para 41. Issues from the Glidewell Report are considered at paras 7.32 – 7.35 below.

<sup>28</sup> Speech of the Attorney-General accepting the recommendations of the Glidewell Report: *Hansard* (HC) 1 June, 1998, vol 313, col 44 and subsequent oral answers to questions:



- 1.21 The other major change since we published the consultation paper was the publication of the Human Rights Bill.<sup>29</sup> As its long title points out, it gives “further effect to the rights of freedoms guaranteed under the European Convention on Human Rights”. The Lord Chancellor has explained<sup>30</sup> that “a major change which the [Bill] will bring flows from the shift to a rights based system”. By clause 19 of the Bill a minister will have to publish a written statement that the provisions of the Bill are compatible with the Convention or that he cannot make the statement but the Government wishes to proceed with the Bill. The significance of this to the present project is that prosecutions should be carefully monitored if they are likely to interfere with a defendant’s rights. We consider how they should be monitored later. This is important because one of the categories of case that we consider merits a consent provision is where it is very likely that a defendant will reasonably contend that a prosecution for a particular offence would violate his or her Convention rights.<sup>31</sup>
- 1.22 We believe that it is very likely that by the time that this report is published the Human Rights Bill will have received the Royal Assent.<sup>32</sup> We have not waited for that to occur before publishing this report as we consider that our treaty obligations under the European Convention on Human Rights are such that our recommendation would remain the same even if, for some unforeseeable reason, the Human Rights Bill were not to become law as expected.<sup>33</sup>

#### **SUMMARY OF RECOMMENDATIONS**

- 1.23 It is clear to us that the current regime needs to be reformed. Our view is that a consent provision must attach to a particular offence, not the circumstances of a defendant or a class of defendants. It is also our view that a consent provision is only required where the power of the DPP to take over and terminate a prosecution is not adequate to prevent particular harms.
- 1.24 There are three categories of offences for which we recommend a consent provision:
- (1) where it is very likely that a defendant will reasonably contend that prosecution for a particular offence would violate his or her Convention rights;<sup>34</sup>

*Hansard* (HC) 30 July, 1998, vol 317, col 523. The Attorney-General stated that there was now both a commitment to change and the necessary resources; the House would be provided with a progress report in the autumn.

<sup>29</sup> See para 6.26 below.

<sup>30</sup> The Tom Sargant Memorial Lecture, 16 December 1997.

<sup>31</sup> See para 6.37 below.

<sup>32</sup> It is anticipated that this will occur in November, 1998.

<sup>33</sup> See para 6.39 below.

<sup>34</sup> Those rights and freedoms guaranteed under the European Convention on Human Rights which are given further effect in domestic law by the Human Rights Bill, due to receive the Royal Assent in November, 1998: see paras 6.21 – 6.39 below.

- (2) those which involve the national security or have some international element;<sup>35</sup>
  - (3) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.<sup>36</sup>
- 1.25 We recommend that existing provisions requiring the consent of the Law Officers or the DPP prior to the prosecution of offences which do not fall into any of the above three categories should be dispensed with.<sup>37</sup>
- 1.26 In the case of the second category above, the consent should be given by a Law Officer. In the case of the other two categories, the consent should be given by the DPP. Where it falls to the DPP to give or refuse consent to a prosecution, we recommend that the DPP should only be able to delegate that power to the Head of Central Casework.<sup>38</sup>
- 1.27 It follows that for some offences, it might be appropriate for the consent power to be transferred from one officer to another. As for how the transfer of authority may be effected, we recommend that as regards existing legislation, provision should be made to enable, in appropriate cases, transfer of consent provisions by statutory instrument. We leave open the question of whether such delegated legislation should be subject to the affirmative or negative procedure in the belief that others outside the Commission, more familiar with this issue, are better qualified to make that choice. As regards future legislation, provision should be made to enable transfer of consent provisions by statutory instrument, either by way of a general power, or by way of a specific power conferred in the primary legislation in which the consent provision is contained.
- 1.28 The power of the DPP to take over and discontinue a prosecution, or to offer no evidence, is an important power. We therefore believe it important that the DPP is aware of private prosecutions. However, we recognise that this is not necessary where the body bringing the prosecution applies tests similar to those which the CPS would apply. Therefore, we recommend that the DPP have the power to license bodies to bring prosecutions without the CPS having to be automatically notified of them, but that in all other cases the court clerk should have the duty to notify the CPS of the private prosecution. Such notification should not create any duty on the DPP to take over the conduct of material proceedings but he or she would remain empowered to do so under section 6(2) of the POA 1985.<sup>39</sup>

#### **STRUCTURE OF THIS REPORT**

- 1.29 In Parts II and III we describe the way the law works currently: in Part II we explain how a prosecution may be brought, and the procedural limitations on a

<sup>35</sup> See paras 6.40 – 6.46 below.

<sup>36</sup> See paras 6.47 – 6.52 below.

<sup>37</sup> See para 6.54 below.

<sup>38</sup> See para 7.35 and Part VIII, recommendation 18, below.

<sup>39</sup> See para 7.9(3) below.

private prosecution; in Part III we describe how the consents regime functions and we mention the justifications for a requirement of consent. In Part IV we give an account of the faults with the current regime. In Parts V and VI we set out the principles we believe should govern the consents regime, describing in Part VI the three cases in which consent should be required. In Part VII we address ancillary recommendations. Finally, our conclusions and recommendations are collected together in Part VIII.

## **PART II**

# **THE PROSECUTION PROCESS: THE RIGHT TO BRING PRIVATE PROSECUTIONS AND THE MECHANISMS FOR CONTROLLING THEM**

- 2.1 In Part II of the consultation paper we examined in some detail the prosecution process, the right to bring private prosecutions and the mechanisms for controlling them. For the purpose of this report we intend to provide merely a summary of the prosecution process so as to indicate the significance of consents to prosecution.

### **COMMENCING PROCEEDINGS**

- 2.2 A prosecution may be commenced by an accused being charged at the police station or by the laying of an information before a magistrate. In the latter case, the magistrate may either issue a summons requiring the person named to attend court and answer to the information, or issue a warrant for the arrest of the named person, requiring him or her to be brought before the magistrates' court.<sup>1</sup>
- 2.3 The information may be laid by a prosecutor in person, a legal representative or some other authorised person.<sup>2</sup> In deciding to issue a summons, the magistrate is performing a judicial rather than an administrative function,<sup>3</sup> and the magistrates have a discretion to refuse a summons if the application appears to be frivolous, vexatious or an abuse of process.<sup>4</sup>
- 2.4 If proceedings commence by way of a charge at a police station, then usually the prosecutor is the police officer who signs the charge sheet. Although in theory, proceedings are begun by a private individual – usually a police officer – exercising his or her rights as a member of the public,<sup>5</sup> most prosecutions are in effect brought by the police force for which the individual laying the information acts and, once instituted, are taken over by the CPS. In addition to police prosecutions are those proceedings instituted by other prosecuting agencies, such as the

<sup>1</sup> Magistrates' Courts Act 1980, s 1(1).

<sup>2</sup> Magistrates' Courts Rules 1981 (SI 1981 No 552), r 4. It cannot be laid on behalf of an unincorporated association such as the police force: *Rubin v DPP* [1990] 2 QB 80. As is written in *Blackstone* at para D4.2: "an information must be laid by a named, actual person and must disclose the identity of that person".

<sup>3</sup> *R v Gateshead JJ, ex p Tesco Stores Ltd; R v Birmingham JJ, ex p DW Parkin Construction Ltd* [1981] QB 470.

<sup>4</sup> *R v Bros* (1901) 85 LT 581; *R v West London Metropolitan Stipendiary Magistrate, ex p Klahn* [1979] 1 WLR 933. See also *Blackstone*, para D4.3, and para 2.16 below.

<sup>5</sup> See, eg, Diplock J in *Lund v Thompson* [1959] 1 QB 283, 285: "Although, in all but an infinitesimal number of cases, no doubt [the] information is laid and the prosecution is conducted by a particular police officer; ... he is exercising the right of any member of the public to lay an information and to prosecute an offence."

Department of Trade and Industry or the Inland Revenue; by private prosecuting agencies, such as the Copyright Protection Bodies, and those instituted by private individuals who are not acting in any official capacity.

### **THE CROWN PROSECUTION SERVICE**

- 2.5 Prior to the establishment of the CPS, the power of the police to prosecute was exercised locally, under the control of the local chief constable.<sup>6</sup> In 1981, the Philips Commission recommended the establishment of a national prosecution service and, in 1985, that recommendation was put into effect by the Prosecution of Offences Act (“the POA 1985”).
- 2.6 Under section 3(2) of the POA 1985 the DPP has the duty:
- (a) to take over the conduct of all criminal proceedings, other than specified proceedings,<sup>7</sup> instituted on behalf of a police force (whether by a member of that force or by any other person);
  - (b) to institute and have the conduct of criminal proceedings in any case where it appears to him that –
    - (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or
    - (ii) it is otherwise appropriate for proceedings to be instituted by him;
  - (c) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person);
  - (d) to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles); ...
- 2.7 Last year, the Attorney-General<sup>8</sup> announced<sup>9</sup> a series of measures for reorganising the CPS into 42 areas, each with its own Chief Crown Prosecutor, each area to correspond to an existing police force area. The purpose of this reform is said to be “to create a service much more locally based and therefore much better structured to co-operate with the police in ensuring an effective prosecution system”.<sup>10</sup>

<sup>6</sup> Philips Report, para 6.4.

<sup>7</sup> “Specified proceedings” are those set out in the Prosecution of Offences Act (Specified Proceedings) Order, SI 1985 No 2010. They include a number of road traffic offences for which the accused is given an opportunity to plead guilty by post.

<sup>8</sup> The Rt Hon John Morris QC.

<sup>9</sup> Written Answer, *Hansard* (HC) 21 May 1997, vol 294, cols 73–74.

<sup>10</sup> Press Notice issued by the CPS on 21 May 1997.

### **The decision to prosecute and the role of the CPS**

- 2.8 Under section 3(2)(a) of the POA 1985, the DPP (who is head of the CPS) is under a duty to take over almost all proceedings instituted on behalf of the police. Once in the hands of the CPS, the case is reviewed. The decision whether the prosecution should continue with the original charges, or different charges, or whether it should be stopped, is governed by the principles set out in the Code for Crown Prosecutors.<sup>11</sup>
- 2.9 The Code sets out a two-part test which is applied to all cases under review. The test comprises the evidential test and the public interest test.<sup>12</sup> The *evidential test* requires an assessment of whether “there is enough evidence to provide a ‘realistic prospect of conviction’ against each defendant on each charge”.<sup>13</sup> By “realistic prospect of conviction”, it is meant that “a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged”.<sup>14</sup> The *public interest test* is considered only if the evidential test is passed. It involves the prosecutor balancing factors for and against prosecution,<sup>15</sup> and the Code provides some guidance as to which factors should be considered.<sup>16</sup> It is assumed that “[t]he more serious the offence, the more likely it is that a prosecution will be needed in the public interest”<sup>17</sup> and, therefore, “[i]n cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour”.<sup>18</sup>

### **Judicial review of prosecutors’ decisions**

- 2.10 In the recent case of *R v Director of Public Prosecutions, ex p C*,<sup>19</sup> Kennedy LJ said that it had been “common ground” that a decision by the DPP not to prosecute was reviewable, although the power was one “sparingly exercised”.<sup>20</sup> He identified three circumstances in which an application for judicial review of a decision not to prosecute would be effective:<sup>21</sup> if the decision was the result of some unlawful

<sup>11</sup> Issued under s 10 of the POA 1985. The most recent Code was issued in June 1994, replacing the previous Code published in January 1992. It is set out in full at Appendix C.

<sup>12</sup> Code for Crown Prosecutors, paras 4.1 and 4.2.

<sup>13</sup> *Ibid*, para 5.1.

<sup>14</sup> *Ibid*, para 5.2.

<sup>15</sup> *Ibid*, para 6.2.

<sup>16</sup> *Ibid*, paras 6.4 – 6.9.

<sup>17</sup> *Ibid*, para 6.4.

<sup>18</sup> *Ibid*, para 6.2.

<sup>19</sup> [1995] 1 Cr App R 136, a case in which the applicant sought judicial review of the decision of the DPP not to prosecute her husband for non-consensual buggery.

<sup>20</sup> *Ibid*, 139G – 140A.

<sup>21</sup> *Ibid*, 141B – E. See also *R v CPS, ex p Waterworth* [1996] JPIL 261.

policy; if it was made because the DPP had failed to act in accordance with the Code;<sup>22</sup> or if the decision was perverse.

- 2.11 It appears that a decision to prosecute an accused for an offence in circumstances in which an alternative and more serious offence could have been charged is also susceptible to judicial review.<sup>23</sup>

## PRIVATE PROSECUTIONS

### Rights of private prosecution and the POA 1985

- 2.12 The right of private prosecution is expressly preserved by section 6(1) of the POA 1985, which provides:

Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to *take over* the conduct of proceedings does not apply.<sup>24</sup>

- 2.13 The Divisional Court considered the relationship between sections 3 and 6 of the POA 1985 in *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd*.<sup>25</sup> The court held that section 6(1) only precluded private prosecutions in cases where the DPP is under a duty to *take over* proceedings (such a duty exists in relation to proceedings specified in section 3(2)(a), (c) and (d)<sup>26</sup>). It did not preclude private prosecutions in cases where the duty of the DPP is to *institute* proceedings (the duty specified in section 3(2)(b)).

### PROCEDURAL CONSTRAINTS ON PRIVATE PROSECUTIONS

- 2.14 The right of private prosecution is subject to a number of procedural limitations:
- (1) a magistrate may refuse to issue a summons;

<sup>22</sup> See G Dingwall, "Judicial Review and the Director of Public Prosecutions" [1995] CLJ 265, where, of *R v DPP, ex p C* [1995] 1 Cr App R 136, it was said "this case highlights the importance of following the Code for Crown Prosecutors in determining whether to prosecute".

<sup>23</sup> In *R v General Council of the Bar, ex p Percival* [1991] 1 QB 212, where judicial review was sought of a decision by the Professional Conduct Committee of the General Council of the Bar to charge a lesser offence, it was held that that decision was judicially reviewable.

<sup>24</sup> Emphasis added.

<sup>25</sup> (1993) 96 Cr App R 405. The Marchioness, a pleasure-boat, was run down on the River Thames by a dredger, causing the deaths of 51 people. The husband of one of the victims brought a private prosecution for manslaughter against the applicants and four of their employees. The applicants sought judicial review of a decision of the stipendiary magistrate not to stay proceedings. It was argued, inter alia, that the husband did not have *locus standi* to bring the prosecution.

<sup>26</sup> See para 2.6 above, such proceedings are instituted by a police force or by summons under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles).

- (2) the Attorney-General may terminate proceedings by entering a *nolle prosequi*,<sup>27</sup>
- (3) the Attorney-General may prevent criminal proceedings being instituted by vexatious litigants by applying to the High Court for an order declaring such a person to be a vexatious litigant,<sup>28</sup>
- (4) the DPP may take over private prosecutions and terminate them, whether by discontinuance, withdrawal or offering no evidence, and
- (5) the Law Officers, the DPP or some other designated officer or body may, with regard to those offences where consent is a condition precedent to the institution of criminal proceedings, refuse that consent.

2.15 This report is concerned with the last of these limitations, the operation of consent provisions. We shall begin, however, by briefly setting out the other procedural constraints on private prosecutions.

### **The discretion of the magistrates to refuse to issue a summons**

2.16 In *R v West London Metropolitan Stipendiary Magistrate, ex p Klahn*,<sup>29</sup> Lord Widgery CJ stated that, in deciding whether to issue a summons, a magistrates' court should ascertain at least: (1) whether the offence alleged is known to law and whether the essential ingredients of the offence are *prima facie* present; (2) whether time-limits have been complied with; (3) whether the court has jurisdiction; and (4) whether any consent to prosecute, if required, has been obtained.<sup>30</sup> In addition, the magistrate should consider whether the application is vexatious, which would, in turn, require examination of "the whole of the relevant circumstances".

### **The power of the Attorney-General to enter a *nolle prosequi***

2.17 On any indictable matter before the Crown Court, the Attorney-General may enter a *nolle prosequi*.<sup>31</sup> This will stay the proceedings only and does not operate as a bar to future continuation of the proceedings. Nor does it amount to a discharge, or acquittal, on the merits.<sup>32</sup> The majority of cases in which a *nolle prosequi* is entered concern defendants who cannot plead or otherwise stand trial, due to some mental or physical incapacity.

<sup>27</sup> This will stay the proceedings: see para 2.17 below.

<sup>28</sup> See para 2.18 below.

<sup>29</sup> [1979] 1 WLR 933.

<sup>30</sup> [1979] 1 WLR 933 at 935H.

<sup>31</sup> A *nolle prosequi* in criminal proceedings is an undertaking entered on record by leave of the Attorney-General, to forbear to continue proceedings wholly or partially. This can be done at any time after the bill of indictment is signed and before judgment: *Dunn* (1843) 1 Car & K 730; 174 ER 1009.

<sup>32</sup> *Goddard v Smith* (1704) 3 Salk 245; 91 ER 803.



### **The power of the Attorney-General to apply to the High Court for an order declaring a person to be a vexatious litigant**

- 2.18 Under section 42 of the Supreme Court Act 1981<sup>33</sup> and on the application of the Attorney-General, the High Court may make a “criminal proceedings order” against a person if it is satisfied that he or she has “habitually and persistently and without reasonable ground ... instituted vexatious prosecutions (whether against the same person or different persons)”.<sup>34</sup> A “criminal proceedings order” declares the person to be a vexatious litigant and prevents the person bringing further proceedings without leave of the High Court. If the court is satisfied that the person is a vexatious litigant in both civil and criminal proceedings, it may make an “all proceedings order” as a result of which that person is prevented from bringing both criminal and civil proceedings without leave of the High Court.<sup>35</sup>

### **The power of the DPP to take over proceedings**

- 2.19 Section 6(2) of the POA 1985 provides:

Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

- 2.20 Once proceedings have been taken over, the DPP may either proceed with them or terminate them. If the latter, then the DPP may discontinue the prosecution during the preliminary stages, under section 23(3) of the POA 1985, decline to offer evidence<sup>36</sup> or withdraw the case.<sup>37</sup>

### **CONCLUSION**

- 2.21 We have in this part examined the prosecution process with particular emphasis on the relationship between the Crown and private prosecutions. Having set the scene, we now turn in Part III to consider one element of that relationship, namely the consents regime. We consider the practical operation of such a regime and the justifications for the requirement of consent.

<sup>33</sup> As amended by s 24 of the POA 1985.

<sup>34</sup> Supreme Court Act 1981, s 42(1)(c).

<sup>35</sup> Supreme Court Act 1981, s 42(1).

<sup>36</sup> *Turner v DPP* (1979) 68 Cr App R 70.

<sup>37</sup> *Cooke v DPP and Brent JJ* (1992) 156 JP 497.

# **PART III**

## **THE PRACTICAL OPERATION OF THE CONSENTS REGIME AND THE TRADITIONAL JUSTIFICATIONS FOR A REQUIREMENT OF CONSENT**

3.1 In this Part we consider who has authority to grant or refuse consent to prosecution and we briefly describe the constitutional functions of the Law Officers (the Attorney-General and the Solicitor-General) and of the DPP.<sup>1</sup> We explain the practical operation of the consent provisions: the principles applied in exercising the power of consent, the availability of judicial review, the form consent should take and the time when consent must be given.<sup>2</sup> Finally, we set out the justifications traditionally given for a requirement of consent.<sup>3</sup> What follows is an abbreviated version of what was set out in Parts III and IV of the consultation paper.

### **WHOSE CONSENT?**

#### **The Law Officers**

##### ***Historical background***

3.2 The origin of the office of Attorney-General can be traced back to the thirteenth century when, as King's Attorney or King's Serjeant, the office holder was responsible for maintaining the interests of the sovereign in the royal courts.<sup>4</sup> The modern office of Solicitor-General originated in 1461.<sup>5</sup> Although, since the early part of the seventeenth century both the Attorney-General and Solicitor-General were entitled to sit in the House of Commons, "until well into the nineteenth century the generally accepted interpretation of a Law Officer's responsibilities was primarily that of leading counsel, whose professional services could be called upon at any time by the government to look after litigation affecting the Crown".<sup>6</sup> As a result of the increase in the official workload of the Law Officers caused by the increase in the volume and complexity of legislation, in 1893 the Law Officers Department was set up.<sup>7</sup>

<sup>1</sup> See paras 3.2 – 3.15 below.

<sup>2</sup> Paras 3.16 – 3.26 below.

<sup>3</sup> Paras 3.27 – 3.35 below.

<sup>4</sup> J LI J Edwards, *The Law Officers of the Crown* (1964) p 3.

<sup>5</sup> Sir John Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (1987) p 59.

<sup>6</sup> J LI J Edwards, *The Law Officers of the Crown* (1964) p 4.

<sup>7</sup> *Ibid*, pp 4-5.

### ***Present day functions of the Law Officers***

- 3.3 Since about the turn of the century, the emphasis of the work of the Law Officers has been on their ministerial duties (rather than private practice) so that today their primary function is as “legal adviser of the Government as a whole, and of the various government departments”.<sup>8</sup> Although the Law Officers are politically active as members of the legislature and as members of the Government, in their capacity as legal advisors or when discharging their duties as participants in legal proceedings, they are required to act impartially.<sup>9</sup>
- 3.4 The Attorney-General is the guardian of the public interest.<sup>10</sup> This function is demonstrated by the role of the Attorney-General both in relation to criminal and civil proceedings.

#### CRIMINAL PROCEEDINGS

- 3.5 In addition to the power to grant or refuse consent to certain prosecutions, the main functions of the Attorney-General, in regard to criminal proceedings, include instituting and conducting prosecutions of exceptional gravity or complexity (and occasionally appearing in court for the prosecution in such cases), terminating a prosecution by entering a *nolle prosequi*, issuing guidelines on prosecution practice, and appointing<sup>11</sup> and acting as superintendent<sup>12</sup> of the DPP.<sup>13</sup>

#### CIVIL RELATOR ACTIONS

- 3.6 The relator action is a device by which the Crown’s procedural privileges have been made available to private plaintiffs. Although a private individual will have standing to restrain a breach of public law where the interference with the public right involves some interference with private rights (or, perhaps, where that individual is threatened with special damage over and above that which the wrong inflicts on the rest of the public),<sup>14</sup> in all other cases only the Attorney-General can institute proceedings to vindicate public rights. The Attorney-General can act independently, but in practice he or she usually acts at the relation (that is, at the instance) of a private individual. A court can always hear cases brought at the instance of the Attorney-General, because the Crown will always have standing for this purpose, whereas a private plaintiff might be refused relief on the ground that

<sup>8</sup> Sir Elwyn Jones, A-G, QC, MP, “The Office of Attorney-General” [1969] CLJ 43 at p 46.

<sup>9</sup> *Ibid*, p 50:

The Attorney-General, when he is acting in political matters, is a highly political animal entitled to engage in contentious politics ... But the basic requirement of our constitution is that however much of a political animal he may be when he is dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act in an impartial and even quasi-judicial way.

<sup>10</sup> *Ibid*, ch 14.

<sup>11</sup> POA 1985, s 2.

<sup>12</sup> POA 1985, s 3(1).

<sup>13</sup> *Blackstone*, para D2.36.

<sup>14</sup> S de Smith and R Brazier, *Constitutional and Administrative Law* (6th ed 1989) p 595, citing *Boyce v Paddington Corporation* [1903] 1 Ch 109 as authority.

he or she had no more interest in the matter than any other member of the public. A relator action may be brought against a public authority that is acting, or threatening to act, *ultra vires*. Equally it may be brought against any private individual or body committing a public nuisance or otherwise violating public law.

### ***Relationship between the Attorney-General and Solicitor-General***

- 3.7 Until 30 September 1997 the Solicitor-General had a general power to discharge the statutory functions of the Attorney-General in certain circumstances only.<sup>15</sup> On that date, the Law Officers Act 1997 came into force, section 1(1) of which provides that “[a]ny function of the Attorney-General may be exercised by the Solicitor-General”, and section 1(2) of which provides that “[a]nything done by or in relation to the Solicitor-General in the exercise of or in connection with a function of the Attorney-General has effect as if done by or in relation to the Attorney-General”.

### ***Provisions requiring the consent of the Law Officers***

- 3.8 Although, as we shall see, many take the view that there is no unifying principle to account for the variety of offences for which the Attorney-General’s consent is required, *Blackstone* suggests that, broadly, “the Attorney’s consent is required where issues of public policy, national security or relations with other countries may affect the decision whether to prosecute”.<sup>16</sup> Examples of the sorts of offences which raise the issues identified by *Blackstone* include those created under the following Acts:

(1) Public policy

offences of bribery under the Public Bodies Corrupt Practices Act 1889<sup>17</sup> and the Prevention of Corruption Act 1906;<sup>18</sup> offences involving stirring up racial hatred contrary to Part III of the Public Order Act 1986.<sup>19</sup>

(2) National security

offences prosecuted in the United Kingdom as a result of the extension of jurisdiction under the Suppression of Terrorism Act 1978<sup>20</sup> with respect to terrorist offences committed in countries belonging to the European Convention on the Suppression of Terrorism; and offences contrary to the Official Secrets Act 1911.<sup>21</sup>

<sup>15</sup> These were: “ – if (a) the office of Attorney-General is vacant; or (b) the Attorney-General is unable to act owing to absence or illness; or (c) the Attorney-General authorises the Solicitor-General to act in any particular case”: Law Officers Act 1944, s 1(1).

<sup>16</sup> Para D1.84.

<sup>17</sup> Section 4 (Attorney-General or Solicitor-General).

<sup>18</sup> Section 2 (Attorney-General or Solicitor-General).

<sup>19</sup> Section 27 (Attorney-General only).

<sup>20</sup> Section 4 (Attorney-General only).

<sup>21</sup> Section 8 (Attorney-General only).

(3) Relations with other countries

an offence contrary to the Taking of Hostages Act 1982;<sup>22</sup> and proceedings brought under the War Crimes Act 1991.<sup>23</sup>

## **The Director of Public Prosecutions**

### ***Historical background***

- 3.9 The office of the DPP was created by the Prosecution of Offences Act 1879. Originally, it was intended to supplement the existing system by which important government prosecutions were instituted and conducted by the Treasury Solicitor. By the Prosecution of Offences Act 1884, the offices of the Treasury Solicitor and the DPP were merged only to be divided again by the Prosecution of Offences Act 1908, under which the office of the DPP assumed all the functions previously performed by the Treasury Solicitor in respect of criminal proceedings.<sup>24</sup>

### ***Present day function of the DPP***

- 3.10 The office of the DPP is at present governed by the POA 1985 which continues “the well-established relationship”<sup>25</sup> between the Attorney-General and the DPP in which the DPP acts “under the superintendence” of the Attorney-General.<sup>26</sup> Whereas, however, prior to the 1985 Act, the DPP was appointed by the Home Secretary,<sup>27</sup> section 2(1) of the POA 1985 transferred the power of appointment to the Attorney-General.
- 3.11 Before the establishment of the CPS, the DPP was concerned only with those criminal cases sufficiently difficult to warrant the intervention of the DPP; with the enactment of the POA 1985 however, the DPP’s primary function is now, under section 3(2)(a), to take over the conduct of almost all criminal proceedings instituted by the police.

### ***The relationship between the DPP and the CPS and the delegation of consent functions***

- 3.12 The DPP is head of the CPS<sup>28</sup> and statutorily required to issue guidance to crown prosecutors on, for example, when to institute or continue proceedings and which charges should be preferred.<sup>29</sup> Section 1(7) of the POA 1985 provides that any

<sup>22</sup> Section 2 (Attorney-General only).

<sup>23</sup> Section 1(3) (Attorney-General only).

<sup>24</sup> See J Ll J Edwards, *The Law Officers of the Crown* (1964) ch 17, and G Williams, “The Power to Prosecute” [1955] Crim LR 596, 602.

<sup>25</sup> *Hansard* (HC) 16 April 1985, vol 77, col 151, *per* Leon Brittan (Secretary of State for the Home Office) during the Second Reading debate on the Prosecution of Offences Bill.

<sup>26</sup> POA 1985, s 3(1).

<sup>27</sup> POA 1979, s 1(1).

<sup>28</sup> POA 1985, s 1(1).

<sup>29</sup> POA 1985, s 10.

consent to prosecution given by a crown prosecutor shall be treated as having been given by the DPP.

- 3.13 Prior to the POA 1985, the consent functions of the DPP were also delegable. Under the POA 1979, the Secretary of State was empowered not only to appoint the DPP,<sup>30</sup> but also such number of Assistant Directors of Public Prosecutions as the Minister for the Civil Service would sanction,<sup>31</sup> each Assistant being able to do any act or thing which the DPP was required or authorised to do under any Act.<sup>32</sup>

#### ***The relationship between the DPP and the Law Officers***

- 3.14 The DPP acts “under the superintendence” of the Attorney-General, and the Attorney-General is answerable to Parliament for the actions of the DPP. Although a Home Office memorandum written in 1972<sup>33</sup> suggested that there was substantial consultation between the Attorney-General and the DPP when either is required to consider whether to consent to criminal proceedings, we understand<sup>34</sup> that the practice has since changed: most applications for the Attorney-General’s consent to prosecution are sent directly from CPS central casework to the Attorney-General without the intervention of the DPP.<sup>35</sup>

#### ***Examples of provisions requiring the consent of the DPP***

- 3.15 *Blackstone* suggests that the principle underlying the various offences the prosecution of which requires the consent of the DPP, “may be that, in each instance, although sometimes for different reasons, the weighing of the discretionary factors relevant to the decision to prosecute is likely to be a particularly sensitive and difficult exercise, thus making it desirable for the police or the Crown Prosecution Service to obtain prior approval for prosecution.”<sup>36</sup> Examples of offences requiring the DPP’s consent are:

- (a) offences of theft or criminal damage under the Theft Act 1968 where the property stolen or damaged belonged to the accused’s spouse;<sup>37</sup>
- (b) complicity in the suicide of another contrary to the Suicide Act 1961;<sup>38</sup>

<sup>30</sup> POA 1979, s 1(1).

<sup>31</sup> *Ibid*, s 1(2).

<sup>32</sup> *Ibid*, s 1(4).

<sup>33</sup> Further memorandum by the Home Office on the control of prosecutions by the Attorney General and the Director of Public Prosecutions (April 1972) submitted to the Departmental Committee on s 2 of the Official Secrets Act 1911 (“the Home Office memorandum to the Franks Committee”).

<sup>34</sup> From correspondence with the Legal Secretariat to the Law Officers.

<sup>35</sup> This shift away from the centre is likely to continue in that the recently proposed devolution of the CPS may well see the lines of communication developing between the Law Officers and the CPS areas (rather than the central administration).

<sup>36</sup> *Blackstone*, para D1.84.

<sup>37</sup> Theft Act 1968, s 30(4).

- (c) unauthorised interception of communications contrary to the Interception of Communications Act 1985;<sup>39</sup>
- (d) failure of a member of a local authority to disclose a pecuniary interest contrary to section 94 of the Local Government Act 1972.<sup>40</sup>

## **PRACTICAL OPERATION OF THE CONSENT REQUIREMENT**

### **The decision to grant or refuse consent**

#### ***The Law Officers***

3.16 In a report published in 1939,<sup>41</sup> a Select Committee investigating the conduct of the Attorney-General<sup>42</sup> under the Official Secrets Act 1911 said of the Attorney-General's statutory discretion to consent to proceedings under that Act that it should be "exercised judicially": the decision to consent or not "must be arrived at upon principle and not on grounds of expediency."<sup>43</sup>

3.17 In evidence to the Select Committee on the Official Secrets Acts, the Attorney-General said:

[W]here Parliament provides that the fiat of the Attorney-General or the Lord Advocate is a condition precedent to a prosecution taking place, it is not their business to get a prosecution. It is their business to exercise their discretion to the best of their ability, it being clear from the fact of their consent being necessary that this is a case where Parliament thinks it particularly important that a discretion should be exercised and that prosecutions should not automatically go forward merely because the evidence appears to afford technical proof of an offence.<sup>44</sup>

3.18 In a memorandum submitted by the Attorney-General to the Franks Committee, dated September 1971, it was suggested that, in deciding whether to grant or refuse consent to a prosecution under the Official Secrets Acts, an Attorney-General would consider the following factors: the strength of the evidence; the degree of culpability of the potential defendant; the damage to the public interest which has resulted from disclosure; and the effect of the prosecution on the public interest.

**3.19 Thus, the consent decisions of the Law Officers are also founded on the two-part test of evidential sufficiency and public interest.**

<sup>38</sup> Section 2(4).

<sup>39</sup> Section 1(4).

<sup>40</sup> Section 94(3).

<sup>41</sup> Report of the Select Committee on the Official Secrets Act, 1939, HC Paper 101.

<sup>42</sup> Sir Donald Somervell.

<sup>43</sup> Report of the Select Committee on the Official Secrets Act, 1939, HC Paper 101, p xiii, para 20.

<sup>44</sup> Report of the Select Committee on the Official Secrets Act, 1939, HC Paper 101, Minutes of Evidence, p 15, Q 69.

### ***The DPP***

- 3.20 Bearing in mind that the consent of the DPP may be given by any crown prosecutor on behalf of the DPP, and that crown prosecutors are governed by the Code for Crown Prosecutors, the factors taken into account by the DPP in deciding whether to give consent are presumably much the same as those considered in arriving at the decision whether to prosecute (or to continue a prosecution).

### **Availability of judicial review**

- 3.21 In the 1995 case of *R v Solicitor-General, ex p Taylor*,<sup>45</sup> the Divisional Court took the view that there was no jurisdiction for judicial review of a decision of the Solicitor-General to withhold consent to a prosecution under the Contempt of Court Act 1981.<sup>46</sup> Lord Justice Stuart-Smith, giving judgment said:

The authorities ... which lay down the rules in relation to the Attorney-General, point to his unique constitutional position ... Parliament must be taken to know the law as stated in *Gouriet* and the previous authorities; and if it had intended the Attorney-General's discretion to be reviewable by this court in this instance, in my view it would have said so.<sup>47</sup>

- 3.22 As counsel for the applicants in *Ex p Taylor* pointed out, unlike the decisions of the Law Officers, those of the DPP and other prosecuting authorities are susceptible to judicial review.

### **Other procedural matters**

#### ***Form of consent***

- 3.23 In the case of *Cain and Schollick*,<sup>48</sup> the Attorney-General gave his consent to a prosecution under the Explosive Substances Act 1883 in general terms: "I hereby consent to the prosecution of [the accused] ... for an offence or offences contrary to the provisions of the said Act."<sup>49</sup> On appeal on the ground, inter alia, that the consent was ineffective because it was insufficiently detailed, the Court of Appeal held that there was no constitutional objection to the consent being in wide terms

<sup>45</sup> [1996] COD 61.

<sup>46</sup> In that case, the applicants sought judicial review of a decision by the Solicitor-General that it was not appropriate to take proceedings for contempt of court arising out of the newspaper coverage of the trial of the applicants in July 1992. The decision had been made on the basis that any prosecution would, in the light of the evidence, have been unlikely to succeed. It was argued on behalf of the applicants that although the weight of authority was against judicial review of the Attorney-General's decisions, that authority did not apply to those decisions, such as the instant, in which the Attorney-General had refused consent on the ground of evidential insufficiency rather than any political considerations (for which Attorney-General was answerable to Parliament alone).

<sup>47</sup> *R v Solicitor-General, ex p Taylor*, [1996] COD 61. See transcript no CO 2117-94 at pp 21-22.

<sup>48</sup> [1976] QB 496.

<sup>49</sup> It was observed by Lord Widgery CJ in the Court of Appeal that this form of general wording had been used for over 100 years: *ibid*, p 502C.



if the Attorney-General believed that the prosecutors should be at liberty to pursue any charge under the Act justified by the evidence.<sup>50</sup>

- 3.24 Usually consent is given in writing,<sup>51</sup> although it need not be.<sup>52</sup> Indeed, in the recent case of *Jackson*,<sup>53</sup> although the practice of written consent was endorsed, the Court of Appeal took the view that, in cases involving the consent of the DPP, it was sufficient for a crown prosecutor to have turned his or her mind to the question without more.

### ***Absence of consent***

- 3.25 If proceedings which require consent are instituted without consent, both the committal proceedings and the subsequent trial are a nullity.<sup>54</sup>

### ***Time of consent***

- 3.26 In *Whale and Lockton*,<sup>55</sup> concerning charges under the Explosive Substances Act 1883, it was held that proceedings were instituted for the purposes of the Attorney-General's consent provision contained in section 7(1) of that Act when a person came to court "to answer the charge".<sup>56</sup> It was unnecessary, therefore, for the consent of the Attorney-General to be obtained until arraignment. This case appeared to conflict with *Price v Humphreys*,<sup>57</sup> which held that proceedings were instituted when a summons was issued following the laying of an information.<sup>58</sup> In *Bull*,<sup>59</sup> however, it was explained that in cases where the summons procedure had not been used, section 25(2) of the POA 1985<sup>60</sup> would enable a person to be arrested and remanded in the absence of any required consent.

## **JUSTIFICATIONS FOR A REQUIREMENT OF CONSENT**

- 3.27 We now set out the various justifications most often cited in favour of consent requirements.

<sup>50</sup> *Ibid*, pp 502-503 *per* Lord Widgery CJ.

<sup>51</sup> *Blackstone*, para D1.84.

<sup>52</sup> *Cain and Schollick* [1976] QB 496, 502C *per* Lord Widgery CJ.

<sup>53</sup> [1997] Crim LR 293.

<sup>54</sup> *Angel* [1968] 1 WLR 669.

<sup>55</sup> [1991] Crim LR 692.

<sup>56</sup> The decision followed the decision in *Elliot* (1985) 81 Cr App R 115.

<sup>57</sup> [1958] 2 QB 353.

<sup>58</sup> *Per* Devlin J.

<sup>59</sup> (1994) 99 Cr App R 193.

<sup>60</sup> Paragraph (a) of this subsection provides that, as regards any enactment requiring the consent of the Law Officers or the DPP to the institution or carrying on of proceedings, such enactment "shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence".

### **Historical note**

- 3.28 According to Edwards,<sup>61</sup> the first example of a consent provision was contained in the Roman Catholic Relief Act 1829. Subsequently, a number of statutes were enacted during the nineteenth century restricting the right of private prosecution by way of consent provision.<sup>62</sup> Nonetheless, it was not until the Second World War and the substantial amount of social welfare legislation that followed that consent provisions became widely used, acting as a counterbalance to the broad drafting of much of the legislation.<sup>63</sup>

### **Justifications**

- 3.29 Joshua Rozenberg<sup>64</sup> said that the aim of consent provisions was “to stop busybodies blundering in and prosecuting people in circumstances which would not be seen as appropriate”.<sup>65</sup> A more detailed justification is set out in what Edwards describes as the Attorney-General’s “classic exposition of the relevant factors that should govern any resort to a consent formula in new statutory offences”,<sup>66</sup> submitted to the Select Committee on Obscene Publications in 1958.

### ***The Attorney-General and the Obscene Publications Bill 1959***

- 3.30 In a memorandum to the Select Committee on Obscene Publications,<sup>67</sup> the Attorney-General<sup>68</sup> attempted to categorise offences requiring consent, and suggested the following three broad categories:<sup>69</sup>

- (1) “offences which are both public rather than private in character (in the sense that they are directed at the community as a whole rather than at individual members of it) and of sufficient importance to affect the life of the community”;<sup>70</sup>
- (2) “offences which are in their nature liable to provoke vexatious legal proceedings, ie, proceedings instituted rather to gratify some whim of the prosecutor than to vindicate his rights or assist in the administration of justice”;

<sup>61</sup> J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 17.

<sup>62</sup> B M Dickens, “The Attorney-General’s consent to prosecutions” (1972) 35 MLR 347, 354, lists the following examples: the Sunday Observation Prosecutions Act 1871, s 1; the Metalliferous Mines Regulation Act 1872, s 35; the Public Health Act 1875, s 253; the Territorial Waters Jurisdiction Act 1878, s 3; and the Explosive Substances Act 1883, s 7(1).

<sup>63</sup> B M Dickens, “The Attorney-General’s consent to prosecutions” (1972) 35 MLR 347.

<sup>64</sup> The BBC’s Legal Correspondent for News and Current Affairs.

<sup>65</sup> J Rozenberg, *The Case for the Crown: The Inside Story of the Director of Public Prosecutions* (1987) p 169.

<sup>66</sup> J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 26.

<sup>67</sup> Report of the Select Committee on Obscene Publications, 1958, HC 123–1, App 1, pp 23–4.

<sup>68</sup> The holder of the office at that time was the Rt Hon Sir Reginald Manningham-Buller QC MP, later Viscount Dilhorne LC.

<sup>69</sup> Report of the Select Committee on Obscene Publications, 1958, HC 123–1, App 1, p 23, para 4.

<sup>70</sup> Examples suggested are offences under the Official Secrets Acts.

(3) widely drafted offences of the type which prompted the proliferation of consent provisions after the Second World War. These can be divided into:

- (a) “those administered by a Government Department or other public body which is given a right to prosecute”; and
- (b) “those creating offences which are as a matter of drafting incapable of precise definition although there is no doubt about their substance”.<sup>71</sup>

3.31 Later, in a speech made at the Report stage of the Obscene Publications Bill in 1959,<sup>72</sup> the Attorney-General referred to the following three grounds which had been advanced in favour of departing from the “fundamental principle of English law that proceedings may be instituted by private individuals”:<sup>73</sup>

- (a) to secure uniformity in the administration of the law;
- (b) to prevent vexatious proceedings; and
- (c) to restrict prosecutions in circumstances where a law has, necessarily, been drafted in broad terms, thereby creating the risk that it would catch those who had not offended against the spirit of the legislation.<sup>74</sup>

3.32 For the purpose of the Obscene Publications Bill the Attorney-General considered that these were all bad grounds.<sup>75</sup> As to paragraph (a) he said that uniformity had been achieved by virtue of the Prosecution of Offences Regulations 1946.<sup>76</sup> As to paragraph (b) he said that there had been no frivolous or vexatious proceedings since 1946 and there was no reason to expect that there would be in the future. Consequently it was not a valid reason to say that the offences were, by their nature, liable to provoke vexatious legal proceedings.<sup>77</sup> As to paragraph (c) he said that in contrast to the “Horror Comics” Bill, the problem with the Obscene Publications Bill was not one of drafting but one of application.<sup>78</sup>

***The Home Office memorandum to the Franks Committee in 1972***

3.33 Guidance as to the reasons for including a consent provision can also be found in a Home Office memorandum to the Departmental Committee on section 2 of the

<sup>71</sup> An example suggested is s 2 of the Children and Young Persons (Harmful Publications) Act 1955.

<sup>72</sup> *Hansard* (HC) 24 April 1959, vol 604, cols 839 - 846.

<sup>73</sup> *Ibid*, col 840.

<sup>74</sup> *Ibid*, cols 841 and 843 - 4.

<sup>75</sup> *Ibid*, col 841.

<sup>76</sup> These regulations required every Chief Constable to report to the DPP cases of obscene or indecent libels, exhibitions or publications “where the chief officer of police thinks there is a *prime facie* case for the prosecution”.

<sup>77</sup> *Hansard* (HC) 24 April 1959, vol 604, col 843.

<sup>78</sup> *Hansard* (HC) 24 April 1959, vol 604, col 844.

Official Secrets Act 1911<sup>79</sup>. According to that memorandum, “the basic reason for including in a statute a restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances”.<sup>80</sup> Five overlapping reasons were given for considering the inclusion of a consent requirement.<sup>81</sup>

- (a) to secure consistency of practice in bringing prosecutions, eg, where it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
- (b) to prevent abuse, or the bringing of the law into disrepute, eg, with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases;
- (c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;
- (d) to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship;
- (e) to ensure that decisions on prosecutions take account of important considerations of public policy or of a political or international nature, such as may arise, for instance, in relation to official secrets or hijacking.<sup>82</sup>

3.34 Whereas the Attorney-General in 1958 had not drawn any distinction between the roles of the Attorney-General and the DPP,<sup>83</sup> the Home Office suggested apportioning tasks between the two officers. Of the five reasons provided, the Home Office submitted that a consent requirement introduced on ground (a), (b) and (c) “would normally be thought appropriate” to the DPP, whereas ground (e) would lie in the province of the Attorney-General. Where consent is required on ground (d), it would depend on the circumstances of the case whether the consent should be that of the Attorney-General or the DPP.<sup>84</sup>

### ***The choice of designated authority***

3.35 In 1972, the Home Office took the view that the consents which should be within the province of the Attorney-General (and not the DPP) were those which involved “important considerations of public policy or of a political or

<sup>79</sup> Report of the Departmental Committee on s 2 of the Official Secrets Act 1911 (1972) Cmnd 5104 (“the Franks Report”). A prosecution under s 2 of the 1911 Act requires the consent of the Law Officers.

<sup>80</sup> Home Office memorandum to the Franks Committee, Franks Report, vol 2 p 125, para 7.

<sup>81</sup> These reasons are examined in Part VI below.

<sup>82</sup> Home Office memorandum to the Franks Committee, Franks Report, vol 2 p 125, para 7.

<sup>83</sup> *Hansard* (HC) 24 April 1959, vol 604, col 840.

<sup>84</sup> Home Office memorandum to the Franks Committee, Franks Report, vol 2, p 126, para 7(e).

international nature”.<sup>85</sup> The Franks Committee, having regard to the Attorney-General’s particular constitutional position, identified this as the source of the Attorney-General’s particular contribution to the proper prosecution of offences under the consents regime.

<sup>85</sup> Home Office memorandum to the Franks Committee, Franks Report, vol 2, p 126, para 7(e). At para 8 of the memorandum it was explained that

[w]here important political or international considerations may be involved, the [Attorney-General], who is directly answerable in Parliament for his decisions and who is in a position to consult Ministerial colleagues direct if need be, is regarded as the proper person to carry the responsibility. ... Similarly, with sensitive subjects like race relations Parliament may feel that that they would like to hold the Attorney directly answerable for a personal decision ... .

## **PART IV**

# **WHAT IS WRONG WITH THE PRESENT CONSENTS REGIME?**

- 4.1 In this Part, we look at two categories of criticisms which have been made of the consents regime, namely, criticisms based on principle,<sup>1</sup> and criticisms based on the practical operation of the present regime.<sup>2</sup> We then move on to set out our provisional views in the consultation paper and the responses that were received on consultation before making our final recommendation.<sup>3</sup>

### **CRITICISM BASED ON PRINCIPLE**

- 4.2 We have identified two main arguments, both contentious:

- (1) that consent provisions *per se*, irrespective of *whose* consent is required, remove the right of private prosecution;
- (2) that consent provisions involving a decision by a Law Officer risk being politically biased, or having the appearance of political bias.

### **The right of private prosecution**

#### ***The argument***

- 4.3 Although consent provisions usually<sup>4</sup> apply to offences irrespective of who requests the consent – whether the police, the CPS or a private prosecutor – their primary impact is on the private prosecutor. Whereas it seems unlikely that there might be any conflict of interest in respect of a decision to prosecute or continue a prosecution between the Attorney-General on the one hand and the DPP (and the CPS) on the other, there is a real risk of conflict between either the Attorney-General or the DPP and a private prosecutor. Indeed, in view of the difficulty in bringing a private prosecution,<sup>5</sup> resort to that measure is likely to happen only after there has been some disagreement between the individual and the prosecuting authorities.
- 4.4 The right of private prosecution is regarded by many as fundamental to the criminal legal system. Lord Simon of Glaisdale, for example, speaking during the Second Reading debate on the Prosecution of Offences Bill in 1984, said that the principle upon which that right was founded was the general “fundamental constitutional principle of individual liberty based on the rule of law”.<sup>6</sup> Likewise, in

<sup>1</sup> Paras 4.2 – 4.15 below.

<sup>2</sup> Paras 4.16 – 4.26 below.

<sup>3</sup> Paras 4.27 – 4.29 below

<sup>4</sup> In some cases, the “person aggrieved” in relation to an offence may bring proceedings without consent. See, eg, the Building Act 1984, s 113, the Highways Act 1980, s 312 and the Public Health Act 1936, s 298.

<sup>5</sup> See paras 4.08 – 4.11 below.

<sup>6</sup> *Hansard* (HL) 29 November 1984, vol 457, col 1068.

1958, in his submission to the Select Committee on Obscene Publications, the Attorney-General<sup>7</sup> expressed the view that the “fundamental principle ... that proceedings may be instituted by private individuals” should not be restricted “unless some very good reason to the contrary exists”.<sup>8</sup> In the House of Lords case of *Gouriet v Union of Post Office Workers*,<sup>9</sup> both Lord Diplock and Lord Wilberforce emphasised that this right remained an important constitutional safeguard against wrongful failure by the authorities to prosecute.<sup>10</sup>

### ***The counter-argument***

- 4.5 On the other hand, we note that the right of private prosecution is not without its critics. For example, Edwards<sup>11</sup> refers to the comments made in the Eighth Report, published in 1845, of the Commissioners on the Criminal Law in which it was said that “entrusting the conduct of the prosecution to a private individual opens a wide door to bribery, collusion and illegal compromises.” During the passage of the Prosecution of Offences Bill in the House of Lords in 1985, Lord Hutchinson of Lullington, a distinguished criminal silk, suggested that the mischief of private prosecutions was that they “may be based on personal spite, on revenge, on financial gain, on blackmail, on fanaticism.”<sup>12</sup>
- 4.6 The Philips Commission made proposals which would have, in effect, abolished the right to bring a private prosecution, replacing it with a system of publicly financed “private” prosecutions subject to the leave of the court.<sup>13</sup>
- 4.7 We note also that the right of private prosecution is not one which is treated as constitutionally inviolable. Not only is it subject to the constraint, in regard to specific offences, of a consent requirement, but also, as we have seen,<sup>14</sup> private prosecutions may be stayed by the Attorney-General’s prerogative power to enter a *nolle prosequi* or terminated by the DPP who has the power to take over and discontinue proceedings under sections 6 and 23 of the POA 1985.
- 4.8 Furthermore, there are the practical constraints on the right of private prosecution: the cost of bringing a prosecution, the private prosecutor’s lack of investigative resources and the risk a prosecutor runs of being sued in the civil courts for malicious prosecution or false imprisonment.

<sup>7</sup> The holder of the office at that time was the Rt Hon Sir Reginald Manningham-Buller QC MP, later Viscount Dilhorne LC.

<sup>8</sup> Report on the Select Committee on Obscene Publications, HC 123-1, App 1, p 23, para 3.

<sup>9</sup> [1978] AC 435.

<sup>10</sup> *Ibid*, p 477C, *per* Lord Wilberforce and p 498B, *per* Lord Diplock. See also para 5.3 below.

<sup>11</sup> J Ll J Edwards *The Law Officers of the Crown* (1964) p 340.

<sup>12</sup> *Hansard* (HL) 17 January 1985, vol 458, col 1149.

<sup>13</sup> Philips Report, para 7.50. See also the consultation paper, Part V, n 18.

<sup>14</sup> See para 2.17 above.

#### THE COSTS CONSTRAINT

- 4.9 Legal aid in criminal proceedings is not available to a private prosecutor save only for the purpose of resisting an appeal to the Crown Court.<sup>15</sup> A claim for costs may be made either against central funds or against the accused but, even if successful, an award might not meet the full cost of a prosecution.

#### ACCESS TO INVESTIGATIVE MACHINERY

- 4.10 Once a case has been committed for trial, a private prosecutor can compel the police, through an application for a witness summons under the Criminal Procedure (Attendance of Witnesses) Act 1965, to produce all statements and exhibits relevant to the case that they have in their possession.<sup>16</sup> However, there is no obligation on the police or the CPS to disclose material if the prosecution has yet to be instituted.<sup>17</sup>

#### LIABILITY IN TORT

- 4.11 A private prosecutor, in bringing criminal proceedings, may be at risk of being sued in an action for malicious prosecution or false imprisonment – although in both sorts of action, the burden of proof on the plaintiff is onerous.

### **The risk of political bias or the appearance of political bias**

#### ***The argument***

- 4.12 The Law Officers perform two fundamentally different roles: on the one hand, they are members of the legislature<sup>18</sup> and of the executive, and as such are required to act on party political lines; on the other hand, they have prerogative and statutory powers which can be described as “quasi judicial” and which have to be exercised impartially and without reference to party politics. Some, such as Lord Steyn, have doubted whether or not an Attorney-General or Solicitor-General is able, in practice, to compartmentalise the functions of the office in this way.<sup>19</sup>

<sup>15</sup> Legal Aid Act 1988, s 21(1).

<sup>16</sup> *Pawsey* [1989] Crim LR 152.

<sup>17</sup> *R v DPP, ex p Hallas* [1988] Crim LR 316.

<sup>18</sup> The Attorney-General will always be a member of the House of Commons (see eg Sir Elwyn Jones “The Office of Attorney-General” [1969] CLJ 43, 44–45). The Solicitor-General may be drawn from either House as recent examples illustrate. Lord Falconer was the former Solicitor-General and Ross Cranston, MP succeeded him in July, 1998.

<sup>19</sup> Recently, for example, in his 1996 Annual Lecture of the Administration Law Bar Association, he said:

The power of the Attorney-General to take civil proceedings on behalf of the general community and his control over criminal prosecution is quasi judicial. Yet he is also a political figure responsive to political pressures. It is argued that abuse is avoided by two constitutional conventions. First, in his quasi judicial function the Attorney-General is not subject to collective responsibility and he does not take orders from the Government. But he may seek the views of other ministers and they may volunteer their views. Secondly, it is said that the Attorney-General is not influenced by party political considerations. On the other hand he may take into account public policy considerations. These conventions are weak. Their efficacy depends on Chinese walls in the mind of the Attorney-General.



- 4.13 The Franks Committee was in “no doubt” that there was widespread unease amongst those “outside governmental and Parliamentary circles” about the Attorney-General carrying out both political and quasi-judicial functions.<sup>20</sup> However, the Committee was of the opinion that this unease was not well founded.<sup>21</sup>

#### ***The counter-argument***

- 4.14 The Franks Committee, in proposing a new Official Information Act, also proposed that prosecutions for offences under the Act relating to defence and internal security, foreign relations, the currency and the reserves, and other matters<sup>22</sup> should be subject to the consent of the Attorney-General. Summing up the views of a number of witnesses,<sup>23</sup> the Committee identified the particular contribution of the Attorney-General as follows:

The main point made by these witnesses was that when a decision involves questions of public policy, or of a political or international character, it is essential that the person with responsibility for the decision should have experience of the kind of issues involved, and essential that he should be able to consult directly the Minister concerned with the area of Government business in question so as to ensure that, before taking his decision, he is made fully aware of the views of the Government on any questions of national interest involved. No one except the Attorney-General fits this specification.<sup>24</sup>

- 4.15 It can be argued, therefore, that in certain cases – those involving matters of international sensitivity for example – the Attorney-General is well placed to be informed about those matters which should be considered when deciding the balance of public interest, and also well placed to be properly and publicly held to account.

#### **CRITICISM OF THE PRACTICAL OPERATION OF THE CONSENTS REGIME**

- 4.16 We have identified a number of points of criticism:

- (1) The first set concerns the haphazardness of the regime:
  - (a) the consent regime is not underpinned by any unifying principle to justify the list of offences for which consent is needed;

The Rt Hon Lord Steyn, “The Weakest and Least Dangerous Department of Government” [1997] PL 84, 91–92.

<sup>20</sup> Franks Report, para 250.

<sup>21</sup> Franks Report, para 251.

<sup>22</sup> Namely, offences relating to the confidences of the citizen and to Cabinet documents.

<sup>23</sup> Franks Report, para 249. The witnesses were: the Attorney-General and his Legal Secretary, the previous Attorney-General, the DPP, Sir Philip Allen and Sir William Armstrong.

<sup>24</sup> Franks Report, para 249.

- (b) there are anomalies between those offences which require consent and those which do not;
  - (c) there are anomalies between those offences which require the consent of the Attorney-General and those which require the consent of the DPP;
- (2) The second set focuses on the administration of the regime:
- (a) the administrative burden of servicing the unnecessary proliferation of consent provisions; and
  - (b) whether consent decisions by the DPP are delegable to too great a degree.

### **The haphazardness of the consents regime**

#### ***Absence of unifying principle***

- 4.17 Lord Simon of Glaisdale said that the consents regime was an “absolute hotchpotch”.<sup>25</sup> A number of other commentators have also noted that, despite the theoretical justification for the consents regime, in practice it is full of anomalies. The Philips Commission, for example, suggested that “an examination of the Acts concerned suggests that some of the restrictions have been arbitrarily imposed.”<sup>26</sup> In the Home Office memorandum to the Franks Committee, it was acknowledged that “[s]urviving records ... would not support any thesis that there was a firmly established general policy which had been closely adhered to over the years.”<sup>27</sup>
- 4.18 As for academic opinion, B M Dickens, writing in 1974, suggested that the inconsistency within the consent regime was inexplicable “unless one stoically accepts the inevitability of anomalies arising from the pragmatic nature of English legislation.”<sup>28</sup> And Edwards, in 1984, observed that “[a]ny attempt to derive a set of uniform principles that would provide a rational basis for the various categories of consent provisions is frankly an impossible task.”<sup>29</sup>

#### ***Common law anomalies***

- 4.19 A comparison between those offences requiring consent and those which do not illustrates the anomalies of the consent regime, the clearest examples being those in which a statutory offence (requiring consent) has some sort of common law counterpart.

<sup>25</sup> *Hansard* (HL) 29 November 1984, vol 457, col 1050.

<sup>26</sup> Philips Report, para 7.56.

<sup>27</sup> Franks Report, vol 2, p 125, para 6.

<sup>28</sup> B M Dickens, “The prosecuting roles of the Attorney-General and Director of Public Prosecutions” [1974] PL 50, 55.

<sup>29</sup> J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 25.

## CORRUPTION OFFENCES

- 4.20 The criminal law of corruption is both common law and statutory. The offer or receipt of a bribe, for example, may in certain cases<sup>30</sup> be charged under the common law of bribery *or* under the Prevention of Corruption Acts 1889 to 1916.<sup>31</sup> In the former case, no consent is required; in the latter, the consent of a Law Officer has to be given prior to the institution of proceedings.

## INCHOATE OFFENCES

- 4.21 As regards offences of *conspiracy*, the Criminal Law Act 1977 provides that where a prosecution for the substantive offence can only be brought by or with the consent of the Attorney-General or the DPP, proceedings charging a conspiracy to commit that offence will be subject to the same restriction.<sup>32</sup> Similarly, as regards *attempts*, the Criminal Attempts Act 1981 provides that if the institution or continuation of proceedings in relation to a substantive offence requires the consent of any person, then proceedings in relation to an attempt to commit that offence also require the consent of that person.<sup>33</sup> *Incitement*, on the other hand, remains a common law offence and it appears that the institution of proceedings for inciting the commission of an offence does not require the consent of any person even if, were the substantive offence charged, consent would be required.<sup>34</sup>

### ***Statutory anomalies***

- 4.22 A stark example of a statutory anomaly is proved by section 30(4) of the Theft Act 1968 which states that proceedings “instituted against a person for any offence of stealing or doing unlawful damage to property which at the time of the offence belongs to that person’s wife or husband, or for any attempt, incitement or conspiracy to commit such an offence” require the consent of the DPP. Professor Sir John Smith is critical of the limitation of this provision to stealing and criminal damage:

If a wife alleges, or a third party alleges, that her husband has obtained her property by deception, blackmailed her, wounded her or raped her, no consent is required ... It is not obvious why this clause ... should be thus limited.<sup>35</sup>

<sup>30</sup> The scope of the common law and the statute law is not co-terminous: eg the common law applies only to public officers, whereas the Prevention of Corruption Act 1906 extends the criminal law of corruption to all agents, private as well as public.

<sup>31</sup> The collective name given, by s 4(1) of the 1916 Act, to the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.

<sup>32</sup> Criminal Law Act 1977, ss 4(2) and (3). Section 4(1) provides that, subject to those offences requiring the Attorney-General’s consent in any event, proceedings charging conspiracy to commit *any* summary offence are subject to the consent of the DPP.

<sup>33</sup> Criminal Attempts Act 1981, s 2(2)(a).

<sup>34</sup> See, eg, *R v Assistant Recorder of Kingston-upon-Hull, ex p Morgan* [1969] 2 QB 58.

<sup>35</sup> J C Smith, *The Law of Theft* (8th ed 1997) para 14-30.

### ***Anomalies in the designation of consent authority***

- 4.23 Not only have consent provisions been applied inconsistently but the authority to grant or refuse consent has been assigned inconsistently. For example, the Children and Young Persons (Harmful Publications) Act 1955 stipulates that no prosecution can be instituted without the consent of the Attorney-General,<sup>36</sup> while the Obscene Publications Act 1959, which similarly prohibits the publication of certain types of material, and therefore contains a similar restriction on the freedom of expression, provides for the consent of the DPP.<sup>37</sup> In the case of offences relating to incitement to racial hatred, now contained in Part III of the Public Order Act 1986, the Attorney-General's consent<sup>38</sup> is required. The earlier Incitement to Disaffection Act 1934, on the other hand, which also raises the issue of freedom of speech, provides for the consent of the DPP.<sup>39</sup>

### **Administrative issues**

#### ***Administrative burden***

- 4.24 A proliferation of consent provisions might, depending on the frequency of the relevant prosecutions, increase the administrative burden on the Law Officers and the DPP. In addition to the preparation necessary for a decision to be made by the DPP or a crown prosecutor in cases requiring the consent of the DPP, the DPP will also be expected to express a view in difficult cases requiring the consent of the Attorney-General.

#### ***Delay***

- 4.25 Although, to the best of our knowledge, there is no suggestion that obtaining a consent takes an unreasonable amount of time,<sup>40</sup> an additional stage to the institution of criminal proceedings is likely to delay the institution of those proceedings.

#### ***The DPP and delegation***

- 4.26 Although we understand that the CPS has internal arrangements for ensuring that different categories of offence are dealt with at an appropriate level within the organisation,<sup>41</sup> we are mindful that, by virtue of section 1(7) of the POA 1985, a consent decision may be taken by any crown prosecutor.

### **OUR PROVISIONAL PROPOSAL**

- 4.27 For reasons that have just been set out, we provisionally concluded in the consultation paper that the present consents regime is in an unsatisfactory state

<sup>36</sup> Section 2(2) in relation to an offence under s 2(1) of that Act.

<sup>37</sup> Section 2(3)(a) in relation to an offence under that section.

<sup>38</sup> Section 27(1) in relation to an offence under Part III of that Act.

<sup>39</sup> Section 3(2) in relation to any offence under that Act.

<sup>40</sup> The Law Officers would expect to turn cases round within five working days, although substantial cases may take a little longer.

<sup>41</sup> See *Blackstone*, para D1.84.

and it should therefore be reformed.<sup>42</sup> We were bold enough to say that we did not anticipate that this provisional conclusion would provoke controversy, and drew support from the Philips Report which, following criticism of the consent regime, concluded that “[r]ationalisation of the current provisions need not be delayed”.<sup>43</sup>

### **Responses on consultation**

- 4.28 All the respondents who commented on this provisional proposal agreed with it. We must point out, however, that there was a strong body of opinion which was critical of our assumption that there was a continued need for a right of private prosecution<sup>44</sup> and their responses must be seen in this light.
- 4.29 **We conclude that the present consents regime is in an unsatisfactory state and recommend that it should be reformed.**

<sup>42</sup> Para 5.46.

<sup>43</sup> The Philips Report, para 7.57.

<sup>44</sup> Paras 5.10 – 5.12 below.

## **PART V**

### **PRINCIPLES FOR REFORM OF THE CONSENTS REGIME (I)**

- 5.1 In Parts V and VI we consider the principles underlying reform. In this Part we review the fundamental principle underlying the right to private prosecution,<sup>1</sup> the harm caused by an unfettered right of private prosecution<sup>2</sup> and the role of consent provisions in preventing harm.<sup>3</sup> We then consider whether a reformed consents regime should be offence-structured.<sup>4</sup> We ask whether such a regime should ever be supplemented by reference to the identity of the defendant (looking in particular at doctors in relation to medical manslaughter).<sup>5</sup> We also discuss the basis for departures from the fundamental principles.<sup>6</sup> Finally, we ask whether a consents regime should be used to control the prosecution of offences which would often be more appropriately left to the civil court.<sup>7</sup>
- 5.2 In Part VI we consider the traditional justifications for consent provisions and conclude that, save in three categories of exception, consent requirements should be dispensed with.

#### **THE FUNDAMENTAL PRINCIPLE**

- 5.3 In the consultation paper we considered the significance of private prosecutions.<sup>8</sup> We have earlier drawn attention to the comments made by Lord Simon of Glaisdale who saw the principle underlying the right to private prosecution as “the fundamental constitutional principle of individual liberty based on the rule of law”.<sup>9</sup> We have also referred to the House of Lords case of *Gouriet v Union of Post Office Workers*<sup>10</sup> in which both Lords Diplock and Wilberforce emphasised that although resort was rarely made to instituting a private prosecution, such a right provided a constitutional safeguard against “capricious, corrupt, or biased failure, or refusal”<sup>11</sup> by the prosecuting authorities and “inertia or partiality on the part of the authority”.<sup>12</sup>

<sup>1</sup> Paras 5.3 – 5.13 below.

<sup>2</sup> Paras 5.14 – 5.24 below.

<sup>3</sup> Paras 5.25 – 5.27 below.

<sup>4</sup> Paras 5.28 – 5.35 below.

<sup>5</sup> Paras 5.36 – 5.42 below.

<sup>6</sup> Paras 5.43 – 5.45 below.

<sup>7</sup> Paras 5.46 – 5.51 below.

<sup>8</sup> Paras 6.3 – 6.4.

<sup>9</sup> See para 4.4 above.

<sup>10</sup> [1978] AC 435.

<sup>11</sup> *Ibid*, at p 498 *per* Lord Diplock.

<sup>12</sup> *Ibid*, at p 477B *per* Lord Wilberforce. See also a recent reaffirmation of this principle by the High Court in *Hayter v L* [1998] 1 WLR 854.

- 5.4 We provisionally agreed and referred to the similar view taken in our recent report on Involuntary Manslaughter,<sup>13</sup> in which we considered that the right to private prosecution was “an important one which should not be lightly set aside”.<sup>14</sup> We explained that “for some members of our society – those, for example, who have doubts about the impartiality of the prosecuting authorities, or believe that an individual prosecutor has misjudged the evidence in a case – the right of prosecution provides an important safeguard against abuse”.<sup>15</sup> Our approach was “that the right of private prosecutions should be unrestricted unless some very good reason to the contrary exists”.<sup>16</sup>
- 5.5 As we have pointed out, however, there are practical constraints on bringing a private prosecution in terms of costs,<sup>17</sup> access to investigative machinery,<sup>18</sup> and the risk of liability in tort.<sup>19</sup> There are also procedural restraints, which include the discretion of the magistrates to refuse to issue a summons.<sup>20</sup> We have explained the power of the Attorney-General to enter a *nolle prosequi*,<sup>21</sup> the power of the Attorney-General to apply to the High Court for an order declaring a person to be a vexatious litigant<sup>22</sup> and the power of the DPP to take over proceedings and proceed, discontinue proceedings, decline to offer evidence, or withdraw the case.<sup>23</sup>
- 5.6 As we have made clear above,<sup>24</sup> the purpose of this project is to examine *one* of the procedural mechanisms used to control the prosecution process, namely, the requirement in respect of certain offences for the consent of the Law Officers or the DPP as a condition precedent to the institution of criminal proceedings. Our recommendations, therefore, should be considered in context, namely, that they are made on the basis that the environment in which a reformed consents regime will operate will include a variety of mechanisms which seriously impinge on and interfere with the ability of the private prosecutor to *continue* a private prosecution.
- 5.7 Sir Louis Blom Cooper QC thought “the power of the DPP to take over a prosecution to drop the proceedings has rendered the private citizen’s right to prosecute obsolescent, if not obsolete”.<sup>25</sup> This comment might exaggerate the use made by the DPP of that power as numerous private prosecutions are brought, for

<sup>13</sup> Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

<sup>14</sup> *Ibid*, para 8.66.

<sup>15</sup> *Ibid*, para 6.4.

<sup>16</sup> *Ibid*.

<sup>17</sup> Para 4.9 above

<sup>18</sup> Para 4.10 above.

<sup>19</sup> Para 4.11 above.

<sup>20</sup> Paras 2.14 and 2.16 above.

<sup>21</sup> Paras 2.17 above.

<sup>22</sup> Paras 2.18 above, re “criminal or all proceedings orders”.

<sup>23</sup> Paras 2.19 – 2.20 above.

<sup>24</sup> Paras 1.16 and 2.14 – 2.15 above. See also, the consultation paper, paras 1.1 and 1.14.

<sup>25</sup> “Remedying Harm: Civil and Criminal Justice” paper given at Criminal Bar Association Conference 1997.

example, by trade bodies or by charities such as the NSPCC and the RSPCA which the DPP does not make any offer to take over. There are also some private prosecutions which do not reach the attention of the CPS and we consider later in this paper whether there should be a system requiring automatic notification of private prosecutions.<sup>26</sup> Nevertheless, the fetters on the right to *continue* private prosecutions are important; we agree with Professor Sir John Smith's comments about private prosecutions that "even in the absence of a consent provision, [it] is not much of a right seeing that it can be neutralised by the DPP or the Attorney-General at any time without reasons given".

- 5.8 The right of private prosecution would therefore more accurately be expressed as a right to *institute* a prosecution,<sup>27</sup> which is limited by the absence of any unlimited right to *continue* the prosecution. Indeed, this point is reflected in the language used in section 6(1) of the POA 1985 which expressly reserves the right to initiate a private prosecution by providing that

nothing in this Part shall preclude any person from *instituting* any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.<sup>28</sup>

- 5.9 As we have stated,<sup>29</sup> the purpose of this paper has not been to see whether private prosecutions should continue, but whether the present regime of consent should be revised. The question of whether or not we should have private prosecutions is not a question that we raised in this project. Nevertheless, in light of the responses that we received, we feel that we should make some comment about the continuing right of private prosecution.

### **The continuing right of private prosecution**

- 5.10 The thrust of the objection to the continuing right of private prosecution was that since the establishment of the CPS in 1986, it is only this prosecuting authority that ought to have the power to decide when and whom to prosecute. So, for example, Buxton J thought that it could not be in the general interest for the especially coercive structures of the criminal justice system to be set in motion by an individual.
- 5.11 Buxton LJ pointed out that the prosecutor is a "Minister of Justice" and proper performance of this role requires "wisdom and experience of professional prosecutors". Criminal trials were not, he said, "adapted to deal with, and cannot be conducted properly in the presence of, a prosecutor who is engaged in asserting his own interests".

<sup>26</sup> Paras 7.2 – 7.9 below.

<sup>27</sup> Even this right is occasionally limited by mechanisms other than consent provisions. For example, litigants who have been judged to be "vexatious" by the High Court on the application of the Attorney-General are prevented from instituting proceedings without leave of the High Court.

<sup>28</sup> Emphasis added.

<sup>29</sup> See para 1.10 above.



- 5.12 Other respondents commented that the right of private prosecution was an “anachronistic survival from the times when criminal justice was essentially a matter of private law”;<sup>30</sup> that it was “an antiquated right that serve[d] ... no useful purpose”<sup>31</sup> and that there was “a perception at large that the right is largely theoretical and obsolescent”.<sup>32</sup>
- 5.13 We see the force of these points but do not believe that it is appropriate to consider abolishing the right of private prosecution without specific consideration which has neither been sought nor given in this project. The issues raised on the question of retention of the right of private prosecution are complex and they are not capable of being resolved within the scope of this report.

#### **THE HARM CAUSED BY AN UNFETTERED RIGHT OF PRIVATE PROSECUTION**

- 5.14 In order to decide on the principles for reform, we have to bear in mind the dangers of private prosecutions. In the consultation paper, we examined the potential harms in allowing an unfettered right of private prosecution. We analysed them by contrasting prosecution decisions taken by the CPS and those taken by private prosecutors. Decisions taken by the CPS, unlike those taken by private prosecutors, are governed by the principles contained in the Code for Crown Prosecutors.<sup>33</sup> The Code sets out a two-part test, which is applied to all cases under review (comprising the evidential test and the public interest test).<sup>34</sup> As we have said, this has recently been commented on by the Glidewell Committee.<sup>35</sup>
- 5.15 The *evidential test* is an objective test which requires an assessment of whether “there is enough evidence to provide ‘a realistic prospect of conviction, against each defendant on each charge’”.<sup>36</sup> By “realistic prospect of conviction” it is meant that “a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged”.<sup>37</sup>
- 5.16 The *public interest test* is considered only if the evidential test has been passed. It involves the prosecutor balancing the factors for and against prosecution.<sup>38</sup> The Code provides some guidance as to which factors should be considered.<sup>39</sup> It is assumed that “[t]he more serious the offence, the more likely it is that a prosecution will be needed in the public interest”<sup>40</sup> and therefore in cases of any

<sup>30</sup> Paul Roberts, Lecturer in Law, University of Nottingham.

<sup>31</sup> Charles Blake.

<sup>32</sup> Professor John Jackson.

<sup>33</sup> Issued under s 10 of the POA 1985. The Code is set out in its entirety in Appendix C below.

<sup>34</sup> Code for Crown Prosecutors, paras 4.1 – 4.2.

<sup>35</sup> See para 1.19 above.

<sup>36</sup> Code for Crown Prosecutors, para 5.1.

<sup>37</sup> *Ibid*, para 5.2.

<sup>38</sup> *Ibid*, para 6.2.

<sup>39</sup> *Ibid*, paras 6.5 – 6.9.

<sup>40</sup> *Ibid*, para 6.4.

seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.<sup>41</sup>

- 5.17 The Code sets out the factors favouring prosecution<sup>42</sup> which include, for example, the fact that a conviction is likely to result in a significant sentence; that a weapon was used or violence threatened during the commission of the offence; that the evidence shows that the defendant was a ringleader or organiser of the offence; that the victim was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance; that the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views, or sexual preference; that there are grounds for believing that the offence is likely to be continued or repeated (for example, a history of recurring conduct); or that the offence, although not serious in itself, is widespread in the area in which it was committed.
- 5.18 There is also reference to factors militating against prosecution<sup>43</sup> which include, for example, the fact that the court is likely to impose a very small or nominal penalty; that the offence was committed as a result of a genuine mistake or misunderstanding;<sup>44</sup> that there has been a long delay between the offence taking place and the date of the trial;<sup>45</sup> that a prosecution is likely to have a very bad effect on the physical or mental health of the victim; that the defendant is elderly or is, or was, at the time of the offence, suffering from significant mental, or physical ill-health;<sup>46</sup> or that details may be made public that could harm sources of information, international relations, or national security.
- 5.19 In the consultation paper,<sup>47</sup> we took the view that private prosecutions were likely to be instituted in cases which failed the tests applicable to the CPS and concluded accordingly that the following types of harm were likely to result from such prosecution:
- (1) the harm that results from an unsuccessful prosecution of an innocent defendant;
  - (2) the harm that results from any prosecution, successful or not, which is not in the public interest.

<sup>41</sup> *Ibid*, para 6.2.

<sup>42</sup> *Ibid*, para 6.4.

<sup>43</sup> *Ibid*, para 6.5.

<sup>44</sup> “[T]hese factors must be balanced against the seriousness of the offence”: Code for Crown Prosecutors, para 6.5(b).

<sup>45</sup> Unless the offence is serious, the delay has been caused in part by the defendant, the offence has only recently come to light, or the complexity of the offence has meant that there has been a long investigation: Code for Crown Prosecutors, para 6.5(d).

<sup>46</sup> Unless the offence is serious or there is a real possibility that it may be repeated: Code for Crown Prosecutors, para 6.5(f).

<sup>47</sup> Para 6.7.

- 5.20 It is clear from the Code that some of the factors relevant to the “public interest” test relate to the harm that a prosecution would do to the *private* interests of the various individuals involved. We have seen that the reasons for not prosecuting include matters relating to the condition of both the defendant and the victim.<sup>48</sup> The greater the likely harm to the individuals involved, the less likely it is that the public interest will require a prosecution.
- 5.21 The first type of harm described in paragraph 5.19 above, could result from circumstances in which a private prosecutor brought a prosecution despite the evidence being such that it failed the evidential sufficiency test. Generally, cases which fail the evidential sufficiency test are likely to result in an acquittal, but the acquitted defendant would in those circumstances have suffered the harm of being the subject of criminal proceedings. The second type of harm may result from circumstances in which a private prosecutor brings a prosecution although it may not satisfy the public interest test set out in the Code, so that on balance a prosecution is not needed in the public interest.
- 5.22 We accepted in the consultation paper<sup>49</sup> that at first blush our conclusion about the harms that might result from the unfettered right of prosecution appeared to undermine our fundamental principle. We demonstrated that this was not the case as:
- (1) There is always a risk that an individual Crown Prosecutor will either misapply the Code or – more likely, given the width of the Code tests – apply a personal interpretation to the tests which, although not wrong, might differ from that of other prosecutors.<sup>50</sup>
  - (2) The Code itself may, in the eyes of some, fail to achieve a proper balance between the rights of the defendant and the interests of the community.
  - (3) It should not be assumed that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. If, for example, a case is turned down by the CPS because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if

<sup>48</sup> Para 5.18 above and paras 6(5)(e) and (f) of the Code for Crown Prosecutors in Appendix C.

<sup>49</sup> Para 6.12.

<sup>50</sup> See A Hoyano, L Hoyano, G Davis and S Goldie, “A Study of the Impact of the Revised Code for Crown Prosecutors” [1997] Crim LR 556, 559:

[V]ery few prosecutors believed that the “more likely than not” clarification had made any difference to their actual decisions. In part this was because many prosecutors thought that “more likely than not” simply reflected the test that was already being applied. Others observed that the wording was too imprecise to be employed as guidance in specific cases ... Prosecutors stressed that the only way to acquire the ability to assess likelihood of conviction was through experience, or through consulting colleagues. They acknowledged that different prosecutors might well reach different conclusions in the one case, so finely balanced were the judgments involved.

the case is a serious one, then a private prosecution might be thought desirable.

### **Responses on consultation**

5.23 The vast majority of those who considered the provisional conclusions relating to the harm which might result from an unfettered right or private prosecutors agreed and made very little additional comment. Lord Archer of Sandwell QC<sup>51</sup> added that a problem arose when it was necessary to apply a judgment based on standards, and he cited as an example the Obscene Publications Act. He commented that the extent to which this was a problem might depend upon how centralised the CPS structure was at any time. Lord Archer doubted whether it was a problem at present and he was merely setting down a marker. We believe that the responses that we have received confirm our provisional view.

5.24 **We therefore conclude that the harm which might result from an unfettered right of prosecution would be either or both of the following:**

- (1) the harm that results from an unsuccessful prosecution of an innocent defendant;**
- (2) the harm (whether to the individual involved in the criminal process or to the public interest in the strict sense) that results from any prosecution successful or not which is not in the public interest.**

### **THE ROLE OF CONSENT PROVISIONS IN PREVENTING THIS HARM**

5.25 In the consultation paper, we pointed out<sup>52</sup> that a private prosecution is likely to be undesirable if it fails either or both of the Code tests. We explained that an undesirable prosecution should be terminated as soon as possible but it would be better if it was not brought at all. We advocated a prosecutorial control system which prevented undesirable private prosecutions being *brought* rather than a system which *terminated* proceedings after they had been commenced.

5.26 The reasoning behind this is that if there was a consent provision the defendant would not suffer the harm caused by an aborted prosecution and the legal and administrative costs would not be incurred. Again, it is a less attractive option for the CPS to intervene after a private prosecutor has gone to the trouble of instituting proceedings rather than to prevent the commencement of proceedings at the outset. In essence, the consents provision acts as a pre-emptive measure preventing the institution of undesirable proceedings and is thus preferable to the other mechanisms of control, namely, the power of the CPS to take over a prosecution and terminate it or the power of the Attorney-General to enter a *nolle prosequi*, both of which are retrospective, not pre-emptive.

5.27 Our provisional view was that the consent mechanism was the preferred mechanism for preventing the harm that would be caused by an undesirable

<sup>51</sup> Solicitor-General 1975–1979.

<sup>52</sup> Para 6.17.

prosecution.<sup>53</sup> This view was accepted by the majority who commented on it, while those who disagreed did not put forward any argument which persuaded us to change our provisional conclusion. A significant point raised was that it is important to bear in mind that the consent provisions are to be seen in the light of the fact that *existing* private prosecutions can be stopped by the DPP or the Attorney-General.<sup>54</sup> We therefore appreciate that the salient feature of a consent provision is that it prevents the *institution* of inappropriate criminal proceedings which could subsequently be stopped. Professor Sir John Smith said in his response, “the question to be asked seems to be, why is it not sufficient that the DPP can take over private prosecutions and, without giving any reasons<sup>55</sup> terminate them”. We must focus on the harm that could be caused between institution and discontinuance of misconceived private prosecutions and ensure that the consent mechanism deals, if possible, with this harm.

### **SHOULD WE HAVE AN OFFENCE-STRUCTURED CONSENTS REGIME?**

- 5.28 We now turn to look at the circumstances in which consent should be required. The present regime is basically offence-structured in the sense that broadly the consent attaches to a particular offence rather than, for example, to a particular type of offender with a particular set of circumstances. In other words, the question of whether a consent is required depends on the offence charged, although there are some examples of hybrid criteria.<sup>56</sup> A fundamental issue to be determined is whether we should retain an offence-structured regime or adopt a different type of structure.
- 5.29 In the consultation paper we stressed the importance of certainty as to when consent is or is not required as it would be totally unsatisfactory for the criterion to be framed in such a way that only a ruling at the start of the trial would determine whether or not the prosecution was valid.<sup>57</sup>
- 5.30 The approach taken in the consultation paper was, therefore, to focus on the kinds of prosecution that we are trying to prevent; as we have said<sup>58</sup> they are prosecutions which are unlikely to succeed and those which, even if likely to succeed, are undesirable because the public interest in prosecuting the guilty is outweighed by

<sup>53</sup> Para 6.17.

<sup>54</sup> See paras 2.14 and 2.17 – 2.20 above.

<sup>55</sup> POA s 23(6) provides that:

on giving any notice [that he does not want the proceedings to continue in which case they should be discontinued with effect from the giving of that notice] the Director shall inform the accused of the notice and of the accused’s right to require the proceedings to be continued; but the Director shall not be obliged to give the accused any indication of his reasons for not wanting the proceedings to continue.

<sup>56</sup> For example, the Law Reform (Year and a Day) Rule Act 1996 imposes a requirement of consent on the prosecution of homicide offences but *only in certain* circumstances, namely (a) where there is a lapse of more than three years between the date of the injury and the date of the death and (b) when the defendant has already been convicted in relation to the injury.

<sup>57</sup> Para 6.19.

<sup>58</sup> See paras 5.19 – 5.21 above.

other interests public, private or both, militating against prosecution. We stated in the consultation paper that we believed the most important kind of harm to be averted in prosecutions which are unlikely to succeed is the suffering of the (presumably) innocent defendant who, as a result of the prosecution, might be subjected to stress, expense and damage to career or reputation.<sup>59</sup> As regards harm to innocent defendants, a distinction has to be drawn between those innocent defendants who are particularly likely to be prosecuted and suffer harm and those who *if* privately prosecuted, are likely to suffer *serious harm*.

- 5.31 Our approach was that the first category of individuals was an abstract one which had no actuality as we could not see why a particular class of individuals (defined other than by way of the offence charged) should attract *inappropriate* private prosecutions. In relation to the second category, we had been made aware prior to publishing the consultation paper of, for example, the concern of doctors who, it is said, are likely, if privately prosecuted for manslaughter in the event of a patient dying, to suffer particularly serious harm. For the reasons given below,<sup>60</sup> we do not consider that consent provisions should be used in relation to any separate categories of individual whose working lives are likely to be damaged by an inappropriate prosecution.
- 5.32 Turning to the second type of harm we are trying to prevent (where other interests outweigh the public interest in prosecuting the guilty) we provisionally took the view that it was unlikely that we could identify particular groups of individuals who were more likely than others to be defendants in private prosecutions which may, for public interest reasons, be regarded as inappropriate. We therefore provisionally concluded that a reformed consents programme should in general be offence-structured, while recognising that it is arguable that such a regime could be usefully and fairly supplemented by certain consent provisions which attach not to an event but to the character of the defendant.
- 5.33 On consultation, the overwhelming majority of respondents who dealt with this issue agreed with it and made little additional comment. The only alternative was a suggestion raised by the CPS, that all private prosecutions should have the consent of the designated authority before a summons would be issued. The CPS however recognised that the imposition of a requirement of prior consent to prosecute “across the board” would be “a heavy-handed approach entailing the vetting of many cases which would not, in fact, be of any risk to the public interest”. Not only does an “across the board” approach not have the support of other respondents, it is also inconsistent with our assumption that private prosecutions should continue.
- 5.34 In the light of the responses that we have received **we conclude that a reformed consents regime should be offence-structured.**
- 5.35 It has been suggested that such a regime might perhaps be usefully supplemented by certain consent provisions which attach not to an offence but to the character of the defendant or to some other factor. It has been said to us by the British

<sup>59</sup> Para 6.20.

<sup>60</sup> Paras 5.36 – 5.42 below.

Medical Association that prosecutions for medical manslaughter, to which we now turn, are one such case.

### **Medical manslaughter**

- 5.36 We considered whether a consent requirement would be justified not merely in respect of certain offences but also in respect of other offences when they are allegedly committed by certain defendants – the reason being that such defendants if innocent, would suffer particularly serious harm in the event of a private prosecution. The only such case that we have been asked to consider is the question of the prosecution of doctors for manslaughter.
- 5.37 In a recent report, we describe “involuntary manslaughter” as the name given to those *unintentional* killings that are criminal at common law: causing death in the course of doing an unlawful act, and causing death by gross negligence or recklessness.<sup>61</sup> We noted that involuntary manslaughter is not recognised as a separate crime in its own right: it is simply a label used to describe certain ways of committing the very broad common law crime of manslaughter.<sup>62</sup>
- 5.38 The starting point must be to bear in mind the strength of feeling understandably and inevitably caused by fatal accidents, and we appreciate the intense pressure that can be brought to bear by relatives of the deceased seeking a prosecution. An acute illustration of this is said to arise when a person dies in hospital or where the relatives of the deceased believe that the person died as a result of some professional act or omission of the doctors. As we pointed out in the consultation paper,<sup>63</sup> it had been suggested to us that criminal prosecutions, even if subsequently dropped before proceedings have concluded, would be likely to cause irreparable damage to the reputation of a doctor with the result that his or her career would be placed in serious jeopardy. On the assumption that this was correct, this raised the issue of whether in those special circumstances, consent should be required before doctors could be prosecuted for manslaughter. We also bore in mind that many occupations carry with them the risk of exposing others to death or serious injury and we cited as examples, dentists, nurses, lorry drivers and train drivers. In each of these cases, an unsuccessful private prosecution for manslaughter is likely to cause the defendant some substantial harm whatever his or her occupation. We appreciated that some would therefore ask why doctors should be given special protection.

<sup>61</sup> Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com 237, paras 1.3 and 1.4. In this report, we recommended that the broad offence of involuntary manslaughter be replaced by two different offences of unintentional killing based on different fault elements: reckless killing and killing by gross carelessness.

<sup>62</sup> Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com 237, at para 1.3. The other ways of committing manslaughter, commonly called “voluntary manslaughter”, require the same intention as for murder (*viz* to kill or cause serious injury), mitigated by provocation, diminished responsibility or agreement to enter into a suicide pact (when the killer is a survivor of the pact): Homicide Act 1957, ss 2–4.

<sup>63</sup> Para 6.55.

- 5.39 In the consultation paper,<sup>64</sup> we expressed concern that a number of other groups could claim that they should be entitled to the benefit of consent provisions if manslaughter charges against doctors were to require consent on the general ground that their working lives are likely to be substantially damaged if they were prosecuted for (even though subsequently acquitted of) an offence particularly harmful to his or her position. Such a principle would mean that consent provisions would be required not only to protect lorry drivers and train drivers on manslaughter charges but also those in a range of different occupations, such as allegations of dishonesty against a bank manager or of indecent assault against a school teacher. We were troubled by this and therefore proposed that there should be no requirement of consent attaching to categories of defendant. We asked not only for views on this but also, if protection by means of a requirement of consent should be given, which categories of people, other than doctors, should be protected?
- 5.40 On consultation the majority were critical of any suggestion that any specified class of persons should be protected by consent provisions. No respondent thought the protection should be offered only to doctors and a few respondents thought the introduction of such protection, explicitly nor implicitly, should be limited to a specified class of persons predominantly those in the medical profession. The Recorder of Bristol thought the category should be restricted to professionals who were forced to make life and death decisions in the operating theatre, while Longmore J gave as examples doctors, nurses and possibly other paramedical staff but pointed out the class should be fairly narrowly defined. The Medical Defence Union asked for consideration to be given to other health-care workers whose position was similar to doctors and who could only work effectively in a climate of trust and confidence. The Police Federation wanted the consents regime to include prosecution of police officers because it would prevent ill-conceived private prosecutions which were undertaken solely “to disrupt and frustrate in well-founded criminal proceedings brought against defendants”. Lord Archer of Sandwell QC<sup>65</sup> believed that there was a more difficult problem in relation to prosecution of policemen or soldiers for murder, particularly in Northern Ireland and he explained that “to permit private individuals to initiate such prosecutions where a verdict of guilty may in fact be inevitable is to expose the public interest to abuse for political or retaliatory reasons”.
- 5.41 Nevertheless, the majority believed that there should be no departure from the fundamental regime. They gave a number of different reasons. One argument was that no class deserves more protection than another; the Bar Council among others adopted this approach pointing out that the effects of prosecution for theft against a bank manager or prosecution for indecent assault against a school teacher would be equally devastating when compared with the effects of a prosecution for involuntary manslaughter of a doctor. Others took the view that the definition of the class would be difficult, arbitrary and uncertain, whilst some thought that the existing mechanisms to take over a prosecution by the CPS constituted suitable protection for defendants. The Criminal Bar Association pointed out that “unless and until citizens feel that a decision not to bring a

<sup>64</sup> Para 6.56.

<sup>65</sup> Solicitor-General from 1974 to 1979.



prosecution can be properly appealed or reviewed then a provision by which certain professionals cannot be privately prosecuted for involuntary manslaughter without consent is bound to cause hostility”.

- 5.42 Having considered these responses, **we conclude that it would not be appropriate to depart from the fundamental principle so as to require consent for prosecutions of doctors for manslaughter or for any other category of individuals whose working lives are likely to be substantially damaged if they are prosecuted for – even though subsequently acquitted of – an offence bearing particularly on his or her position.** In reaching that conclusion we have been influenced not only by the cogent arguments in support of that point to which we have referred, but also the absence of any evidence that the working lives of doctors or others have been substantially damaged because they were subject to misconceived private prosecutions which were ultimately dismissed.

#### **THE BASIS FOR DEPARTURE FROM THE FUNDAMENTAL PRINCIPLE**

- 5.43 In the consultation paper,<sup>66</sup> we explained that we acknowledged that there should be exceptions to the fundamental principle in favour of the right of private prosecution where an unfettered right created a risk of harm either to an innocent defendant or to the public interest, whether in the terms of the public interest in the strict sense or to those private interests which are put in the balance when the public interest test is applied. We are, of course, focusing on the harm that would be caused by the *commencement* of private prosecutions because, as we have explained, there are a number of tools available to end a private prosecution. Our approach was that the most effective way of preventing the commencement of misconceived prosecutions was a consent provision which would be basically offence-structured.
- 5.44 We now have to consider the more difficult task of identifying those offences which ought to attract a consent provision. In the consultation paper,<sup>67</sup> we considered, but rejected, a simple approach of trying to decide which offences, if prosecuted despite failing one or other of the Code for Crown Prosecutors tests,<sup>68</sup> would give rise to the harm that we are seeking to avoid. This approach is flawed because a private prosecution, if brought inappropriately, in respect of *any* offence is likely to have some adverse effect. We thought that a more promising approach was to identify those offences, the prosecution of which would be “most likely” to give rise to the harm that we have mentioned and which would therefore most appropriately require a consent provision. We therefore suggested in the consultation paper<sup>69</sup> that we should bear in mind the kinds of harm that we have already identified,<sup>70</sup> and this meant posing and answering the following two questions:

<sup>66</sup> Para 6.24.

<sup>67</sup> Para 6.25.

<sup>68</sup> For details of the Code tests see paras 5.14 – 5.18 above.

<sup>69</sup> Para 6.25.

<sup>70</sup> See paras 5.19 – 5.21 above.

- (1) which offences, when privately prosecuted, are particularly likely to fail because of evidential weakness; and, of those, which offences are more likely than others to involve proceedings against innocent defendants?
- (2) which offences when privately prosecuted are most at risk of being contrary to the public interest?<sup>71</sup>

To these, we can now add a third question when we take into account the fact that we are focusing on the harm caused by the *institution* of proceedings and that question is:

- (3) of the offences identified by answering questions (1) and (2) which of them, if inappropriately prosecuted, would cause such a *substantial amount of harm* by the mere fact of proceedings being *instituted* that a consent provision is justified as an additional restriction over and above the other restrictions on the right to bring a private prosecution?<sup>72</sup>

### **Evidential weaknesses**

5.45 Our basic approach has been that we are, in principle, in favour of using consent provisions as a means of preventing those private prosecutions which cause harm because they are particularly likely to fail because of evidential weakness. Nevertheless, we find it difficult to see how particular *offences* can be identified as falling into such a category. We considered whether there might be offences which tend not to be prosecuted by the CPS because of the difficulty in proving them at trial so that it is possible that these sorts of offences are more likely than others to be privately prosecuted. Nevertheless, even armed with this information it appears difficult to see how it might be possible to distinguish those offences which, if they are privately prosecuted without success, are harmful because they tend to involve *innocent* defendants from those which we do not believe to be harmful because the defendant is guilty and the evidence against him or her is substantial although not “sufficient” to meet the necessary standards of the Code. Therefore this exception could not work effectively. In the consultation paper,<sup>73</sup> we provisionally concluded that a consent provision could not be used as a mechanism to prevent the harm caused by *evidentially weak* private prosecutions. On consultation, all those who commented agreed with the provisional view but the Law Reform Committee of the Bar Council added that the potential damage to the defendant could be minimised by an automatic and speedy reference to the DPP and consideration by the CPS. We will consider that point in greater detail when we look to see whether there should be automatic referrals of all prosecutions to the DPP.<sup>74</sup> In the light of the support for our provisional proposal, we believe that it was correct and **we therefore conclude that a consent provision cannot be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions.**

<sup>71</sup> Para 6.25.

<sup>72</sup> Those other restrictions are set out in para 5.5 above.

<sup>73</sup> Para 6.26.

<sup>74</sup> See paras 7.2 – 7.9 below.

## **Controlling the prosecution of offences which will often be more appropriately left to the civil courts**

- 5.46 In the consultation paper,<sup>75</sup> we provisionally concluded that a consent provision should attach to offences in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution. In coming to this provisional conclusion, we were very conscious that a private prosecutor might be tempted to institute criminal proceedings when civil proceedings were underway or contemplated, merely to bolster the negotiating position in those civil proceedings.
- 5.47 We did not go so far as to say that a consent provision would be justified in the case of any offence which might be the subject of civil proceedings as well as criminal because this, of course, would include the majority of criminal offences. We were conscious that in many cases if civil proceedings were underway, an impartial person – such as a Crown Prosecutor – would be likely to conclude that because of the existence of the civil proceedings, it was *unnecessary* to prosecute. We thought a good illustration of the sort of offence we had in mind was copyright law. We recalled that not only can a civil action be brought against a defendant for infringement of copyright, but also criminal proceedings – for example, under section 107(1)(a) of the Copyright Designs and Patents Act 1988 it is an offence to make for sale or hire any article which is an “infringing copy”<sup>76</sup> without the consent of the copyright holder.<sup>77</sup> We could therefore envisage circumstances in which a defendant might be subject to two sets of proceedings, civil and criminal, which are for all practical purposes the *same* proceedings.<sup>78</sup>
- 5.48 On consultation the majority who responded favoured this category but a strong minority argued against it, both on the question of principle and in relation to copyright offences as an illustration. We must now consider those criticisms.
- 5.49 The Criminal Bar Association pointed out that it was not clear that the provision of parallel proceedings has, in fact, caused the mischief feared in the consultation paper and that, in any event, it would be difficult to decide what motives lay behind concurrent civil and criminal proceedings. They queried whether a prosecution for careless driving would require consent if the clear purpose of the complaint was to aid a civil action in negligence for the same act. We see the force

<sup>75</sup> Paras 6.47 – 6.51.

<sup>76</sup> Section 27(2) of the 1988 Act provides that an article “is an infringing copy if its making constitutes an infringement of the copyright in the work in question”.

<sup>77</sup> Copyright Designs and Patents Act 1988, s 107(1)(a).

<sup>78</sup> In *Thames and Hudson Ltd v Design and Artists Copyright Society Ltd* (1995) 22 FSR 153 an application was made to stay criminal proceedings under the Copyright Designs and Patents Act 1988 brought against the plaintiffs in circumstances where civil proceedings were later commenced in the Chancery Division. The plaintiffs alleged that the criminal proceedings had been brought “not for the purpose of deterring crime” but for the “illegitimate collateral purpose” of pressurising them into settling a commercial dispute. Although the court in this instance found against the plaintiffs’ submission that the criminal proceedings were vexatious and an abuse, and therefore refused to grant the application, this does not, in our view, mean that the CPS, applying the Code tests, would have concluded that the proceedings were needed in the public interest. On the contrary, the CPS might well have taken the view that the matter could safely be left to the civil courts.

of these criticisms, especially as there are many cases at present where individuals are prosecuted for theft in order to obtain evidence for a civil claim based on interference with goods; we are not aware of this causing injustice.

- 5.50 Another problem that was pointed out in relation to this category was that it was subjective and difficult to define. Indeed, the Bar Council thought “the class of offence as currently provisionally proposed is based on tests that are both subjective and highly speculative”. Professor Andrew Ashworth<sup>79</sup> thought that this category, as with trivial vexatious prosecutions, was concerned with cases where the facts relevant to the propriety of the proceedings would “come to light more clearly once the prosecution had been launched”.
- 5.51 We have to balance the cogency of those responses against the view of the majority that our proposals are acceptable. Having considered the matter carefully, **we conclude that we should not pursue our provisional proposal that consent provisions should be used to control the prosecution of offences which would often be more appropriately left to the civil courts.**
- 5.52 We will continue the process of identifying which categories of offence ought to attract a consent provision, in the following Part. To that end, we review the traditional justifications for consent provisions, as set out in the Home Office memorandum to the Franks Committee.<sup>80</sup>

<sup>79</sup> In an editorial note in [1997] Crim LR 845.

<sup>80</sup> Home Office memorandum to the Franks Committee, Franks Report, vol 2, pp 125 - 126.

## **PART VI**

### **PRINCIPLES FOR REFORM OF THE CONSENTS REGIME (II): THE THREE CATEGORIES OF CASE IN WHICH CONSENT SHOULD BE REQUIRED**

- 6.1 In this Part we consider the traditional justifications for consent provisions as set out in the Home Office memorandum to the Franks Committee.<sup>1</sup> On the basis of that review, we identify three categories of case which we recommend should include consent provisions.<sup>2</sup>

#### **THE TRADITIONAL JUSTIFICATION FOR CONSENT PROVISIONS**

- 6.2 As we have mentioned, the Home Office have considered the circumstances in which a consent provision should be justified and their position is to be found in the Home Office memorandum to the Franks Committee.<sup>3</sup> We have explained that the memorandum records that “the basic reason for including in a statute restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances”.<sup>4</sup> We believe that a useful starting point is to examine the five overlapping reasons for consent provisions set out by the Home Office in this memorandum.

#### **Imprecise offences**

- 6.3 The Home Office Memorandum gives as its first reason for including a consent requirement:

*to secure consistency of practice in bringing prosecutions, for example, where it is not possible to define the offence very precisely so that the law goes wider than the mischief aimed at or is open to a variety of interpretations.*<sup>5</sup>

- 6.4 This Commission has repeatedly pointed out that it is “not merely desirable, but obligatory, that legal rules imposing serious criminal sanctions should be stated with the maximum clarity that the imperfect medium of law could attain”.<sup>6</sup> Our approach is and remains that “the criminal law should have no place for an offence which is not sufficiently precise and it is not possible to say with reasonable certainty whether any combination of facts constitutes the offence”.<sup>7</sup>

<sup>1</sup> Paras 6.2 – 6.20 below.

<sup>2</sup> Para 6.21 – 6.52 below.

<sup>3</sup> Home Office memorandum to the Franks Committee, Franks Report, vol 2, p 125, para 7.

<sup>4</sup> See para 3.33 above.

<sup>5</sup> Franks Report, vol 2, p 125, para 7(a).

<sup>6</sup> Binding Over (1994) Law Com No 222, para 4.12, referring to Working Paper No 50, (1973) para 9. See also Working Paper No 57 (1974), para 44.

<sup>7</sup> Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, para 3.10.

- 6.5 Consent provisions were frequently used with the pressure of social welfare legislation during and after the Second World War. The exceptional circumstances prevailing at that time are no longer relevant. Our approach is that all effort should be to ensure that offences are not imprecise.
- 6.6 Nevertheless, even with the best efforts, there are on occasions imprecisely drafted offences and, for example, many common law offences such as conspiracy to defraud and misconduct in public life are well-known for their uncertain scope. This Commission is concerned with trying to revise such offences<sup>8</sup> and when we prepared the consultation paper, we were of the view that we did not want the availability of consent provisions to be treated as an alternative to the precise formulation of offences. In any event, it is difficult to know what degree of imprecision would be required before a consent provision would be considered justified. In the consultation paper, we provisionally concluded that the prosecution of imprecise offences, statutory or common law, should not be restricted by a consent provision.<sup>9</sup>
- 6.7 Of those who responded on this point, all agreed with our provisional view. The Criminal Bar Association pointed out that “many wide-ranging offences such as *Conspiracy to Defraud* have not been tied to consent provisions without any evident mischief”. We agree, and in the light of the support for our provisional conclusions **we conclude that the prosecution of imprecise offences, statutory or common law, should not be restricted by a consent provision.**

#### **Offences attracting vexatious and trivial prosecutions**

- 6.8 The second of the Home Office reasons for consent provisions was

*to prevent abuse, or the bringing of the law into disrepute, eg. with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases.*<sup>10</sup>

It is useful to distinguish between the two separate and alternative factors relied on, namely “vexatious” private prosecutions and “trivial cases”. “Vexatious” proceedings were defined by Sir Reginald Maningham-Buller<sup>11</sup> as being “proceedings instituted rather to gratify some whim of the prosecutor than vindicate his rights or assist in the administration of justice; in other words, these are prosecutions which are not well-founded and the result of some improper motive”.

- 6.9 On the other hand, “trivial cases” would cover prosecutions founded on sufficient evidence but relating to conduct which only just reaches the threshold of criminality.

<sup>8</sup> See, for example, *Legislating the Criminal Code: Corruption* (1998) Law Com No 248.

<sup>9</sup> Para 6.30.

<sup>10</sup> Franks Report, vol 2, p 125, para 7(b).

<sup>11</sup> As Attorney-General in his memorandum to the Select Committee on Obscene Publications, appendix 1, p 23, para 4(b).

- 6.10 As we have pointed out,<sup>12</sup> the CPS Code lists various “factors against prosecution” to be taken into account to decide whether a prosecution is in the public interest. One such factor is the fact that “the court is likely to impose a very small or nominal penalty,”<sup>13</sup> while another is that “the loss or harm can be described as minor and was the result of a single incident”.<sup>14</sup>

### ***Trivial prosecutions***

- 6.11 In the consultation paper, we provisionally agreed that it was not in the public interest for trivial cases to be prosecuted and so if it were practicable, the consents regime should be used to prevent private prosecution of trivial cases. We did point out that there was a practical difficulty in seeing how particular *offences* could be identified as trivial; in any event, describing an offence as trivial would suggest that the conduct criminalised should not be an offence at all. In essence, our approach was that triviality was not a characteristic of an offence but meant nothing more than a description of a particular example of an offence which may, in other circumstances, be very serious. It is easy to imagine a theft which is trivial. Consider the defendant who took an item off a shelf dishonestly with the intention of permanently depriving the owner of it, and so committed theft, but then immediately replaced it. On the other hand, it is very easy to imagine serious cases of theft. In the consultation paper, we provisionally took the view therefore that preventing the harm to the public interest caused by private prosecutors bringing trivial prosecutions is not a matter for the consents regime.<sup>15</sup>
- 6.12 On consultation, all those who responded agreed. The Law Reform Committee of the Bar Council agreed and wished to see the protection afforded by the power of the CPS to take over and discontinue a case “properly considered and zealously enforced”. We agree with that. In the light of the responses, we still hold to our provisional view and **we therefore conclude that preventing the harm to the public interest caused by private prosecutors bringing trivial prosecutions is not a matter for the consents regime.**

### ***Vexatious prosecutions***

- 6.13 It has been argued that the particular character of some sorts of offences attracts vexatious prosecutions so that a consent requirement would provide a necessary safeguard in such cases. When Parliament was debating the introduction of a new offence covering acts intended or likely to stir up racial hatred,<sup>16</sup> Lord Janner answered such concerns by explaining that the requirement for the consent of the Attorney-General would be “sufficient safeguard against anyone bringing a prosecution which is not based on thorough grounds”.<sup>17</sup>

<sup>12</sup> See para 5.18 above.

<sup>13</sup> Code for Crown Prosecutors, para 6.5(a).

<sup>14</sup> *Ibid*, para 6.5(c).

<sup>15</sup> Para 6.34.

<sup>16</sup> Public Order Act 1986, s 18.

<sup>17</sup> *Hansard* (HL) 15 November 1976, vol 377, col 1097.

- 6.14 If the defining feature of a vexatious prosecution is that it is not well-founded and is prompted by some improper motive our approach must be to see whether it is possible to identify those *offences* which, if privately prosecuted, are *particularly* likely to be unsuccessful because of evidential weaknesses and to cause harm to an innocent defendant even though he or she is subsequently acquitted. We have already concluded that a consent provision could not be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions.
- 6.15 We have considered an alternative approach by trying to focus on vexatious prosecutions as we encompass the sort of *offences* which tend to be brought for some improper motive. An obvious illustration is where the defendant is the spouse of the prosecutor; this was recognised by section 30(4) of the Theft Act 1968 which provides that the consent of the DPP is required for prosecutions for theft or unlawful damage to property where the defendant is the spouse of the victim.<sup>18</sup> The Government justified that consent requirement as being to prevent vexatious prosecutions.<sup>19</sup>
- 6.16 We did not consider that the likelihood of an improper motive could be used to justify consent provisions for all prosecutions of any particular *offence*. In the consultation paper, we provisionally took the view that the likelihood of an offence being prosecuted for an improper motive was not in itself a reason for restricting private prosecutions which were otherwise well-founded and not contrary to the public interest.<sup>20</sup>
- 6.17 Of those respondents who commented on this, all agreed with this provisional view. **We therefore conclude that the likelihood of an offence being prosecuted for an improper motive is not, in itself, a reason for restricting private prosecutions which are otherwise well-founded and not contrary to the public interest.**

#### **Allowing mitigating factors to be taken into account**

- 6.18 The third reason suggested in the Home Office Memorandum for justifying a consent requirement is

*to enable account to be taken of mitigating factors which may vary so widely from case to case that they are not susceptible to statutory prosecution.*<sup>21</sup>

- 6.19 As we have explained, the public interest test in the CPS code will militate against prosecution in circumstances where there are mitigating circumstances such as, where the offence was committed as a result of a genuine mistake or misunderstanding,<sup>22</sup> or where the loss or harm is minor and was a result of a single

<sup>18</sup> Professor Sir John Smith has been very critical of this provision. See para 4.22 above.

<sup>19</sup> Lord Stonham during the Second Reading debate on the Theft Bill: *Hansard* (HL) 15 February 1968, vol 289, col 222.

<sup>20</sup> Para 6.36.

<sup>21</sup> Franks Report, vol 2, p 125, para 7(c).

<sup>22</sup> Code for Crown Prosecutors, para 6.5(b).



incident, particularly if it was caused by a misjudgment.<sup>23</sup> Another factor militating against prosecution in the public interest test is where the penalty would be likely to be very small or nominal.<sup>24</sup> Thus where there are mitigating factors it is quite likely to lead to the minimal penalty and so be a factor against commencing a prosecution. We readily accepted in the consultation paper that a private prosecution which is brought despite the presence of mitigating factors may well be against the public interest, but once again we are faced with the difficulty that the presence or absence of mitigating factors is not a characteristic of any *specific offence*, but rather of *the circumstances* of particular cases. We therefore provisionally took the view that it was not possible to use a consent provision to prevent private prosecutions which fail to take into account mitigating factors.

- 6.20 All our respondents agreed. **We therefore conclude that it is not practical to use a consent provision to prevent private prosecutions which fail to take into account mitigating factors.**

#### **CONTROLLING THE PROSECUTION OF OFFENCES WHERE PROSECUTION MAY VIOLATE A CONVENTION RIGHT**

- 6.21 The fourth reason given in the Home Office memorandum for including a consent requirement is

*to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship.*<sup>25</sup>

- 6.22 This approach has been used as justifying consent provisions in relation to the following offences which directly affect the freedom of expression:

- (1) offences of stirring up racial hatred under the Public Order Act 1986 – referring to its precursor, the Race Relations Act 1965, in its memorandum to the Franks Committee, the Home Office suggested that an Attorney-General’s consent “provide[d] the necessary safeguard, and enable[d] prosecutions to be confined to the ringleaders and organisers of incitement”;<sup>26</sup>
- (2) offences relating to the production, publication and distribution of “horror comics” under the Children and Young Persons (Harmful Publications) Act 1955 – the Home Office justified the inclusion of an Attorney-General (as opposed to a DPP) consent provision on the ground that the Act deals with “a subject which intimately affects the liberty of the subject and it involves questions of censorship”;<sup>27</sup>

<sup>23</sup> *Ibid*, para 6.5(c).

<sup>24</sup> *Ibid*, para 6.5(a).

<sup>25</sup> Franks Report, vol 2, p 126, para 7(d).

<sup>26</sup> Home Office memorandum to the Franks Committee: Franks Report, vol 2, p 126, para Ib.

<sup>27</sup> *Ibid*, para Ia.

- (3) offences relating to the presentation of obscene performances of plays under the Theatres Act 1968 – according to the Home Office, “[t]he reasons for restricting the right to prosecute were to secure uniformity of enforcement in a difficult field, and to protect those who present plays ... from ill-judged prosecutions.”<sup>28</sup>

6.23 In the consultation paper our approach<sup>29</sup> was that we appreciated that from time to time it was necessary for Parliament to pass legislation which created offences that were controversial in the sense that they undermined rights fundamental to democratic society. We noted in particular that the fundamental right that was particularly protected under the present consent regime is freedom of expression. In the consultation paper,<sup>30</sup> we were very conscious that prosecuting in such circumstances might involve the delicate task of balancing countervailing fundamental principles – namely the right to bring a private prosecution as against the right to freedom of expression; this in itself might involve issues of public policy of greater importance than merely the facts of a particular case in question. Our provisional view was therefore that it was in the democratic interest that such difficult but important decisions should be made by an officer directly or indirectly accountable to Parliament and we therefore provisionally concluded that consent provisions should be used to control the prosecution of those offences which directly affect freedom of expression.<sup>31</sup>

6.24 The majority of those who responded agreed with our provisional view but two very important points were made that require further consideration.

### **1. Should the exception be limited to freedom of expression?**

6.25 There was concern about limiting this exception to freedom of expression as Lord Hope of Craighead explained:

we are moving closer to the incorporation of the European Convention on Human Rights into our law and there may be other rights and freedoms which ought to be taken into consideration in considering whether an individual should be allowed to prosecute where the public prosecutor – perhaps due to a concern that some other fundamental right or freedom would be impaired – had declined to do so. This is a large and delicate subject but it is also a developing one. I wonder whether it ought to be looked at a little more fully, just in case there are some other rights or freedoms which should be mentioned.

6.26 Since our consultation paper was published, the Government has introduced into Parliament the Human Rights Bill under which further effect in domestic law is given to rights and freedoms guaranteed in the Convention. Clause 1 of the Bill defines “Convention rights” as the rights and fundamental freedoms set out in Articles 2-12 and 14 of the Convention and Articles 1-3 of the First Protocol, as read with Articles 16 to 18 of the Convention. The Convention rights to which

<sup>28</sup> Home Office memorandum to the Franks Committee; Franks Report, vol 2, p 126, para 1c.

<sup>29</sup> Para 6.41.

<sup>30</sup> *Ibid.*

<sup>31</sup> Para 6.42.

further effect is given by the Bill are thus: the right to life,<sup>32</sup> prohibition of torture,<sup>33</sup> prohibition of slavery and forced labour,<sup>34</sup> the right to liberty and security,<sup>35</sup> the right to a fair trial,<sup>36</sup> no punishment without law,<sup>37</sup> the right to respect for private and family life,<sup>38</sup> freedom of thought, conscience and religion,<sup>39</sup> freedom of expression,<sup>40</sup> freedom of assembly and association,<sup>41</sup> the right to marry,<sup>42</sup> prohibition of discrimination,<sup>43</sup> protection of property,<sup>44</sup> the right to education,<sup>45</sup> and the right to free elections.<sup>46</sup>

6.27 The implications of this new legislation are very substantial. As the Lord Chancellor has said:<sup>47</sup>

the Act will give to the court the tools to uphold freedom at the very time their infringement is threatened. Ministers and administrators would be obliged to do all their work keeping clearly and directly in mind its impact on human rights as expressed in the Convention and the jurisprudence which attaches to it. For, where any Bill is introduced in either House, the Minister of the Crown, in whose charge it is, will be required to make a written statement that, either, in his view, the provisions of the Bill are compatible with the Convention rights; or that he cannot make that statement but the Government nevertheless wishes the House to proceed with the Bill. ...Human rights will not be a matter of fudge. The responsible Minister will have to ensure that the legislation does not infringe guaranteed freedoms, will be prepared to justify his decision openly and in the full glare of parliamentary and public opinion.

6.28 Under the new Act the CPS will have to take Convention rights into account when deciding whether or not to prosecute. In their response to our consultation paper the CPS stated:

<sup>32</sup> European Convention on Human Rights, art 2.

<sup>33</sup> *Ibid*, art 3.

<sup>34</sup> *Ibid*, art 4.

<sup>35</sup> *Ibid*, art 5.

<sup>36</sup> *Ibid*, art 6.

<sup>37</sup> *Ibid*, art 7.

<sup>38</sup> *Ibid*, art 8.

<sup>39</sup> *Ibid*, art 9.

<sup>40</sup> *Ibid*, art 10.

<sup>41</sup> *Ibid*, art 11.

<sup>42</sup> *Ibid*, art 12.

<sup>43</sup> *Ibid*, art 14.

<sup>44</sup> European Convention on Human Rights, First Protocol, art 1.

<sup>45</sup> *Ibid*, art 2.

<sup>46</sup> *Ibid*, art 3.

<sup>47</sup> "The Development of Human Rights in Britain Under An Incorporated Convention on Human Rights": The Tom Sargent Memorial Lecture, 16 December 1997.

following incorporation of the ECHR into UK law it will be incumbent upon the CPS, as a public authority, to ensure that it discharges its statutory duties in a manner which is compatible with the rights and freedoms protected by the Convention. This will, of course, include the review function and will apply to all cases.

- 6.29 In the consultation paper we regarded freedom of expression as being of particular importance. With the introduction of the Human Rights Bill, we now have to consider whether other rights fall into the same category, whilst bearing in mind the words of Professor Sir John Smith that “the imposition of a further constraint in the form of the consent provision should be exceptional and require some special justification”. Our respondents agreed with our provisional proposal regarding consent provisions and freedom of expression, and we now have to consider whether other Convention rights ought to be treated in the same way.
- 6.30 We believe that *all* prosecutions should be subject to scrutiny in the light of the Convention. It is highly desirable that *private* prosecutions are not used in a way which would violate legitimate rights protected under the Convention: after all, the Convention does not declare any right of private prosecution. A consents regime could act as a form of scrutiny to ensure that prosecutions are not brought under statutes that were in force before the Human Rights Bill comes into force, so as to violate a fundamental right or restrict a fundamental freedom. In recommending a consents regime to serve this purpose we are honouring the spirit of the Convention.
- 6.31 On consideration, we have reached the view that there is no reason to give greater value and protection to the freedom of expression than to, say, the right to respect for private and family life, home and correspondence, or the freedom of assembly and association, and so the exception should cover all Convention rights.
- 6.32 As we have already explained,<sup>48</sup> we are not in a position to set out a list of offences, the prosecution of which it could be reasonably contended would violate a Convention right. We have only been asked to deal with principles; others more knowledgeable about specific statutory provisions will be able to see whether an application of our principles requires a consent provision for a particular offence.
- 6.33 Having said that, we can offer an example. It may well be that the offence of abduction by a person connected with a child contrary to section 1 of the Child Abduction Act 1984<sup>49</sup> is capable of constituting such an offence. At present, the

<sup>48</sup> Paras 1.12 – 1.14 above.

<sup>49</sup> Section 1 of the Child Abduction Act 1984 provides that:

(1) Subject to subsections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

(2) A person is connected with a child for the purposes of this section if –

(a) he is a parent of the child; or

(b) in the case of a child whose parents were not married to each other at the time of his ... birth, there are reasonable grounds for believing that he is the father of the child; or

consent of the DPP is required before a prosecution can be brought under that Act notwithstanding that it is triable either way.<sup>50</sup> It might well be that a defendant would reasonably contend that a prosecution brought under this provision would violate his or her right to respect of private and family life under Article 8 of the Convention.<sup>51</sup> We set this out as a possible illustration of the type of offence that might possibly fall into this category.

- 6.34 If there are, in fact, no other offences for which it may reasonably be contended that the prosecution constitutes a violation of a Convention right, other than the freedom of expression, then no consent requirements will be attached to any offences other than those concerning freedom of expression. Nonetheless, it must be right *in principle* to allow for this possibility, especially as it cannot be predicted what offences might be created in future.

## 2. The scope of this category – the need for greater certainty

- 6.35 Professor Andrew Ashworth questioned whether the existing list of “freedom of expression” offences that we referred to in the consultation paper<sup>52</sup> was arbitrary. We are anxious to ensure that consents to prosecutions are limited to the minimum number of offences. We therefore bear in mind our earlier conclusion<sup>53</sup> that we are seeking to identify offences where it is likely that, if they are inappropriately prosecuted, a *substantial* amount of harm would be caused by the institution of proceedings. We do so to address concerns that the creation of an exception based on *all* Convention rights would cause consent to be required in respect of more offences than are necessary. We consider that consent provisions should be used to control the prosecution of offences which *directly* affect Convention rights<sup>54</sup> but only where it is very likely that a defendant will reasonably contend that prosecution for the particular offence would violate his or her Convention rights.
- 6.36 The effect of this approach can be shown by looking at public order offences. The prosecution of the offence of using threatening behaviour contrary to section 5(1) of the Public Order Act 1986<sup>55</sup> does not require any consent before it can be

(c) he is a guardian of the child; or

(d) he is a person in whose favour a residence order is in force with respect to the child; or

(e) he has custody of the child.

<sup>50</sup> Child Abduction Act 1984, s 4(1) and (2).

<sup>51</sup> Article 8(1) provides that:

everyone has the right to respect for his private and family life, his home and his correspondence.

<sup>52</sup> The Public Order Act 1986, the Children and Young Persons (Harmful Publications) Act 1955, the Theatres Act 1968, the Contempt of Court Act 1981 and the Obscene Publications Act 1959, see the consultation paper, para 7.13.

<sup>53</sup> Para 5.44(3) above.

<sup>54</sup> See para 6.26 above.

<sup>55</sup> The subsection reads:

A person is guilty of an offence if he –

prosecuted even though it impinges upon such a defendant's freedom of expression (protected by Article 10(1) of the Convention). Article 10(2) provides *inter alia* that the exercise of these freedoms may be subject to restrictions and penalties prescribed by law and necessary in a democratic society in the interests of public safety, for the prevention of disorder or crime, for the protection of health or morals and for the protection of the reputation or rights of others. Consequently, we do not consider that it is very likely that a defendant could reasonably contend that a prosecution under section 5(1) of the Public Order Act 1986 violates a Convention right. What is important for the purpose of this project is that there has been no suggestion that the absence of a consent requirement has led to any, and definitely not a *substantial* amount, of harm being caused by proceedings being instituted. So experience has shown there is no need to impose a consent regime.

6.37 **We therefore recommend that a consent provision should be used to control the prosecution of those offences where it is very likely that a reasonable defendant would contend that a prosecution for the particular offence would violate his or her Convention rights.**

6.38 It has been agreed between us and the Law Officers' Secretariat that they will carry out the task of seeing which offences meet those criteria; they have specialist knowledge on these matters that we do not have. It is not envisaged that this task will present any serious difficulties for them.

6.39 We believe that it is very likely that by the time that this report is published the Human Rights Bill will have received, or be about to receive, the Royal Assent<sup>56</sup> and become law. We have not however held this report back from publication to await that event. Our recommendation relates to "Convention rights"<sup>57</sup> and we consider that our treaty obligations under the Convention would warrant such a recommendation even if, for some unforeseeable reason, the Human Rights Bill were not to become law.

#### **CONTROLLING THE PROSECUTION OF OFFENCES WHICH INVOLVE THE NATIONAL SECURITY OR SOME INTERNATIONAL ELEMENT**

6.40 The Home Office memorandum gives as its final reason for including a consent provision that it should be

*to ensure that decisions on prosecutions take account of important considerations of public policy or of a political or international nature*

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

<sup>56</sup> It is anticipated that this will occur in November 1998.

<sup>57</sup> As defined in cl 1(1) of the Human Rights Bill.

*such as may arise, for instance, in relation to official secrets or hijacking.*<sup>58</sup>

- 6.41 The Home Office considered that this was the only ground which merited the exclusive consent of the Attorney-General. The Philips Commission went further and suggested that this was the only ground which merited *any* consent requirement at all and they explained,

[t]he only consideration that should apply, in our view, statutorily and absolutely to restrict prosecution would relate to those very few cases where national interest may be thought to be particularly involved. These are cases where the decisions to prosecute have to take account of important considerations and the political or international character, such as offences against national security or in relation to international law or the country's international obligations. The duty for making prosecution decisions in these cases should rest with the Attorney-General, or if he considers it appropriate to delegate, with the Director of Public Prosecutions.<sup>59</sup>

- 6.42 We have already pointed out that when considering the arguments for and against prior consent being vested in a political figure, such as the Attorney-General, the Franks Committee was of the opinion that the Attorney-General was uniquely well-placed to assess the public interest in bringing a criminal prosecution in circumstances involving a political or international element. During the debates on the Jurisdiction (Conspiracy and Incitement) Bill of 1997,<sup>60</sup> which was primarily intended as an interim terrorism measure<sup>61</sup> and sought to criminalise the activities of, for example, those conspiring to commit acts of violence against foreign governments, an Attorney-General's consent provision was included as a safeguard.<sup>62</sup>

- 6.43 Similarly, following the report of the War Crimes Inquiry,<sup>63</sup> the War Crimes Act 1991 was passed. This provides that proceedings for murder, manslaughter and culpable homicide may be brought against a person in the United Kingdom,

<sup>58</sup> Franks Report, vol 2, p 126, para 7(e).

<sup>59</sup> Philips Report, para 7.56.

<sup>60</sup> This Bill fell at the end of the parliamentary session.

<sup>61</sup> Its effect, had it been enacted, would have been to make criminal any act which amounted to incitement or conspiracy to carry out activities in foreign jurisdiction if those activities were illegal in both the United Kingdom and the foreign jurisdiction.

<sup>62</sup> Donald Anderson MP justified the consent provision by saying that

[the] political delicacy of many of the decisions that had to be made, meant that the Crown Prosecution Service was not equipped for the task, however skilled it was in its work. Frequently, the decisions that need to be taken are well outside its domain; they entail an in-depth investigation of overseas law and a sensitive appraisal of the effect on race relations in this county – another matter for which the CPS is not equipped but on which the Government, with their wider responsibilities are well-equipped to decide.

*Hansard* (HC) 11 February 1997, Standing Committee E, col 6.

<sup>63</sup> Report of the War Crimes Inquiry (Members: Sir Thomas Hetherington KCB CBETD QC and William Chalmers Esq CB MC) Cm 744, published in July 1989.

irrespective of that person's nationality at the time of the alleged offence, if the offence (a) was committed during the Second World War in either Germany or territory under German occupation, and (b) constituted a violation of the laws and customs of war.<sup>64</sup> In recognition of the particular sensitivity of the subject matter of the offences and the particular difficulty of ensuring fairness, the 1991 Act makes provision for various safeguards, including the requirement that any proceedings brought by virtue of the Act should be by or with the consent of the Attorney-General.<sup>65</sup>

6.44 In our consultation paper we agreed, having taken into account that the decision to prosecute in such circumstances might involve questions of public policy, international and national, going beyond the facts of the case under consideration, that it is in the democratic interest that such decisions should be made by an officer who is directly or indirectly accountable to Parliament. We therefore provisionally concluded that the prosecution of offences involving the national security or some international element should be restricted by a consent provision. By offences involving "some international element" we meant those which:

- (1) are related to the international obligations of the state;
- (2) involve measures introduced to combat international terrorism;<sup>66</sup>
- (3) involve measures introduced in response to international conflict; or
- (4) have a bearing on international relations.

6.45 On consultation the vast majority of respondents agreed. The Crown Prosecution Service believed "that it would be possible to identify those offences that fall within this category without too much difficulty". The only person who was unhappy with this category was Longmore J who did "not see why consent should be needed at all in this category" explaining that "the State in the person of the Attorney-General can always decide to offer no evidence but, in this particular category, it is important that that should be done openly with public explanation after the prosecution has started rather than behind closed doors before it begins". We see the force of this point but would be troubled if, for example, private prosecutions could be brought under the War Crimes Act 1991 with the ensuing worry and expense or if decisions were made to prosecute under the Official Secrets Acts 1911 – 1989 without the Attorney-General considering whether it would be in the public interest to do so.

6.46 Having taken all the considerations into account, we believe that we should not change our provisional conclusion. **We therefore recommend that prosecution of offences involving the national security or some international element**

<sup>64</sup> War Crimes Act 1991, s 1(1).

<sup>65</sup> War Crimes Act 1991, s 1(3).

<sup>66</sup> Since this Report was agreed by Commissioners on 14 July 1998, the Criminal Justice (Terrorism and Conspiracy) Act 1998 has been enacted (on 4 September 1998, with immediate effect). The provision in section 5(2), which requires the consent of the Attorney-General to prosecution for an offence triable by virtue of section 1A, is illustrative of the use of consent provisions for offences in this category.



**should be restricted by a consent provision. Offences would be regarded as involving some “international element” if they**

- (1) are related to the international obligations of the State;**
- (2) involve measures that were introduced to combat international terrorism;**
- (3) involve measures introducing response to international conflict; or**
- (4) have a bearing on international relations.**

**CONTROLLING THE PROSECUTION OF OFFENCES WHICH CREATE A HIGH RISK THAT THE RIGHT OF PRIVATE PROSECUTION WILL BE ABUSED AND THE INSTITUTION OF PROCEEDINGS WILL CAUSE IRREPARABLE HARM**

- 6.47 We are concerned with harm that might be suffered by a defendant who is the subject of an inappropriate prosecution which causes harm for which there is no adequate compensation possible when the prosecution is subsequently terminated. By using the word “harm” we mean not only financial loss but also damage to reputation and other loss.
- 6.48 As we have previously explained, we have focused on the loss that might be suffered, between the commencement of a prosecution and its discontinuance, by an individual who is prosecuted unreasonably. In some cases this loss might be irreparable and we are anxious to identify the offences in which this is likely to occur. It is desirable to impose a consent provision for such offences as this will enable the DPP or the Law Officers to decide whether the prosecution should be commenced, before the defendant to the private prosecution is placed at risk of suffering irreparable harm. There will only be a very limited number of offences to which this problem applies.
- 6.49 An illustration of this might be the long-standing criminal offence of misfeasance of public office by which a public employee can be prosecuted for failing to comply with his or her duties.<sup>67</sup> It is easy to envisage a case in which, say, a leader of a council has a private prosecution brought against him or her shortly before an election; the complaint receives much publicity and the defendant suffers in the election even though eventually the criminal prosecution is dismissed or taken over by the CPS who discontinue. In that event, the defendant will have suffered substantial loss and damage and he or she cannot be compensated. This would appear to us to be a good case where a consent should be required.
- 6.50 Another example might well be the offence that we propose of misuse of trade secrets in our recent consultation paper.<sup>68</sup> In that case we were very conscious that if a new offence of misuse of trade secrets was to be introduced, it might be used

<sup>67</sup> See *Llewellyn-Jones* [1968] 1 QB 429 and *Dytham* [1979] QB 722.

<sup>68</sup> Consultation Paper No 150, Misuse of Trade Secrets.

to improve the commercial bargaining power of the party to a civil dispute who is alleging misuse of trade secrets.<sup>69</sup> As Hoffmann LJ pointed out:

There is a strong incentive for employers to launch a pre-emptive strike to crush the unhatched competition in the egg by causing severe strains on the financial and management resources of the defendants or even the withdrawal of their financial support ... Some employers seem to regard competition from former employees as presumptive evidence of dishonesty.<sup>70</sup>

6.51 We therefore provisionally proposed that prosecutions for a new offence of misuse of trade secrets should be brought only by or with the consent of the Director of Public Prosecutions,<sup>71</sup> on the basis that the prosecution may cause harm which could not be adequately compensated for when prosecution is subsequently dismissed. Another example might be the offence of misuse of public office proposed by the Committee on Standards in Public Life. Their preliminary conclusion was that consent should be required for prosecutions and that the authority to give this should be vested in the Director of Public Prosecutions.<sup>72</sup> They explained this provisional conclusion by noting that “the public interest demands the ability to prosecute privately and there could be a significant problem with vexatious prosecutions or prosecutions stimulated by political motives”.<sup>73</sup> A powerful argument to the same effect was made to us in response to our consultation paper by Lord Neill of Bladen QC, the Chairman of the Committee of Standards in Public Life. We believe that this is another good example of the case where consents should be required.

6.52 **We recommend that a requirement of consent should be used to control prosecutions for those offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause irreparable harm.**

#### SUMMARY

6.53 A requirement of consent should be used to control prosecutions for those offences

- (1) where it is very likely that a defendant will reasonably contend that the prosecution for a particular offence would violate his or her Convention rights;<sup>74</sup>
- (2) those which involve the national security or have some international element;<sup>75</sup> and

<sup>69</sup> *Ibid*, para 5.14.

<sup>70</sup> *Lock plc v Beswick* [1989] 1 WLR 1268, 1280 – 1281.

<sup>71</sup> Consultation Paper No 150, para 5.15.

<sup>72</sup> *Misuse of Public Office* – A consultation paper from the Committee on Standards in Public Life, para 20.

<sup>73</sup> *Ibid*.

<sup>74</sup> See paras 6.21 – 6.39 above.

- (3) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.<sup>76</sup>

6.54 These are the principles we have identified which justify the use of a consent provision to control the institution of a criminal prosecution. Where none of these principles applies to an offence, we believe that neither the consent of the Law Officers nor the DPP should be required. There are currently in existence many offences to which such a consent provision attaches, not all of which would merit such a provision in the light of our principles. **We therefore recommend that, in the case of all other offences which at present require the consent of the Law Officers or the DPP, that requirement should be dispensed with.**

**EXAMPLES OF OFFENCES FOR WHICH THE CONSENT REQUIREMENT WOULD BE EITHER ABOLISHED, RETAINED OR ADDED IF OUR RECOMMENDATIONS WERE ADOPTED**

6.55 Although it is not our objective to make proposals about specific offences, the following are illustrations of the effect of our recommendations regarding the underlying principles for reform of the consents regime. Further details about these provisions can be found in Appendix A.

**Consent provisions which would be abolished**

***Explosive Substances Act 1883, section 7(1)***

6.56 The aim of the legislation was to enable the apprehension of those in possession of materials which could be used to make explosives. The requirement of consent was seen as a safeguard needed because of the breadth of the offence.

***Fraudulent Mediums Act 1951, section 1(4)***

6.57 The purpose of the Fraudulent Mediums Act was to provide penalties to deter fraudulent mediumship whilst alleviating the “harsh and oppressive” effects of the preceding legislation on those claiming to be spiritualist mediums.<sup>77</sup> A consent provision was included in order to “protect mediums against frivolous accusations”.<sup>78</sup>

***Agricultural Land (Removal of Surface Soil) Act 1953, section 3***

6.58 This Act makes it an offence to remove surface soil from land in certain circumstances. During Committee stage in the House of Lords it was proposed that the Bill should include a consent provision to avoid “trivial and annoying prosecutions”.<sup>79</sup>

<sup>75</sup> See paras 6.40 – 6.46 above.

<sup>76</sup> See paras 6.47 – 6.52 above.

<sup>77</sup> *Hansard* (HL) 3 May 1951, vol 171, cols 718–719, *per* Lord Dowding.

<sup>78</sup> *Ibid*, col 722, *per* Lord Dowding.

<sup>79</sup> *Per* Earl Jowitt, *Hansard* (HL) 27 January 1953, vol 180, cols 19–20.

***Theft Act 1968, section 30(4)***

- 6.59 As we saw above,<sup>80</sup> the Theft Act includes a consent provision for a specific circumstance, namely, when proceedings are brought for theft or unlawful damage to property and the defendant is the spouse of the victim. It was said to be necessary to prevent vexatious prosecutions.

***Animals (Scientific Procedures) Act 1986, section 26(1)***

- 6.60 The Animals (Scientific Procedures) Act 1986 sought to control experimentation on animals by licensing. A consent provision was included to prevent “vexatious and ill-informed” prosecutions.<sup>81</sup>

***Law Reform (Year and a Day Rule) Act 1996, section 2(1)***

- 6.61 The existence of a consent provision in this Act flowed from a Law Commission recommendation made in our report Law Com No 230.<sup>82</sup> At that time, we took the view that the consent requirement was necessary because we believed that it was likely that the number of stale prosecutions and prosecutions of people who had previously been convicted of an offence committed in circumstances alleged to be connected with the death would increase. Some of these would be instituted by private prosecutors, and we believed that these cases would present exceptionally difficult problems for prosecutors. In the event, our fears have not been justified: there have been no applications for consent under the Act during the year since it came into force. We now take the view that a consent provision is not needed.

**Offences for which consent would be retained or added**

***Convention rights***

- 6.62 The following are examples of statutes in which we believe the consent provisions specified below should be retained due to the likelihood that a defendant will reasonably contend that a prosecution would violate his or her Convention rights:

- the Public Order Act 1986 (section 27, in relation to offences involving racial hatred);
- the Children and Young Persons (Harmful Publications) Act 1955 (section 2(2), in relation to offences of printing, publishing and selling works to which the Act applies);
- the Theatres Act 1968 (section 8, in relation to offences of the presentation of obscene performances of plays, the provocation of a breach of the peace by means of a public performance of a play and the publication of defamatory matter in the course of a performance of a play);

<sup>80</sup> Para 4.22 above.

<sup>81</sup> *Hansard* (HL) 17 December 1985, vol 469, col 790, *per* Lord Glenarthur.

<sup>82</sup> *Legislating the Criminal Code: The Year and a Day Rule in Homicide* (1995) Law Com 230.

- the Contempt of Court Act 1981 (section 7, in relation to proceedings for contempt under the “strict liability rule”,<sup>83</sup> and section 8(3) which relates to proceedings for contempt regarding breach of confidentiality of jury deliberations); and
- the Obscene Publications Act 1959 (section 2(3A) in relation to the offence of publication of obscene matter under that section).

6.63 There is no consent provision in the Representation of the People Act 1983, in relation to the offence under section 75, as currently drafted. That provision has recently been held by the European Court on Human Rights in *Bowman v UK*<sup>84</sup> to violate article 10 of the Convention. We believe that this is an example of a provision in respect of which, in the course of drafting any revised legislation aimed at addressing this decision, consideration should be given to the need for the inclusion of a consent provision.

***Offences involving the national security or with an international element***

6.64 The following are examples of statutes in which we believe the consent provisions should be retained on the ground that the substance of the statute has potential international repercussions or some impact on national security:<sup>85</sup>

- the War Crimes Act 1991 (section 1(3) in relation to proceedings for murder, manslaughter or culpable homicide under that section);
- the Taking of Hostages Act 1982 (section 2(1)(a) in relation to any offence under that Act);
- the Biological Weapons Act 1974 (section 2(1)(a) in relation to the offence of developing certain biological weapons under section 1 of the Act);
- the Prevention of Terrorism (Temporary Provisions) Act 1989 (section 19(1)(a) in relation to offences under sections 2, 3, 8-11, 17, 18 and 18A of the Act); and
- the Official Secrets Acts 1911 and 1989 (sections 8 and 9 respectively, in relation to any offence under the Acts, apart from section 4(2) of the 1989 Act, for which the DPP’s consent will suffice). The consent of the Attorney-General is also required by section 8(2) of the Official Secrets Act 1920, for any offences to be tried summarily under that Act or under the 1911 Act.

<sup>83</sup> The “strict liability rule” is contained within s 1 and provides that “conduct may be treated as a contempt of court, as tending to interfere with the course of justice in particular legal proceedings, regardless of intent to do so”.

<sup>84</sup> (1998) 26 EHRR 1.

<sup>85</sup> See also n 66 above.

## **PART VII**

# **ANCILLARY RECOMMENDATIONS**

- 7.1 In this Part, we discuss three important matters which are ancillary to our main recommendations. First, we look to see whether there should be automatic notification of *all* private prosecutions to the DPP.<sup>1</sup> We then turn our attention to the distribution of consent provisions between the DPP and the Law Officers and whether statutory provision should be made to allow, in appropriate cases, a transfer of authority to give consent, from the Law Officers to the DPP to be made by statutory instrument.<sup>2</sup> We finally consider to whom the DPP should have the power to delegate his or her powers to consent.<sup>3</sup>

### **AUTOMATIC NOTIFICATION OF PRIVATE PROSECUTIONS**

- 7.2 We have already concluded that the consents regime should continue to be offence-structured on the basis that it is better than any other structure.<sup>4</sup> Such a structure nevertheless has the disadvantage that it cannot accommodate particular cases where a private prosecution is instituted without the need for prior consent but which is, in the particular circumstances, contrary to the public interest. Such proceedings may be taken over by the DPP under section 6(2) of the POA 1985<sup>5</sup> and discontinued during the preliminary stages, under section 23(3) of the POA 1985.<sup>6</sup> The exercise of these powers is, of course, dependent on the DPP being aware of such prosecutions. There is no automatic notification and the only obligation for the DPP to be notified of private prosecutions is under section 7(4) of the POA 1985 which provides that

It shall be the duty of every justices' clerk to send to the Director, in accordance with the regulations, a copy of the information and of any depositions and other documents relating to any case in which –

- (a) a prosecution for an offence before the magistrates' court to which he is clerk is withdrawn or is not proceeded with within a reasonable time;
  - (b) the Director does not have the conduct of the proceedings; and
  - (c) there is some ground for suspecting that there is no satisfactory reason for the withdrawal or failure to proceed.
- 7.3 There would therefore be many prosecutions in which the clerk does not have an obligation to notify the DPP. It would in practice be unlikely for many private

<sup>1</sup> See para 7.2 – 7.9 below.

<sup>2</sup> See paras 7.10 – 7.27 below.

<sup>3</sup> See paras 7.28 – 7.35 below.

<sup>4</sup> See para 5.34 below.

<sup>5</sup> See para 2.19 above.

<sup>6</sup> See para 2.20 above.

prosecutions to take place without the CPS, of which the DPP is the head, knowing about it because in many cases the private prosecutor is likely to have attempted to persuade the CPS to institute proceedings owing to the difficulties in mounting a private prosecution.<sup>7</sup> If a private prosecution is then instituted, the defendant is likely to seek to persuade the CPS to take it over and discontinue it. In the consultation paper,<sup>8</sup> we invited consultees to consider whether there should be an automatic notification of *all* private prosecutions to the DPP on the grounds that this would make the power to discontinue private prosecutions a more effective safeguard against inappropriate private prosecutions.<sup>9</sup>

- 7.4 On consultation, 13 out of the 23 respondents who dealt with this issue agreed. The Bar Council stated that it “unreservedly” supported the idea that there should be automatic notification, arguing that undesirable prosecutions outside the proscribed list of offences might be commenced and automatic notification would “facilitate the speedy disposal of such undesirable cases”. Professor Andrew Ashworth commented that a proposal for automatic notification was of particular importance and we agree; it would ensure that CPS actually know of all private prosecutions rather than the present position, which is much less certain.
- 7.5 Our approach is that there should be some form of review of private prosecutions even in cases where consent is not required so that in appropriate cases the power of the DPP to take over such prosecutions and to discontinue them may be exercised effectively. At present, the CPS consider that “existing practices ensure that [inappropriate private prosecutions] will usually, if not invariably be brought to the attention of the CPS whether by the prosecutor, the defendant or the court or by the publicity surrounding the case”. Nevertheless, they impliedly concede that there will be some private prosecutions that do not come to their attention and the aim of any reform must be to ensure that there is automatic, rather than chance notification of all private prosecutions to the DPP.
- 7.6 To minimise the administrative burden on the CPS we would exclude from the notification requirement those prosecutions brought by responsible organisations; organisations that are unlikely to bring prosecutions which should not be brought either because they are likely to fail or because prosecution is not in the public interest. We are, of course, focusing on misconceived private prosecutions. As the CPS report, many private prosecutions are initiated by organisations, such as the RSPCA, which adopt suitable evidential and public interest tests. In these cases there is very little need for the CPS to be either notified or involved; inappropriate private prosecutions are “far more likely to be instituted by individuals”.

<sup>7</sup> See paras 4.8 – 4.11 above.

<sup>8</sup> Para 6.61.

<sup>9</sup> During the passage of the Prosecution of Offences Bill through the House of Lords, Lord Mishcon, speaking from the opposition benches, moved an amendment which would have required automatic notification. The amendment was resisted by the Government on the ground that it would be administratively burdensome and encroach on the right of private prosecution. It is difficult to see the force of the latter reason since merely informing the DPP of a private prosecution cannot in itself detract from the right of private prosecution. *Hansard* (HL) 17 January 1985, vol 458, cols 1149–1151.

7.7 Clearly, there must be a regime for exempting prosecutions brought by responsible organisations. We believe that the DPP is the appropriate authority to decide which organisations should be able to conduct prosecutions without any need for notification. We consider that it should not be difficult, when presented with an application from a particular body, giving details of the tests they apply when deciding whether or not to institute a prosecution, to determine whether or not such a body should be licensed. We have been told for example that the BT Legal Group adopts such tests.<sup>10</sup> Where this is established we believe that such organisations should be exempted from the requirement of automatic notification. Automatic notification of other private prosecutions should be effected by way of notice from the magistrates' courts' clerk to the CPS, of which the DPP is the head.

7.8 We now turn to consider the question of what the CPS is bound to do when notified of a private prosecution. As we have already explained,<sup>11</sup> at present the DPP has the power to take over a private prosecution.<sup>12</sup> After proceedings have been taken over the DPP may either proceed with them or terminate them.<sup>13</sup> We are unaware of any dissatisfaction about the fact that the DPP has merely a power and not a duty to take over proceedings. Indeed, it has not been suggested to us that the existing power should be changed to a duty and we consider that when the CPS is notified of all private prosecutions except for those instituted by organisations licensed by the DPP, the DPP should, as under the present law, not be under any duty to take over their conduct but merely have the power to do so.

#### 7.9 **We therefore recommend**

- (1) that the DPP should have the power to license an organisation or person to bring criminal proceedings without the CPS being notified of the prosecution where the institution applies evidential and public interest tests which are comparable to the tests which the CPS would apply; and**
- (2) that court clerks should be required to notify the CPS of all private prosecutions except for those instituted by organisations licensed by the DPP; and**
- (3) that such notification shall not create any duty on the DPP to take over the conduct of such proceedings though he should continue to be empowered to do so under section 6(2) of the POA 1985.**

<sup>10</sup> See paras 2.8 – 2.9 above, for details of the two-part test applied by crown prosecutors.

<sup>11</sup> Para 2.19 above.

<sup>12</sup> Section 6(2) of the POA 1985 provides:

Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

<sup>13</sup> This can be done either by discontinuing the prosecution under s 23(2) of the POA 1985, declining to offer evidence or withdrawing the case: see para 2.20 above.



## DISTRIBUTION OF CONSENT FUNCTIONS

### Offences involving the national security or some international element

- 7.10 The Franks Report considered that prosecutorial decisions involving an international element benefited from the complex governmental role of the Law Officers.<sup>14</sup> A similar view was expressed in the Philips Report.<sup>15</sup>
- 7.11 In the consultation paper,<sup>16</sup> we provisionally proposed that those offences requiring consent because they involve the national security or some international element should require the consent of a Law Officer but the consent for other offences for which consent is needed should be that of the DPP.
- 7.12 On consultation, 24 out of approximately 60 respondents commented on this issue and 14 agreed with our proposal. Six disagreed out of concern about political bias.<sup>17</sup> We are not satisfied that there has been or will be political bias; indeed, if there had been political bias, there would have been documented instances, but none were drawn to our attention.

**7.13 We recommend that, where a consent is required, it should be that of the DPP except for those offences which require consent because they involve the national security or some international element, where the consent should be given by a Law Officer.**

### Transfer of consent authority from Law Officers to the DPP

#### *A previous reform proposal: the Consents to Prosecutions Bill 1979*

- 7.14 On 24 June 1977, the Prime Minister<sup>18</sup> announced the setting up of the Philips Commission. At the same time, it was announced that, as the Commission would

<sup>14</sup> Summing up the views of a number of witnesses, (Franks Report, p 93, para 249). The witnesses were: the Attorney-General and his legal Secretary, the previous Attorney-General, the DPP, Sir Philip Allen and Sir William Armstrong. The Franks Committee identified the particular contribution of the Attorney-General as follows:

The main point made by these witnesses was that when a decision involves questions of public policy, or of a political or international character, it is essential that the person with responsibility for the decision should have experience of the kind of issues involved, and essential that he should be able to consult directly the Minister concerned with the area of Government business in question so as to ensure that, before taking his decision, he is made fully aware of the views of the Government on any questions of national interest involved. No one except the Attorney-General fits this specification.

<sup>15</sup> At para 7.56 it is stated that there are cases

where the decisions to prosecute have to take account of important considerations of a political or international character, such as offences against national security or in relation to international law or the country's international obligations. The duty for making prosecution decisions in these cases should rest with the Attorney-General, or if he considers it appropriate to delegate, with the Director of Public Prosecutions.

<sup>16</sup> Para 7.17.

<sup>17</sup> Three of the remainder were critical of our assumption that there was a continued need for a right of private prosecution: see para 5.12 above.

<sup>18</sup> The Rt Hon James Callaghan MP.

be concerned “essentially with matters of principle”, the Home Secretary and the Attorney-General would undertake a review of arrangement for prosecutions and of the relationship between the DPP and other prosecutors with a view to improvements “within the existing structure”.<sup>19</sup>

7.15 As part of that review, the Working Party on Prosecution Arrangements was set up under the auspices of the Law Officers and the DPP. The terms of reference of the working party included an examination of consent provisions. It concluded that a number of the consent functions vested in the Attorney-General (either solely or with the Solicitor-General) could be safely transferred to the DPP.<sup>20</sup>

7.16 Its proposals led to the introduction of the Consents to Prosecutions Bill in the House of Commons in February 1979. The Bill, which failed to pass through Parliament because a general election was called, was intended to update and clarify the law on consent to prosecution. The Attorney-General<sup>21</sup> described the purpose of the Bill as follows:

It is right that from time to time these provisions should be reviewed to demote or weed out those that are no longer needed. The Bill’s principal purpose is to perform that function.<sup>22</sup>

7.17 In particular, the Bill made provision for the transfer of the consent function of the Law Officers in a number of statutes to the DPP. Clause 1(1) provided:

All functions of a Law Officer under the enactments specified in the Schedule to this Act<sup>23</sup> (which confer functions relating to prosecutions and consents to prosecutions) are hereby transferred to the Director of Public Prosecutions or, if exercised by a Law Officer concurrently with the Director, shall cease to be exercisable by the Law Officer.

7.18 The reasons given for the transfer were, according to Edwards, “more practical than theoretical”: they concerned saving the time of the Law Officers in having to consider run-of-the-mill cases, and that of the DPP in having to prepare a statement of relevant facts for the Attorney-General in each case presented to the Attorney-General for consideration.<sup>24</sup> The Attorney-General sought to reassure the Second Reading Committee that in “important and sensitive” cases the DPP would consult the Law Officers and that the transfer of functions would not affect

<sup>19</sup> Written Answer, *Hansard* (HC) 24 June 1997, vol 933, cols 603–605.

<sup>20</sup> *Hansard* (HC) 14 March 1979, vol 964, col 659.

<sup>21</sup> The Rt Hon Sam Silkin QC MP.

<sup>22</sup> *Hansard* (HC) 14 March 1979, vol 964, col 658.

<sup>23</sup> The schedule listed various enactments including the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Explosive Substances Act 1883.

<sup>24</sup> J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) pp 22–23. The Attorney-General, in Second Reading Committee, argued in favour of the transfer of functions from the Attorney-General to the DPP on the ground that it would make “a modest but real contribution to expediting the administration of justice and easing the burden both upon my Department and upon that of the Director”: *Hansard* (HC) 14 March 1979, vol 964, col 659.

the DPP's duty to act under the general superintendence of the Attorney-General.<sup>25</sup>

- 7.19 Clause 2 of the Bill made provision for effecting future transfers of consent functions so that it could be done by way of statutory instrument, subject to the affirmative procedure, rather than by primary legislation. Clause 3 enabled the Attorney-General to direct "generally or in relation to any cases or classes of cases", that any consent function exercisable by the Attorney-General could also be exercised by the Solicitor-General.

### ***Our provisional proposal***

- 7.20 A consequence of our provisional view that the consents regime should be rationalised – both in terms of the offences to which a consent provision should be attached and of the officer to whom the power of consent should be assigned – is that, for some offences, it might be appropriate for the consent power to be transferred from one officer to another.<sup>26</sup>

- 7.21 We recognise also that there are advantages in allowing a transfer of function by way of secondary rather than primary legislation. The principal advantages are:<sup>27</sup>

- (1) secondary legislation allows for greater flexibility to deal with administrative difficulties or changes in circumstances which may arise after the primary legislation has been passed;
- (2) it saves parliamentary time and avoids the need for a new statute;
- (3) it affords great opportunity for consideration of and consultation about legislation on technical subjects, and keeps highly technical provisions off the statute book;
- (4) it allows government to act promptly in times of emergency.

- 7.22 There are two procedures by which statutory instruments are created. Under the affirmative procedure, the instrument has no effect, or no continuing effect, until Parliament has expressly approved it. Under the negative procedure, the instrument has effect but may be annulled within a time-limit if either House records its disapproval.<sup>28</sup> The negative procedure is more frequently used than the affirmative,<sup>29</sup> but clearly involves a lesser degree of parliamentary scrutiny.

- 7.23 Some attempts have been made to formulate the criteria for choosing between the affirmative and negative procedures, most notably in the Second Report from the

<sup>25</sup> *Hansard* (HC) 14 March 1979, vol 964, col 660.

<sup>26</sup> Eg, that the consent power in relation to offences under Part III of the Public Order Act 1986 should be transferred from the Attorney-General to the DPP.

<sup>27</sup> E C S Wade and A W Bradley, *Constitutional and Administrative Law* (11th ed 1993) pp 625–626.

<sup>28</sup> A request to have an instrument annulled is known as a "prayer".

<sup>29</sup> *Erskine May*, p 547.

Joint Committee on Delegated Legislation.<sup>30</sup> But, using language redolent of that used to describe the absence of any principle underpinning the present consents regime, the Report suggests that any attempt to deduce criteria from past precedents is

full of difficulties and pitfalls ... Parliament has chosen in the past between the Affirmative and Negative procedures not always in any specifically rational way on a consideration of the merits of the choice, but often arbitrarily and, even at times, capriciously for reasons which have often had nothing whatsoever to do with merits.<sup>31</sup>

7.24 In *Erskine May* it is suggested that the affirmative procedure is used “principally for substantial and important portions of delegated legislation, on which a high degree of scrutiny is sought”.<sup>32</sup> We were inclined to take the view that a transfer of authority to consent warrants the level of scrutiny afforded by the affirmative procedure. In coming to this view, we bore in mind the following comments contained in the minutes of evidence to the Joint Committee made by the First Parliamentary Counsel:<sup>33</sup>

The field where one is considering affirmative resolution procedure ... is where perhaps in the past it has usually been in an Act and this is now the first occasion when it is a question of dealing with it in subordinate legislation.<sup>34</sup>

7.25 In the consultation paper,<sup>35</sup> we provisionally proposed

- (1) that, as regards existing legislation, provision should be made to enable, in appropriate cases, transfer of consent functions by statutory instrument subject to the affirmative procedure; and

<sup>30</sup> HL (1972–73) 204; HC (1972–73) 468.

<sup>31</sup> Memorandum by the Clerk of the Parliament, House of Lords, Appendix I, p 30. The Second Report refers to the analysis of precedents for the use of the affirmative procedure carried out by Sir Alan Ellis in 1953. He arranged the majority of powers subject to the affirmative procedure in four classes: (1) powers the exercise of which will substantially affect provisions in Acts or Parliament, whether by alteration of their effect, or by increase or limitation of the extent or duration of their effect, or otherwise; (2) powers to impose financial charges or to make other forms of financial provision; (3) skeleton powers, that is, powers to make schemes where the purpose of the scheme only is stated by the enabling Act, and the actual details of the scheme are to be left to delegated legislation; and (4) powers the exercise of which involve consideration of some special importance (a miscellaneous class). See memorandum to the Select Committee on Delegated Legislation, HC (1953) 310–I, pp 31–34.

<sup>32</sup> *Erskine May's Parliamentary Practice* (21st ed 1989, ed C J Boulton CB), p 546.

<sup>33</sup> Mr A N Stainton CB.

<sup>34</sup> Second Report of the Joint Committee on Delegated Legislation HL (1972–73) 204; HC (1972–73) 468, pp 1–2.

<sup>35</sup> Para 7.31.

(2) that, as regards future legislation, provision should be made to enable transfer of consent functions, by statutory instrument subject to the affirmative procedure, either

(a) by way of a general power, or

(b) by way of a specific power conferred in the primary legislation in which the consent provision is contained.

7.26 On consultation we did not receive many responses on this issue but there was general support for the transfer provisions and we believe that they should be introduced. In contrast, the issue of whether there should be affirmative or negative procedures has caused us some concern. We have become increasingly conscious that the issue of the type of parliamentary scrutiny falls outside matters with which this Commission is familiar and we believe that others outside the Commission are better qualified to come to a decision on whether the transfer provisions should be subject to affirmative or negative procedures. We therefore do not propose to recommend which of these procedures should be adopted.

#### 7.27 **We therefore recommend that**

**(1) as regards existing legislation, provision should be made to enable, in appropriate cases, transfer of consent provisions by statutory instrument; and**

**(2) as regards future legislation, provision should be made to enable transfer of consent provisions by statutory instrument, either**

**(a) by way of a general power, or**

**(b) by way of a specific power conferred in the primary legislation in which the consent provision is contained.**

#### **DELEGATION OF THE DPP'S POWERS OF CONSENT**

7.28 Prior to the POA 1985, where the consent of the DPP was required it was delegable but only in a very limited way in that, under the POA 1979, the Secretary of State was empowered not only to appoint the DPP<sup>36</sup> but also such numbers of Assistant Directors of Public Prosecutions as the Minister for the Civil Service would sanction.<sup>37</sup> Each Assistant was able to do any act or thing which the DPP was required or authorised to do under any Act.<sup>38</sup> Matters changed radically in 1985 because section 1(7) of POA 1985 provided that any consent given by a crown prosecutor shall be treated as having been given by the DPP.<sup>39</sup> Joshua Rozenberg rightly said of crown prosecutors after the extension of the range of delegation brought about by the 1985 Act that “despite being the lowest grade of

<sup>36</sup> POA 1979, s 1(1).

<sup>37</sup> POA 1979, s 1(2).

<sup>38</sup> POA 1979, s 1(4).

<sup>39</sup> See Appendix B.

legally qualified staff [they] have all the powers which until 1986 could only be exercised by the Director of Public Prosecutions and his Assistant Directors".<sup>40</sup> We have been told that there are arrangements within the CPS governing levels of decision making but when we wrote the consultation paper we were troubled that the DPP has very wide powers to delegate. This extends to matters which the legislature had considered required a consent and might therefore be of substantial complexity. We therefore provisionally proposed that consent on behalf of the DPP should be given either by the DPP or by a senior crown prosecutor, namely one of the Chief Crown Prosecutors appointed, following the announcement in June 1997 by the Attorney-General,<sup>41</sup> to oversee the work of the proposed new CPS areas.<sup>42</sup>

- 7.29 On consultation, this approach was warmly welcomed. The vast majority agreed although Judge Bathurst-Norman would exempt from this requirement those offences triable only summarily as otherwise this would place an unfair burden on the DPP and the Senior Crown Prosecutor. We do not think that this is a valid point because if there is to be a consent mechanism, it means that the offences require specific attention before proceedings can be sanctioned; such consideration can only in fact be given by a senior person such as the type referred to in our provisional proposal. We also received a very helpful response from the CPS who supported the existing system explaining that the current provisions had not, so far as they were aware, caused any significant problems in practice. Sadly, that does not appear to be the case. For example, we received a cogent response from Brian Smedley J who had dismissed a prosecution for which consent had been given. Upon enquiry by him, he found that this had been given by a very inexperienced and junior prosecutor. He considered that matter should have been considered by somebody substantially senior.
- 7.30 There was sustained criticism by those with substantial practical experience of the civil servants in the prosecution system of our provisional view that the Chief Crown Prosecutors should be allowed to give consent. Thus Brooke LJ was not satisfied that "there is likely to be a sufficient reservoir of practical knowledge and experience at the Chief Crown Prosecutor level in each of the 42 CPS areas to justify delegating the powers to them". Professor Jack Beatson QC took the same view. John Nutting QC, a former first Treasury Counsel and so possessing unrivalled prosecution experience, wanted to see the consent given by the DPP him or herself, as did the Recorder of Manchester who explained that the number of decisions to be made by the DPP herself would not be over-large given that the new regime would restrict considerably the instances where consent would be required.
- 7.31 We obviously attach great importance to these helpful and cogent views and will consider them in the light of the Glidewell Report, which proposes major changes, the thrust of which has been accepted by the Government.

<sup>40</sup> *The Case for the Crown* (1987) p 98.

<sup>41</sup> Written Answer *Hansard* (HC) 24 July 1997, vol 933, cols 603–605.

<sup>42</sup> Para 7.19.

### **The Glidewell Report<sup>43</sup>**

- 7.32 One of the areas examined by the Glidewell Committee in its detailed review of the CPS was the Central Casework unit and it is worthwhile describing its history. Before 1986, most prosecutions were conducted locally. A major exception to this was the work of the DPP's Department. Chief Officers of Police were required by Regulations to provide the DPP with information so that he could decide whether to proceed with the prosecution of "(i) offences in which the prosecution has by statute to be undertaken by, or which require the consent of, one of the Law Officers or the DPP; (ii) more serious offences such as homicide, abortion, obscene publications; and (iii) other more unusual crimes, eg as libel of holders of public office".<sup>44</sup> The DPP usually took over the prosecution of offences that were referred to him. The DPP was also under a duty in cases of importance or difficulty, to give advice, or undertake criminal proceedings.<sup>45</sup>
- 7.33 When the CPS was established in 1986, a Headquarters Casework unit was formed, comprising many of the staff of the former DPP's department, and others. This unit continued to deal centrally with important and sensitive cases, such as terrorism, offences against the Official Secrets Act, serious fraud other than that dealt with by the Serious Fraud Office and charges against police officers.<sup>46</sup> It has become known as Central Casework and also handles cases referred to the Court of Appeal by the Criminal Cases Review Commission, appeals to the House of Lords and a number of other difficult types of work.<sup>47</sup> The Glidewell Committee expressed the view that it is essential that Central Casework should be a centre of excellence and believed that it should continue to handle the same range of work, with the exception of fraud.<sup>48</sup> It considered that when the new forty-two Area structure is in place, Central Casework would not fit happily as a forty-third Area, and recommended that it should "revert to being part of Headquarters, with a Head of Central Casework responding to a Director, Central Operations" through whom, he would be accountable to the DPP.<sup>49</sup>
- 7.34 We are very conscious that the Head of Central Casework will have substantial expertise and an ability to reach sensible decisions. We believe that it would be advantageous to have consent provisions at the CPS in the hands of two people for the further reason that it would lead to a uniform policy throughout the country.

### **Our recommendation**

- 7.35 In the light of the Glidewell recommendations, our view now is that **the DPP should be able to delegate the power to give or refuse consent to a prosecution to the Head of Central Casework.**

<sup>43</sup> See paras 1.18 – 1.20 above.

<sup>44</sup> Glidewell Report, ch 9, para 1.

<sup>45</sup> *Ibid.*

<sup>46</sup> Glidewell Report, ch 9, para 2

<sup>47</sup> *Ibid.*

<sup>48</sup> Glidewell Report, ch 9, para 20.

<sup>49</sup> *Ibid.*, para 23.

## **PART VIII**

# **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

In this Part we set out our conclusions and recommendations, with reference to the paragraphs of the report where they appear.

### **THE NEED FOR CHANGE**

- 1 We conclude that the present consents regime is in an unsatisfactory state and recommend it be reformed.

(paragraph 4.29)

### **THE HARM CAUSED BY AN UNFETTERED RIGHT OF PRIVATE PROSECUTION**

- 2 We conclude that the harm which might result from an unfettered right of prosecution would be either or both of the following:

- (1) the harm that results from an unsuccessful prosecution of an innocent defendant;
- (2) the harm (whether to the individual involved in the criminal process or to the public interest in the strict sense) that results from any prosecution successful or not which is not in the public interest.

(paragraph 5.24)

### **SHOULD WE HAVE AN OFFENCE-STRUCTURED CONSENTS REGIME?**

- 3 We conclude that a reformed consents regime should be offence-structured.

(paragraph 5.34)

### **Medical manslaughter**

- 4 We conclude that it would not be appropriate to depart from the fundamental principle so as to require consent for prosecutions for a doctor for manslaughter or for any other category of individuals whose working lives are likely to be substantially damaged if they are prosecuted – even though subsequently acquitted of – an offence particularly harmful to his or her position.

(paragraph 5.42)

### **THE BASIS FOR DEPARTURE FROM THE FUNDAMENTAL PRINCIPLE**

#### **Evidential weaknesses**

- 5 We conclude that a consent provision cannot be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions.

(paragraph 5.45)



**Controlling the prosecution of offences which will often be more appropriately left to the civil court**

- 6 We conclude that we should not pursue our provisional proposal our provisional proposal that consent provisions should be used to control the prosecution of offences which would often be more appropriately left to the civil courts.

(paragraph 5.51)

**Imprecise offences**

- 7 We conclude that the prosecution of imprecise offences, statutory or common law, should not be restricted by a consent provision.

(paragraph 6.7)

**Offences attracting vexatious and trivial prosecutions**

***Trivial prosecutions***

- 8 We conclude that preventing the harm to a public interest caused by private prosecutors bringing trivial prosecutions is not a matter for the consents regime.

(paragraph 6.12)

***Vexatious prosecutions***

- 9 We conclude that the likelihood of an offence being prosecuted for an improper motive is not, in itself, a reason for restricting private prosecutions which are otherwise well-founded and not contrary to the public interest.

(paragraph 6.17)

**Allowing mitigating factors to be taken into account**

- 10 We conclude that it is not practical to use a consent provision to prevent private prosecutions which fail to take into account mitigating factors.

(paragraph 6.20)

**CONTROLLING THE PROSECUTION OF OFFENCES WHERE PROSECUTION MIGHT VIOLATE A CONVENTION RIGHT**

- 11 We recommend that a consent provision should be used to control the prosecution of those offences where it is very likely that a reasonable defendant would contend that a prosecution for the particular offence would violate his or her Convention rights.<sup>1</sup>

(paragraph 6.37)

<sup>1</sup> Those rights and freedoms guaranteed under the European Convention on Human Rights which are given further effect in domestic law by the Human Rights Bill, due to receive the Royal Assent in November, 1998.

**CONTROLLING THE PROSECUTION OF OFFENCES WHICH INVOLVE THE NATIONAL SECURITY OR SOME INTERNATIONAL ELEMENT**

12 We recommend that prosecution of offences involving the national security or some international element should be restricted by a consent provision. Offences would be regarded as involving some “international element” if they

- (1) are related to the international obligations of the state;
- (2) involve measures that were introduced to combat international terrorism;
- (3) involve measures introducing response to international conflict; or
- (4) have a bearing on international relations.

(paragraph 6.46)

**CONTROLLING THE PROSECUTION OF OFFENCES WHICH CREATE A HIGH RISK THAT THE RIGHT OF PRIVATE PROSECUTION WILL BE ABUSED AND THE INSTITUTION OF PROCEEDINGS WILL CAUSE IRREPARABLE HARM**

13 We recommend that a requirement of consent should be used to control prosecutions for those offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause irreparable harm.

(paragraph 6.52)

**DISPENSING WITH CONSENT REQUIREMENTS FOR OFFENCES OTHER THAN THOSE CONTAINED IN THE CATEGORIES SET OUT IN RECOMMENDATIONS 11, 12 AND 13 ABOVE**

14 We recommend that, in the case of all other offences which at present require the consent of the Law Officers or the DPP, that requirement should be dispensed with.

(paragraph 6.54)

**AUTOMATIC NOTIFICATION OF PRIVATE PROSECUTIONS**

15 We recommend

- (1) that the DPP should have the power to license an organisation or person to bring criminal proceedings without the CPS being notified of the prosecution where the institution applies evidential and public interest tests which are comparable to the tests which the CPS would apply; and
- (2) that court clerks should be required to notify the CPS of all private prosecutions except for those instituted by organisations licensed by the DPP; and
- (3) that such notification shall not create any duty of the DPP to take over the conduct of such proceedings though he should be empowered to do so under section 6(2) of the POA 1985.

(paragraph 7.9)

## **DISTRIBUTION OF CONSENT FUNCTIONS**

### **Offences involving the national security or some international element**

- 16 We recommend that, where a consent is required, it should be that of the DPP except for those offences which require consent because they involve the national security or some international element, that consent should be given by a Law Officer.

(paragraph 7.13)

### **Transfer of consent authority from Law Officers to the DPP**

- 17 We recommend that
- (1) as regards existing legislation, provision should be made to enable, in appropriate cases, transfer of consent provisions by statutory instrument; and
  - (2) as regards future legislation, provision should be made to enable transfer of consent provisions by statutory instrument, either
    - (a) by way of a general power, or
    - (b) by way of a specific power conferred in the primary legislation in which the consent provision is contained.

(paragraph 7.27)

## **DELEGATION OF THE DPP'S POWERS OF CONSENT**

- 18 We recommend that the DPP should be able to delegate the power to give or refuse consent to a prosecution to the Head of Central Casework.

(paragraph 7.35)

*(Signed)* MARY ARDEN, *Chairman*  
ANDREW BURROWS  
DIANA FABER  
CHARLES HARPUM  
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*  
14 July 1998

# APPENDIX A

## OFFENCES REQUIRING THE CONSENT OF THE ATTORNEY-GENERAL OR THE DPP

### PROVISIONS REQUIRING THE CONSENT OF THE ATTORNEY-GENERAL

#### Offences under Public General Acts

- (1) **Agricultural Credits Act 1928, s 10(3)** in relation to the s 10(1) offence of printing for publication or publishing any list of agricultural charges or the names of farmers who have created agricultural charges.
- (2) **Agriculture and Horticulture Act 1964, s 20(3)** in relation to any offence created in Part III of the Act which makes provisions regarding the grading and transport of fresh horticultural produce. The consent of the Secretary of State will also suffice.
- (3) **Agricultural Land (Removal of Surface Soil) Act 1953, s 3** in relation to any offence created by the Act. The Act makes it an offence to remove surface soil from land in certain circumstances. The consent of the DPP will also suffice.
- (4) **Auctions (Bidding Agreements) Act 1927, s 1(3)** in relation to s 1 of the Act which renders certain bidding agreements illegal. The consent of the Solicitor-General will also suffice.
- (5) **Aviation Security Act 1982, s 8(1)(a)** in relation to offences against the safety of aircraft under ss 1, 2, 3, 5 and 6 of the Act.
- (6) **Aviation and Maritime Security Act 1990, s 1(7)** in relation to the offence of endangering safety at aerodromes under that section.
- (7) **Biological Weapons Act 1974, s 2(1)(a)** in relation to the offence of developing certain biological agents and toxins and biological weapons under s 1 of the Act.
- (8) **Building Act 1984, s 113** in relation to any offence created by or under the Act unless proceedings are taken by a party aggrieved or local authority or body whose function it is to enforce the provision in question.
- (9) **Cancer Act 1939, s 4(6)** in relation to the offence of advertising cancer treatments created by s 4(1) of the Act. The consent of the Solicitor-General will also suffice.
- (10) **Chemical Weapons Act 1996, s 31(1)(a)** in relation to offences of using chemical weapons or constructing premises or equipment for producing chemical weapons under ss 2 and 11 of that Act. By s 31(2) offences under the Act other than those in these sections can only be instigated by or with the consent of the Secretary of State.
- (11) **Children and Young Persons (Harmful Publications) Act 1955, s 2(2)** in relation to the offence of printing, publishing and selling works to which the Act applies under s 2(1) of the Act.

- (12) **Contempt of Court Act 1981, ss 7 and 8(3)**. Section 7 relates to proceedings for contempt under the strict liability rule. Section 8(3) relates to proceedings for contempt regarding breaches of confidentiality of jury deliberations. In both cases a court having jurisdiction may of its own motion bring proceedings.
- (13) **Counter Inflation Act 1973, s 17(9)** in relation to any offence created under the Act. This subsection is prospectively repealed by the Competition Act 1980, s 33(4), Sch 2 as from 1 Jan 2011, by virtue of the Competition Act 1980 (Commencement No 1) Order 1980 SI 1980/497.
- (14) **Criminal Attempts Act 1981, ss 2(1) and 2(2)(a)**, the former of which provides that any provision to which the section applies shall have effect with respect to an offence under s 1 of attempting to commit an offence as it has effect with respect to the offence committed, and the latter of which expressly provides that any consent provisions in those offences apply equally to attempts.
- (15) **Criminal Justice Act 1987, s 11(13)** in relation to the offence of breach of reporting restrictions under s 11 of the Act.
- (16) **Criminal Justice Act 1988, s 135(a)** in relation to offences of torture under s 134 of the Act.
- (17) **Criminal Law Act 1977, ss 4(2), 4(3), 9(6)**. The first two sections relate to the offence of conspiracy to commit an offence created by s 1 of the Act. Section 4(1) provides that the DPP's consent is required for summary proceedings. Section 4(2) provides that where the offence in question requires the consent of the Attorney-General then on a charge of conspiracy such consent is also required, if necessary substituting that of the DPP set out in s 4(1). Section 4(3) preserves the situation where the offence requires the consent of the DPP. Section 9(6) provides that proceedings for the offence of trespassing on premises of foreign missions created by s 9 require the consent of the Attorney-General.
- (18) **Customs and Excise Management Act 1979, s 145(5)**. Section 145(1) provides that no proceedings for an offence under the Customs and Excise Acts shall be instituted except by order of the Commissioners. Section 145(5) provides that this does not affect the institution of such proceedings by the law officers.
- (19) **Explosive Substances Act 1883, s 7(1)** in relation to any offence under the Act.
- (20) **Genocide Act 1969, s 1(3)** in relation to the offence of genocide as defined in Article II of the Genocide Convention as set out in the Schedule to the Act.
- (21) **Highways Act 1980, s 312** in relation to offences under ss 167 and 177 or byelaws made under them and the provisions of the Act specified in Sch 22. Proceedings may also be taken by a person aggrieved or by the highway authority or council having an interest in the enforcement of the provisions of byelaws in question. Section 312(3) provides that a constable may take proceedings for an offence under ss 171(6)(b) and (c) and s 174 without the consent of the Attorney-General.
- (22) **Horticultural Produce Act 1986, s 5(c)** which applies s 20(3) of the Agriculture and Horticulture Act 1964 (see above) to all offences under the Act.

- (23) **Income and Corporation Taxes 1988, s 766(4)** in relation to s 765 which makes certain transactions unlawful if they are conducted without the Treasury's consent.
- (24) **Judicial Proceedings (Regulation of Reports) Act 1926, s 1(3)** in relation to any offence under the Act.
- (25) **Internationally Protected Persons Act 1978, s 2(1)** in relation to proceedings for an offence which would not be an offence apart from s 1 (attacks and threats on protected persons), disregarding the provisions of the Suppression of Terrorism Act 1978 and the Nuclear Material (Offences) Act 1983.
- (26) **Law of Property Act 1925, s 183(4)** in relation to the fraudulent concealment of documents and falsification of pedigrees under that section.
- (27) **Law Reform (Year and a Day Rule) Act 1996, s 2(1)** in relation to proceedings under s 2(2) against a person for a "fatal offence" where (a) the injury alleged to have caused the death was sustained more than three years before the death occurred or (b) the person has previously been convicted of an offence committed in circumstances alleged to be connected with the death. By s 2(4) no provision that proceedings may be instituted only by or with the consent of the DPP shall apply to any such proceedings.
- (28) **Legal Aid Act 1988, s 38(5)** in relation to the offence of improper disclosure of information relating to the seeking or receiving of advice under that section.
- (29) **Magistrates' Courts Act 1980, ss 8(6) and 71(4)**. Section 8(6) relates to the offence of breaching reporting restrictions on committal proceedings under that section. Section 71(4) relates to the offence of breaching reporting restrictions on domestic proceedings under that section.
- (30) **Marine Insurance (Gambling Policies) Act 1909, s 1(3)** in relation to offences under the Act which prohibits gambling on loss by maritime perils.
- (31) **Mines and Quarries Act 1954, s 164** in relation to an offence under s 151(1) of the Act which requires the fencing of abandoned or disused mines and quarries.
- (32) **National Health Service Act 1977, s 124(6)** unless proceedings are taken by a party aggrieved or the Health authority concerned, in relation to a failure to give notice of birth in accordance with s 124(4) of the Act.
- (33) **Newspaper, Printers and Reading Rooms Repeal Act 1869, Sch II, para 1** in relation to the printing, publishing or dispersing of papers which do not bear the printer's name and address or assisting in so doing. The consent of the Solicitor-General will also suffice.
- (34) **Official Secrets Act 1911, s 8** in relation to any offence under the Act.
- (35) **Official Secrets Act 1920, s 8(2)** which provides that the consent of the Attorney-General under the Act or the 1911 Act is required for offences to be tried summarily.
- (36) **Official Secrets Act 1989, s 9** in relation to any offence under the Act except s 4(2) for which the consent of the DPP will suffice.

- (37) **Prevention of Corruption Act 1906, s 2(1)** in relation to any offence under the Act. The consent of the Solicitor-General will also suffice.
- (38) **Prevention of Oil Pollution Act 1971, s 19(1)(a)** in relation to any offence under the Act. Section 2(2)(b) provides that for an offence under ss 2 and 18 proceedings may be brought by a harbour authority. Section 2(2)(c) provides that in all cases where the harbour authority may not bring proceedings the consent of the Secretary of State or a person authorised by any special or general direction of the Secretary of State will suffice.
- (39) **Prevention of Terrorism (Temporary Provisions) Act 1989, s 19(1)(a)** in relation to offences under ss 2, 3, 8–11, 17, 18 and 18A of the Act.
- (40) **Protection of Trading Interests Act 1980, s 3(3)** in relation to a failure to comply with any requirement imposed under s 1(2) or knowing contravention of a direction under s 1(3) or s 2(1). The consent of the Secretary of State will also suffice.
- (41) **Public Bodies Corrupt Practices Act 1889, s 4(1)** in relation to any offence under the Act. Section 4(2) provides that the consent of the Solicitor-General will also suffice.
- (42) **Public Health Act 1936, s 298** in relation to any offence under the Act unless proceedings are taken by a party aggrieved, a council, or a body whose function is to enforce the provisions or byelaws in question.
- (43) **Public Health (Control of Diseases) Act 1984, s 64(1)** in relation to any offence under the Act unless proceedings are taken by a party aggrieved, a local authority, or a body whose function it is to enforce the provision or byelaw in question. Section 64(2) provides that a constable may take proceedings in respect of an offence against a byelaw.
- (44) **Public Order Act 1936, s 2(2)** in relation to an offence under that section which places a prohibition on quasi-military organisations.
- (45) **Public Order Act 1986, s 27(1)** in relation to an offence under Part III of the Act which makes provision for offences involving racial hatred.
- (46) **Registered Homes Act 1984, s 53(1)** in relation to an offence of carrying on a nursing home or mental nursing home without being registered, or failing to affix a certificate of registration in a conspicuous place in the home under ss 23(1) and (6). Section 53(1) further provides that proceedings may be taken by a party aggrieved or the Secretary of State.
- (47) **Sexual Offences (Amendment) Act 1976, s 5(5)** in relation to proceedings for an offence of publishing information likely to lead to the identification of the complainant of rape under s 4(5) of the Act.
- (48) **Solicitors Act 1974, s 42(2)** in relation to an offence under that section of failing to disclose the fact of being struck off or suspended.
- (49) **Suppression of Terrorism Act 1978, s 4(4)** in relation to an offence which, disregarding certain named statutes would not be an offence apart from s 4. (This section is concerned with jurisdiction, e.g. if a person does an act in certain foreign countries which would be an offence under the Act if performed in the United Kingdom, that person shall be guilty as if he or she had done that act here: s 4(1)).

- (50) **Taking of Hostages Act 1982, s 2(1)(a)** in relation to any offence under the Act.
- (51) **Theatres Act 1968, s 8** in relation to offences of the presentation of obscene performances of plays, and provocation of a breach of the peace by means of a public performance of a play under ss 2 and 6 of the Act, or for an offence at common law committed by the publication of defamatory matter in the course of a performance of a play.
- (52) **War Crimes Act 1991, s 1(3)** in relation to proceedings for murder, manslaughter or culpable homicide under that section.
- (53) **Water Act 1945, s 46** in relation to any offence under the Act. The section further provides that proceedings may also be taken by the Secretary of State, a local authority, statutory water undertakers or by a person aggrieved. Most of this Act has been repealed with savings for byelaws.
- (54) **Water Industry Act 1991, s 211** in relation to sewerage offences derived from the Public Health Act 1936, s 298 as applied by the Water Act 1973, s 14(2) and as read with the Water Act 1989, s 69, Sch 8, para 1. Subsections (a), (b) and (c) respectively provide that a party aggrieved, a sewerage undertaker, or a body whose function it is to enforce the provisions in question may also take proceedings.

#### **Offences under Local Government Acts**

The following offences require the consent of the Attorney-General for the laying of an information for an offence created by or under the Act by a person other than a party aggrieved, a local authority or a police constable.

- (55) **Cheshire County Council Act 1980, s 105.**
- (56) **County of Kent Act 1981, s 125.** A parish council may also lay an information without the consent of the Attorney-General.
- (57) **County of Merseyside Act 1980, s 134(1).**
- (58) **County of South Glamorgan Act 1976, s 67.**
- (59) **Greater Manchester Act 1981, s 175.** A parish council may also lay an information without the consent of the Attorney-General.
- (60) **Isle of Wight Act 1980, s 60.**
- (61) **South Yorkshire Act 1980, s 102.** The executive or a parish council may also lay an information without the consent of the Attorney-General.
- (62) **Tyne and Wear Act 1980, s 51.**
- (63) **West Midlands County Council Act 1980, s 114.**
- (64) **West Yorkshire Act 1980, s 88.**

#### **Offences committed by military personnel**

These comprise an exceptional category of offences requiring the Attorney-General's consent.

- (65) **Air Force Act 1955, s 132** provides that the Attorney-General must consent to prosecutions for civil offences committed by Air Force personnel outside the United Kingdom.



- (66) **Army Act 1955, s 132** provides that the Attorney-General must consent to prosecutions for civil offences committed by Army personnel outside the United Kingdom.
- (67) **Naval Discipline Act 1957, s 52** provides that the Attorney-General must consent to prosecutions for civil offences committed by naval personnel outside the United Kingdom.

However, the **Air Force Act 1955, s 204A, Army Act 1955, s 204A and Naval Discipline Act 1957 s 129A** all provide that no enactment, with the exception of the three given above, which requires the consent of the Attorney-General or the DPP to prosecution shall have effect under the above Acts.

#### **PROVISIONS REQUIRING THE CONSENT OF THE DPP<sup>1</sup>**

##### **Offences under Public General Acts**

- (68) **Agricultural Land (Removal of Surface Soil) Act 1953, s 3** in relation to any offence created by the Act. The Act makes it an offence to remove surface soil from land in certain circumstances. The consent of the Attorney-General also suffices.
- (69) **Agricultural (Miscellaneous Provisions) Act 1954, s 9(7)** in relation to offences regarding s 9(5) of wilfully depositing anything unsuitable for animal feeding stuffs in any receptacle provided by the local authority for that purpose, and under s 9(6) concerning offences against byelaws regulating the collection of waste for animal feeding stuffs. Section 9(7) further provides that local authorities in whose area the offence is alleged to have been committed may take proceedings.
- (70) **Animals (Scientific Procedures) Act 1986, s 26(1)** in relation to offences under the Act or under s 1 of the Protection of Animals Act 1911 where it is alleged that the offence was committed in respect of an animal at a designated establishment. By s 26(3) time limits for summary offences may be extended where, in the opinion of the DPP, this is justified.
- (71) **Antarctic Act 1994, s 28(1)(b)** in relation to proceedings for any offence under the Act. By s 28(1)(a) the Secretary of State or a person authorised by him may also institute proceedings.
- (72) **Atomic Energy Act 1946, s 14(4)** in relation to proceedings for an offence of disclosure of information relating to a plant to any other person except an authorised person without the consent of the Minister under s 11 of the Act.
- (73) **Bail Act 1976, s 9(5)** in relation to the offence of agreeing to indemnify sureties in criminal proceedings under s 9(1) of the Act.
- (74) **Banking Act 1987, s 96(5)(a)** in relation to proceedings for any offence under the Act. Proceedings may also be brought by or on behalf of, the bank.

<sup>1</sup> In addition to these consent provisions, s 218 of the Insolvency Act 1986 specifies that the DPP shall be the “prosecuting authority” for offences committed in relation to a company which is being wound up.

- (75) **Broadcasting Act 1990, Sch 15, paras 4(1) and (2)** in relation to an offence under s 2 of the Obscene Publications Act 1959 of publishing an obscene article where that took place in the course of inclusion in a programme in a programme service or was to take place in the course of the inclusion of a programme in a programme service.
- (76) **Building Societies Act 1986** as amended by the Bankers Act 1987, s 96(5) and (6). The DPP's consent is not required if proceedings are brought by the Building Societies Commission.
- (77) **Cereals Marketing Act 1965, s 22(1)(b)** in relation to proceedings for an offence under the Act. Section 22(1)(a) provides that the Home-Grown Cereals Authority may also bring proceedings.
- (78) **Charities Act 1993, s 94(1)** in relation to an offence under ss 5, 11, 18(14), 49 or 73(1).
- (79) **Child Abduction Act 1984, ss 4(2) and 5**. Section 4(2) relates to an offence of abduction of a child by a person connected with the child under s 1 of the Act. Section 5 relates to an offence of kidnapping a child under sixteen by a person connected with the child within the meaning of s 1 of the Act.
- (80) **Civil Aviation Act 1982, ss 44(11)(a), 45(7)(a), 50(6)(a), 83(3)(a) and 92(2)(a)**. Section 44(11)(a) relates to offences under that section which deals with the power of the Secretary of State to make orders to obtain rights over land. The consent of the Secretary of State will also suffice. Section 44(11) further provides that proceedings may be instituted by the Civil Aviation Authority (CAA) if they are the authority in whose favour the order in question was made. Section 45(7)(a) relates to offences under that section which deals with the power of the Secretary of State to restrict the use of land for the purpose of securing safety at aerodromes. The consent of the Secretary of State will also suffice. Section 45(7) further provides that the CAA may institute proceedings if the order in question was made in respect of an aerodrome owned or managed by them. Section 50(6)(a) relates to offences under that section which deals with the power of the Secretary of State to authorise the entry of the Civil Aviation Authority onto land for surveying purposes. The consent of the Secretary of State will also suffice. Section 50(6) further provides that the CAA may institute proceedings in a case falling within s 50(6)(1)(a)-(c) and that in a case falling within s 50(6)(1)(d) the person in respect of whom the order in question has been, or is to be, made, may institute proceedings. Section 83(3)(a) relates to offences under that section regarding the recording and registration of births and deaths on aircraft. Section 92(2)(a) relates to proceedings for any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft while in flight elsewhere than in or over the United Kingdom, subject to any provision to the contrary passed after 14 July 1967.
- (81) **Coal Industry Nationalisation Act 1946, s 59(1).**<sup>2</sup>
- (82) **Companies Act 1985, ss 732(1) and (2)(a) and (b)**. Section 732(2)(a) relates to offences under ss 210, 324 and 329 of the Act. The consent of the Secretary of State will also suffice. Section 732(2)(b) relates to

<sup>2</sup> Prospectively repealed by s 67(8) and Sch 11 of the Coal Industry Act 1994, which is not yet in force.

offences under ss 447-451 for which the consent of the Secretary of State or the Industrial Assurance Commissioner will also suffice. Section 732(2)(c) provides that for an offence under s 455 only the Secretary of State can grant consent.

- (83) **Consumer Protection Act 1987, s 11(3)(c)** allows the Secretary of State to require the consent of the DPP for proceedings brought for any safety regulations made under the Act. The consent of Secretary of State will suffice.
- (84) **Criminal Attempts Act 1981, ss 2(1) and (2)(a)** the former of which provides that any provision to which the section applies shall have effect with respect to an offence under s 1 of attempting to commit an offence as it has effect with respect to the offence committed, and the latter of which expressly provides that any consent provisions in those offences apply equally to attempts.
- (85) **Criminal Justice Act 1988, s 160(4)** in relation to an offence under that section of possession of an indecent photograph of a child.
- (86) **Criminal Justice Act 1993, s 61(2)(b)** in relation to offences of insider dealing under Part V of the Act. By s 61(2)(a) proceedings may also be brought by or with the consent of the Secretary of State.
- (87) **Criminal Justice (International Co-operation) Act 1990, s 21(2)(a)** in relation to proceedings under Part II or Sch 3 of the Act. The consent of the Commissioners of Customs and Excise will also suffice.
- (88) **Criminal Law Act 1967, ss 4(4) and 5(3)**. Section 4(4) relates to an offence under s 4(1) of doing any act with intent to impede the arrest or prosecution of any person knowing or believing that person to have committed an arrestable offence. Section 5(3) relates to an offence under that section of concealing offences or giving false information.
- (89) **Criminal Law Act 1977, ss 4(1) and 4(3)**. Section 4(1) relates to proceeding under s 1 of the Act for conspiracy to commit any summary offence and s 4(3) relates to proceedings under s 1 for conspiracy to commit any non-summary offence which requires the consent of the DPP.
- (90) **Data Protection Act 1984, s 19(1)(a)** in relation to proceedings for any offence under the Act. The Data Protection Registrar may also institute proceedings.
- (91) **Deep Sea Mining (Temporary Provisions) Act 1981, s 14(2)(a)** in relation to any proceedings under the Act or any regulations made thereunder. Section 14(2)(c) provides that the consent of the Secretary of State or a person authorised by him on that behalf will also suffice.
- (92) **Detergents (Composition) Regulations 1978 SI No 564, regulation 10(3)** (made under section 2 of the European Communities Act 1972). The DPP's consent is not required if proceedings are brought by or with the consent of the Secretary of State.
- (93) **Emergency Laws (Re-enactments and Repeals) Act 1964, s 14(1)** in relation to proceedings for an offence against an order or direction under ss 1 or 2 of the Act. The consent of the Board of Trade or the Treasury will also suffice.
- (94) **Energy Act 1976, Sch 2, paras 6(1) and 6(2)**. Para 6(1) relates to proceedings for an offence of contravening or failing to comply with a direction of the Secretary of State under s 6 of the Act. The consent of

the Secretary of State also suffices. Para 6(2) relates to an offence of contravening or failing to comply with price controls. The consent of the Secretary of State will suffice. Proceedings may also be taken by or on behalf of a local weights and measures authority.

- (95) **Environmental Protection Act 1990, s 118(10)** in relation to various offences under that section. The consent of the Secretary of State will also suffice.
- (96) **Fair Trading Act 1973, s 62(4)** in relation to an offence of being knowingly concerned in an unlawful newspaper merger or breach of a condition attached to such by a Secretary of State under that section.
- (97) **Finance Act 1965, s 92(6)** in relation to an offence under that section which deals with grants towards duty charged on bus fuel. The consent of the Minister of Transport also suffices.
- (98) **Financial Services Act 1986, ss 201(1)(a) and 201(3)(a)**. Section 210(1)(a) relates to all offences under the Act except for ss 133 and 185. The consent of the Secretary of State also suffices. Section 201(2)(a) provides that for an offence under s 133 the consent of the Secretary of State or the Friendly Societies Commission will also suffice. Section 201(3)(a) provides that for an offence under s 185 the consent of the Treasury will also suffice.
- (99) **Firearms Act 1968, s 51(4)** which extends the time limits for the prosecution of any summary offence under the Act other than an offence under s 22(3) or an offence relating specifically to air weapons.
- (100) **Fraudulent Mediums Act 1951, s 1(4)** in relation to an offence under that section of purporting to act as a medium with intent to deceive or using any fraudulent device.
- (101) **Gas Act 1965, s 21(2)** which applies s 43(2) of the Gas Act 1986 (see below) to Part II of the Act which deals with the underground storage of gas by gas authorities.
- (102) **Gas Act 1986, s 43(2)** in relation to an offence under that section of making a false statement. The consent of the Secretary of State will also suffice.
- (103) **Geneva Conventions Act 1957, ss 1(3) and 6(7)**. Section 1(3) relates to grave breaches of conventions set out in the Schedules of the Act and s 6(7) concerning the unauthorised use of the Red Cross and other emblems.
- (104) **Health and Safety at Work Etc Act 1974, s 38** in relation to proceedings for any offence under the relevant statutory provisions (Part I of the Act, any health and safety regulations and any existing statutory provisions), proceedings shall not be instituted except by an inspector or by or with the consent of the DPP.
- (105) **Housing Associations Act 1985, ss 27(4) and 30(6)**. Section 27(4) relates to an offence under that section which deals with responsibility for securing compliance for accounting requirements. Section 30(6) relates to an offence of contravention of an order not to part with association money or securities without the approval of the Housing Corporation under s 30(1)(c) of the Act. In both cases the consent of the Corporation also suffices.
- (106) **Human Fertilisation and Embryology Act 1990, s 42(a)** in relation to any proceedings for an offence under the Act.

- (107) **Human Organ Transplants Act 1989, s 5** in relation to offences under ss 1 and 2 of the Act of commercial dealing in organs and breaching restrictions on transplants between persons not genetically related.
- (108) **Incitement to Disaffection Act 1934, s 3(2)** in relation to any offence under the Act.
- (109) **Insurance Companies Act 1982, ss 93(a) and 94(2)**. Section 93(a) relates to any offence under the Act. Section 94(2) extends the time limit for bringing summary proceedings under the Act. In both cases the consent of the Secretary of State or the Industrial Assurance Commission suffices.
- (110) **Interception of Communications Act 1985, s 1(4)(a)** in relation to the offence of intentionally intercepting a communication under that section.
- (111) **Land Commission Act 1967, s 82(2)(a)** in relation to offences under ss 80, 81(1),(2) and (4) of the Act of failing to comply with notices issued by the Commission under s 43 without reasonable excuse.
- (112) **Local Government Act 1972, s 94(3)** in relation to offences under that section of the Act regarding councillors who fail to disclose pecuniary interests and take part and vote on matters in which they have such interests.
- (113) **Local Government and Housing Act 1989, s 19(3)** in relation to an offence under s 19(2) of failure by a member of a local authority to set out his or her pecuniary interests or the giving of misleading information.
- (114) **Lotteries and Amusements Act 1976, s 2(3)** in relation to any matter published in a newspaper which would constitute the offence of calculated inducement to persons to participate in a lottery under s 2(1)(c)(iii) of the Act.
- (115) **Marine, &c., Broadcasting (Offences) Act 1967, s 6(5)** in relation to any offence under the Act. The consent of the Secretary of State also suffices.
- (116) **Mental Health Act 1959, s 128(4)** in relation to offences under that section of unlawful sexual intercourse with patients.
- (117) **Mental Health Act 1983, s 127(4)** in relation to an offence of ill-treatment of patients at hospitals or mental nursing homes under that section.
- (118) **Merchant Shipping (Liner Conferences) Act 1982, s 10(3)** in relation to an offence under s 10(2) of unlawful disclosure of information obtained by the Secretary of State for the purposes of the Code.
- (119) **Mines and Quarries (Tips) Act 1969, s 27(1)** in relation to proceedings under Part II of the Act which makes provisions for the prevention of danger to the public from disused tips. The local authority may also bring proceedings.
- (120) **National Health Service Act 1977, Sch 10, para 1(7)** in relation to an offence under that paragraph which makes additional provisions as to the prohibition of sale of medical practices.
- (121) **Nuclear Installations Act 1965, s 25(3)** in relation to offences under ss 2(2) or 19(5) of the Act. The section further provides that the Minister may bring proceedings.

- (122) **Obscene Publications Act 1959, s 2(3A)** in relation to proceedings for the offence of publication of obscene matter under that section.
- (123) **Official Secrets Act 1989, s 9** in relation to an offence under s 4(2).
- (124) **Oil and Gas (Enterprise) Act 1982, s 27(3)(b)** in relation to proceedings under s 27(1) of the Act. Section 27(3)(a) provides that the Secretary of State or a person authorised by the Secretary of State may institute proceedings in certain cases.
- (125) **Petroleum Act 1987, s 13(1)(b)** in relation to offences under ss 2, 5, 9, or 10 of the Act or under regulations made under s 11. By s 13(1)(a) the consent of the Secretary of State will also suffice.
- (126) **Petroleum and Submarine Pipe-Lines Act 1975, s 29(2)(a)** in relation to an offence under Part III of the Act which makes provisions for the construction and use of pipe-lines. Section 29(2)(c) further provides that the consent of the Secretary of State or a person authorised by the Secretary of State will also suffice.
- (127) **Prevention of Oil Pollution Act 1971, s 19(7)** in relation to offences of discharge of certain oils from pipe-lines or discharge as a result of exploration in a designated area under s 3 of the Act.
- (128) **Prison Security Act 1992, s 1(5)** in relation to an offence of prison mutiny under s 1(1).
- (129) **Protection of Children Act 1978, s 1(3)** in relation to proceedings for any offence under the Act.
- (130) **Protection of Military Remains Act 1986, s 3(3)** in relation to the offence under s 2(2) where a prohibited excavation or operation is carried out in international waters.
- (131) **Public Order Act 1986, s 7(1)** in relation to the offence of riot or incitement to riot under s 1 of the Act.
- (132) **Public Passenger Vehicles Act 1981, s 69(1)** in relation to proceedings under Parts II or III of the Act. Proceedings may also be instituted by or on behalf of a traffic commissioner, a chief officer of police or the council of a county or district by or a person authorised in that behalf. Section 69(2) provides that s 69(1) shall not apply to proceedings for the breach of regulations having effect by virtue of ss 25 or 26 of the Act. Section 69(3) provides that s 69(1) shall not prevent the Secretary of State instituting proceedings under s 27 of the Act.
- (133) **Radioactive Substances Act 1993, ss 38(1)(c)** in relation to proceedings for any offence under the Act. Section 38(a) and (b) further provide that the consent of the Secretary of State or the chief inspector will also suffice.
- (134) **Railways Act 1993, ss 118(8), 119(10), 120(5), 121(6), 146(2)**. Section 118(8) relates to an offence under that section which deals with the control of railways in time of hostilities, severe international tension or great national emergency. Section 119(10) relates to an offence failing to do anything required by an instruction of the Secretary of State regarding security under s 119(9). Section 120(5) relates to an offence under s 120(4) of failing to do anything required by an enforcement notice issued by the Secretary of State regarding security. Section 121(6) relates to an offence under s 121(4) of that section. Section 146(2) relates to an offence of making false statements under that section. All further provide that the consent of the Secretary of State also suffices.

- (135) **Rehabilitation of Offenders Act 1974, s 9(8)** in relation to the offence of unauthorised disclosure of spent convictions under s 9(2) of the Act.
- (136) **Reservoirs Act 1975, s 22(6)** in relation to proceedings for an offence under that section. Proceedings may be instituted by any local authority, London borough council or district council in whose area the reservoir in question or any part of it is situated, but otherwise proceedings may be instituted by or with the consent of the DPP or by the Secretary of State.
- (137) **Restrictive Trade Practices Act 1976, s 39(1)(a)** in relation to an offence under any preceding provisions of the Act. The consent of the Director General of Fair Trading also suffices.
- (138) **Sexual Offences Act 1956, s 37(2) and Sch 2, Pt 2, paras 14 and 15** which relates to offences of incest or attempted incest under ss 10 and 11 of the Act.
- (139) **Sexual Offences Act 1967, s 8** in relation to proceedings against any man for offences of buggery or gross indecency, or aiding and abetting such offences where either of the men was under the age of twenty-one at the time of the offence. (Section 48 of the Criminal Justice Act 1972 provides that s 8 of the 1967 Act has no application to proceedings under the Indecency with Children Act 1969).
- (140) **Solicitors Act 1974, s 44(4)** in relation to proceedings under s 44(1) against a person who has had an order made against him not to be employed or remunerated by a solicitor for the offence of seeking or accepting any employment or remuneration from a solicitor without previously informing the solicitor of the order. The DPP's consent is not required if proceedings are brought by the Law Society or a person acting on its behalf.
- (141) **Suicide Act 1961, s 2(4)** in relation to proceedings for an offence of complicity in another's suicide under that section.
- (142) **Surrogacy Arrangements Act 1985, s 4(2)** in relation to proceedings for an offence under the Act.
- (143) **Theft Act 1968, s 30(4)** in relation to proceedings against a person for any offence of stealing or doing unlawful damage to property which at the time of the offence belongs to that person's spouse.
- (144) **Trading with the Enemy Act 1939, s 1(4)** in relation to a prosecution for an offence of trading with the enemy.
- (145) **Transport and Works Act 1992, s 58** in relation to offences under the various safety provisions of Part II of the Act, other than ss 41 or 43. The consent of the Secretary of State also suffices.
- (146) **Unsolicited Goods and Services Act 1971, s 4(3)** in relation to an offence under that section of sending or causing to be sent any book, magazine or leaflet which is known or ought reasonably be known to be unsolicited and which describes or illustrates human sexual techniques.
- (147) **Water Industry Act 1991, s 207(2)** in relation to an offence under s 207(1) of furnishing false information in making any application under or for the purposes of any provision of the Act. The consent of the Secretary of State or the Minister for Agriculture, Fisheries and Food will also suffice.
- (148) **Weights and Measures Act 1985, s 83(2)** in relation to an offence under s 57(2) involving the failure by packers and importers to furnish

particulars of marks when required to do so by notice from the Secretary of State. The consent of the National Metrological Co-ordinating Unit will also suffice.

- (149) **Wildlife and Countryside Act 1981, s 28(10)** in relation to an offence under s 28(7) regarding the contravention of a condition attached to a notice that land is of special interest by reason of its flora, fauna or geological or physiological features. Proceedings may also be brought by the Nature Conservancy Council.

#### **Offences under Local Government Acts**

The following offences require the consent of the Director of Public Prosecutions for the laying of an information for an offence created by or under the Act by a person other than a party aggrieved, a local authority or a police constable.

- (150) **Cornwall County Council Act 1984, s 44.** A parish council may also lay an information without the consent of the DPP.
- (151) **County of Lancashire Act 1984, s 134.**
- (152) **Derbyshire Act 1981, s 59.**
- (153) **Staffordshire Act 1983, s 68.**



# **APPENDIX B**

## **EXTRACTS FROM RELEVANT LEGISLATION**

### **PROSECUTION OF OFFENCES ACT 1985**

#### **1 The Crown Prosecution Service**

- (1) There shall be a prosecuting service for England and Wales (to be known as the “Crown Prosecution Service”), consisting of –
  - (a) the Director of Public Prosecutions, who shall be head of the Service;
  - (b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and
  - (c) the other staff appointed by the Director under this section.
- (2) The Director shall appoint such staff for the Service as, with the approval of the Treasury as to numbers, remuneration and other terms and conditions of service, he considers necessary for the discharge of his functions.
- (3) The Director may designate any member of the Service who has a general qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990) for the purposes of this subsection, and any person so designated shall be known as a Crown Prosecutor.
- (4) The Director shall divide England and Wales into areas and, for each of those areas, designate a Crown Prosecutor for the purposes of this subsection and any person so designated shall be known as a Chief Crown Prosecutor.
- (5) The Director may, from time to time, vary the division of England and Wales made for the purposes of subsection (4) above.
- (6) Without prejudice to any functions which may have been assigned to him in his capacity as a member of the Service, every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director.
- (7) Where any enactment (whenever passed) –
  - (a) prevents any step from being taken without the consent of the Director or without his consent or the consent of another; or
  - (b) requires any step to be taken by or in relation to the Director;any consent given by or, as the case may be, step taken by or in relation to, a Crown Prosecutor shall be treated, for the purposes of that enactment, as given by or, as the case may be, taken by or in relation to the Director.

#### **2 The Director of Public Prosecutions**

- (1) The Director of Public Prosecutions shall be appointed by the Attorney General.

- (2) The Director must be a person who has a ten year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990.
- (3) There shall be paid to the Director such remuneration as the Attorney General may, with the approval of the Treasury, determine.

### **3 Functions of the Director**

- (1) The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.
- (2) It shall be the duty of the Director, subject to any provisions contained in the Criminal Justice Act 1987 –
  - (a) to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person);
  - (b) to institute and have the conduct of criminal proceedings in any case where it appears to him that –
    - (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or
    - (ii) it is otherwise appropriate for proceedings to be instituted by him;
  - (c) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person);
  - (d) to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles);
  - (e) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences;
  - (f) to appear for the prosecution, when directed by the court to do so, on any appeal under –
    - (i) section 1 of the Administration of Justice Act 1960 (appeal from the High Court in criminal cases);
    - (ii) Part I or Part II of the Criminal Appeal Act 1968 (appeals from the Crown Court to the criminal division of the Court of Appeal and thence to the House of Lords); or
    - (iii) section 108 of the Magistrates' Courts Act 1980 (right of appeal to Crown Court) as it applies, by virtue of subsection (5) of section 12 of the Contempt of Court Act 1981, to orders made under section 12 (contempt of magistrates' courts); and
  - (g) to discharge such other functions as may from time to time be assigned to him by the Attorney General in pursuance of this paragraph.
- (3) In this section –

“the court” means –

  - (a) in the case of an appeal to or from the criminal division of the Court of Appeal, that division;

- (b) in the case of an appeal from a Divisional Court of the Queen's Bench Division, the Divisional Court; and
- (c) in the case of an appeal against an order of a magistrates' court, the Crown Court;

"police force" means any police force maintained by a police authority under the Police Act 1996 and any other body of constables for the time being specified by order made by the Secretary of State for the purposes of this section; and

"specified proceedings" means proceedings which fall within any category for the time being specified by order made by the Attorney General for the purposes of this section.

- (4) The power to make orders under subsection (3) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

## **6 Prosecutions instituted and conducted otherwise than by service**

- (1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
- (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

## **7 Delivery of recognisances etc to Director**

- (1) Where the Director or any Crown Prosecutor gives notice to any justice of the peace that he has instituted, or is conducting, any criminal proceedings, the justice shall –
  - (a) at the prescribed time and in the prescribed manner; or
  - (b) in a particular case, at the time and in the manner directed by the Attorney General;

send him every recognisance, information, certificate, deposition, document and thing connected with those proceedings which the justice is required by law to deliver to the appropriate officer of the Crown Court.

- (2) The Attorney General may make regulations for the purpose of supplementing this section; and in subsection (1) above "prescribed" means prescribed by the regulations.
- (3) The Director or, as the case may be, Crown Prosecutor shall –
  - (a) subject to the regulations, cause anything which is sent to him under subsection (1) above to be delivered to the appropriate officer of the Crown Court; and
  - (b) be under the same obligation (on the same payment) to deliver to an applicant copies of anything so sent as that officer.
- (4) It shall be the duty of every justices' clerk to send to the Director, in accordance with the regulations, a copy of the information and of any depositions and other documents relating to any case in which –

- (a) a prosecution for an offence before the magistrates' court to which he is clerk is withdrawn or is not proceeded with within a reasonable time;
- (b) the Director does not have the conduct of the proceedings; and
- (c) there is some ground for suspecting that there is no satisfactory reason for the withdrawal or failure to proceed.

## **10 Guidelines for Crown Prosecutors**

- (1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them –
  - (a) in determining, in any case –
    - (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
    - (ii) what charges should be preferred; and
  - (b) in considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case.
- (2) The Director may from time to time make alterations in the Code.
- (3) The provisions of the Code shall be set out in the Director's report under section 9 of this Act for the year in which the Code is issued; and any alteration in the Code shall be set out in his report under that section for the year in which the alteration is made.

## **17 Prosecution costs**

- (1) Subject to subsection (2) below, the court may –
  - (a) in any proceedings in respect of an indictable offence; and
  - (b) in any proceedings before a Divisional Court of the Queen's Bench Division or the House of Lords in respect of a summary offence;

order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.
- (2) No order under this section may be made in favour of –
  - (a) a public authority or;
  - (b) a person acting –
    - (i) on behalf of a public authority; or
    - (ii) in his capacity as an official appointed by such an authority.
- (3) Where a court makes an order under this section but is of the opinion that there are circumstances which make it inappropriate that the prosecution should recover the full amount mentioned in subsection (1) above, the court shall –
  - (a) assess what amount would, in its opinion, be just and reasonable; and
  - (b) specify that amount in the order.
- (4) Subject to subsection (3) above, the amount to be paid out of central funds in pursuance of an order under this section shall –

- (a) be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the prosecutor agrees the amount; and
  - (b) in any other case, be determined in accordance with regulations made by the Lord Chancellor for the purposes of this section.
- (5) Where the conduct of proceedings to which subsection (1) above applies is taken over by the Crown Prosecution Service, that subsection shall have effect as if it referred to the prosecutor who had the conduct of the proceedings before the intervention of the Service and to expenses incurred by him up to the time of intervention.
- (6) In this section “public authority” means –
- (a) a police force within the meaning of section 3 of this Act;
  - (b) the Crown Prosecution Service or any other government department;
  - (c) a local authority or other authority or body constituted for purposes of –
    - (i) the public service or of local government; or
    - (ii) carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or
  - (d) any other authority or body whose members are appointed by Her Majesty or by any Minister of the Crown or government department or whose revenue consist wholly or mainly of money provided by Parliament.

## **18 Award of costs against accused**

- (1) Where –
- (a) any person is convicted of an offence before a magistrates’ court;
  - (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
  - (c) any person is convicted of an offence before the Crown Court;
- the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.
- (2) Where the Court of Appeal dismisses –
- (a) an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968; or
  - (b) an application by the accused for leave to appeal to the House of Lords under Part II of that Act; or
  - (c) an appeal or application for leave to appeal under section 9(11) of the Criminal Justice Act 1987;
- it may make such order as to the costs to be paid by the accused, to such person as may be named in the order, as it considers just and reasonable.
- (3) The amount to be paid by the accused in pursuance of an order under this section shall be specified in the order.
- (4) Where any person is convicted of an offence before a magistrates’ court and –

- (a) under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation; and
- (b) the sum so ordered to be paid does not exceed £5;

the court shall not order the accused to pay any costs under this section unless in the particular circumstances of the case it considers it right to do so.

- (5) Where any person under the age of eighteen is convicted of an offence before a magistrates' court, the amount of any costs ordered to be paid by the accused under this section shall not exceed the amount of any fine imposed on him.
- (6) Costs ordered to be paid under subsection (2) above may include the reasonable cost of any transcript of a record of proceedings made in accordance with rules of court made for the purposes of section 32 of the Act of 1968.<sup>3</sup>

### **23 Discontinuance of proceedings in magistrates' courts**

- (1) Where the Director of Public Prosecutions has the conduct of proceedings for an offence, this section applies in relation to the preliminary stages of those proceedings.
- (2) In this section, "preliminary stage" in relation to proceedings for an offence does not include –
  - (a) in the case of a summary offence, any stage of the proceedings after the court has begun to hear evidence for the prosecution at the trial;
  - (b) in the case of an indictable offence, any stage of the proceedings after –
    - (i) the accused has been committed for trial; or
    - (ii) the court has begun to hear evidence for the prosecution at a summary trial of the offence.
- (3) Where, at any time during the preliminary stages of the proceedings, the Director gives notice under this section to the clerk of the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice but may be revived by notice given by the accused under subsection (7) below.
- (4) Where, in the case of a person charged with an offence after being taken into custody without a warrant, the Director gives him notice, at a time when no magistrates' court has been informed of the charge, that the proceedings against him are discontinued, they shall be discontinued with effect from the giving of that notice.
- (5) The Director shall, in any notice given under subsection (3) above, give reasons for not wanting the proceedings to continue.
- (6) On giving any notice under subsection (3) above the Director shall inform the accused of the notice and of the accused's right to require the proceedings to be continued; but the Director shall not be obliged to give the accused any indication of his reasons for not wanting the proceedings to continue.

<sup>3</sup> Criminal Appeal Act 1968.

- (7) Where the Director has given notice under subsection (3) above, the accused shall, if he wants the proceedings to continue, give notice to that effect to the clerk of the court within the prescribed period; and where notice is so given the proceedings shall continue as if no notice had been given by the Director under subsection (3) above.
- (8) Where the clerk of the court has been so notified by the accused he shall inform the Director.
- (9) The discontinuance of any proceedings by virtue of this section shall not prevent the institution of fresh proceedings in respect of the same offence.
- (10) In this section “prescribed” means prescribed by rules made under section 144 of the Magistrates’ Courts Act 1980.

**25 Consents to prosecutions etc**

- (1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except –
  - (a) with the consent (however expressed) of a Law Officer of the Crown or the Director; or
  - (b) where the proceedings are instituted or carried on by or on behalf of a Law Officer of the Crown or the Director;

and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).

- (2) An enactment to which this section applies –
  - (a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; and
  - (b) shall be subject to any enactment concerning the apprehension or detention of children or young persons.
- (3) In this section “enactment” includes any provision having effect under or by virtue of any Act; and this section applies to enactments whenever passed or made.

**26 Consents to be admissible in evidence**

Any document purporting to be the consent of a Law Officer of the Crown, the Director or a Crown Prosecutor for, or to –

- (a) the institution of any criminal proceedings; or
- (b) the institution of criminal proceedings in any particular form;

and to be signed by a Law Officer of the Crown, the Director or, as the case may be, a Crown Prosecutor shall be admissible as prima facie evidence without further proof.

**COURTS AND LEGAL SERVICES ACT 1990**

**27 Rights of audience**

- (1) The question whether a person has a right of audience before a court, or in relation to any proceedings, shall be determined solely in accordance with the provisions of this Part.

- (2) A person shall have a right of audience before a court in relation to any proceedings only in the following cases –
- (a) where –
    - (i) he has a right of audience before that court in relation to those proceedings granted by the appropriate authorised body; and
    - (ii) that body's qualification regulations and rules of conduct have been approved for the purposes of this section, in relation to the granting of that right; ...
  - (c) where paragraph (a) does not apply but he has a right of audience granted by that court in relation to those proceedings ...

#### **LAW OFFICERS ACT 1944**

##### **1 Attorney General and Solicitor General**

- (1) Any functions authorised or required, by any enactment to which this subsection applies, to be discharged by the Attorney General may be discharged by the Solicitor General, if –
- (a) the office of Attorney General is vacant; or
  - (b) the Attorney General is unable to act owing to absence or illness; or
  - (c) the Attorney General authorises the Solicitor General to act in any particular case.

The enactments to which this subsection applies are –

- (i) any enactment passed before the commencement of this Act which makes no provision for enabling the Solicitor General to discharge the functions of the Attorney General thereunder, or which makes provision enabling him to discharge them only in certain circumstances defined by the enactment; and
  - (ii) any enactment passed after the commencement of this Act which does not expressly provide that this section shall not apply thereto.
- (2) During any period when the office of Attorney General is vacant, any certificate, petition, direction, notice, proceeding or other document, matter or thing whatsoever authorised or required, by any enactment to which this subsection applies, to be given, delivered, served, taken or done to, on or against the Attorney General, may be given, delivered, served, taken or done to, on or against the Solicitor General.

The enactments to which this subsection applies are –

- (a) any enactment passed before the commencement of this Act; and
- (b) any enactment passed after the commencement of this Act which does not expressly provide that this subsection shall not apply thereto.

#### **LAW OFFICERS ACT 1997**

##### **1 The Attorney General and the Solicitor General**

- (1) Any function of the Attorney General may be exercised by the Solicitor General.



- (2) Anything done by or in relation to the Solicitor General in exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General.
- (3) The validity of anything done in relation to the Attorney General, or done by or in relation to the Solicitor General, is not affected by a vacancy in the office of Attorney General.
- (4) Nothing in this section –
  - (a) prevents anything being done by or in relation to the Attorney General in the exercise of or in connection with any function of his; or
  - (b) requires anything done by the Solicitor General to be done in the name of the Solicitor General instead of the name of the Attorney General.
- (5) It is immaterial for the purposes of this section whether a function of the Attorney General arises under an enactment or otherwise.

## **MAGISTRATES' COURTS ACT 1980**

### **1 Issue of summons to accused or warrant for his arrest**

- (1) Upon an information being laid before a justice of the peace for an area to which this section applies that any person has, or is suspected of having, committed an offence, the justice may, in any of the events mentioned in subsection (2) below, but subject to subsections (3) to (5) below, –
  - (a) issue a summons directed to that person requiring him to appear before a magistrates' court for the area to answer to the information, or
  - (b) issue a warrant to arrest that person and bring him before a magistrates' court for the area or such magistrates' court as is provided in subsection (5) below.
- (2) A justice of the peace for an area to which this section applies may issue a summons or warrant under this section –
  - (a) if the offence was committed or is suspected to have been committed within the area, or
  - (b) if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being proceeded against, within the area, or
  - (c) if the person charged resides or is, or is believed to reside or be, within the area, or
  - (d) if under any enactment a magistrates' court for the area has jurisdiction to try the offence, or
  - (e) if the offence was committed outside England and Wales and, where it is an offence exclusively punishable on summary

conviction, if a magistrates' court for the area would have jurisdiction to try the offence if the offender were before it.

- (3) No warrant shall be issued under this section unless the information is in writing and substantiated on oath.
- (4) No warrant shall be issued under this section for the arrest of any person who has attained the age of eighteen years unless –
  - (a) the offence to which the warrant relates is an indictable offence or is punishable with imprisonment, or
  - (b) the person's address is not sufficiently established for a summons to be served on him.
- (5) Where the offence charged is not an indictable offence –
  - (a) no summons shall be issued by virtue only of paragraph (c) of subsection (2) above, and
  - (b) any warrant issued by virtue only of that paragraph shall require the person charged to be brought before a magistrates' court having jurisdiction to try the offence.
- (6) Where the offence charged is an indictable offence, a warrant under this section may be issued at any time notwithstanding that a summons has previously been issued.
- (7) A justice of the peace may issue a summons or warrant under this section upon an information being laid before him notwithstanding any enactment requiring the information to be laid before two or more justices.
- (8) The areas to which this section applies are commission areas in England or preserved county in Wales.

## **SUPREME COURT ACT 1981**

### **42 Restriction of vexatious legal proceedings**

- (1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground –
  - (a) instituted vexatious civil proceedings, whether in the High Court or any inferior court, and whether against the same person or against different persons; or
  - (b) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another, or
  - (c) instituted vexatious prosecutions (whether against the same person or different persons),

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.

- (1A) In this section –

“civil proceedings order” means an order that –

- (a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;

- (b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and
- (c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;

“criminal proceedings order” means an order that –

- (a) no information shall be laid before a justice of the peace by the person against whom the order is made without leave of the High Court; and
- (b) no application for leave to prefer a bill of indictment shall be made by him without the leave of the High Court; and

“all proceedings order” means an order which has the combined effect of the two other orders.

- (2) An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.
- (3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application.
- (3A) Leave for the laying of an information or for an application for leave to prefer a bill of indictment by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the institution of the prosecution is not an abuse of the criminal process and that there are reasonable grounds for the institution of the prosecution by the applicant.
- (4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section.
- (5) A copy of any order made under subsection (1) shall be published in the London Gazette.

# APPENDIX C

## CODE FOR CROWN PROSECUTORS

A new edition of the Code was issued in June 1994. It is set out below, verbatim and in its entirety.

### 1. INTRODUCTION

- 1.1 The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. But even in a small case, a prosecution has serious implications for all involved – the victim, a witness and a defendant. The Crown Prosecution Service applies the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions.
- 1.2 The Code contains information that is important to police officers, to others who work in the criminal justice system and to the general public. It helps the Crown Prosecution Service to play its part in making sure that justice is done.

### 2. GENERAL PRINCIPLES

- 2.1 Each case is unique and must be considered on its own, but there are general principles that apply in all cases.
- 2.2 The duty of the Crown Prosecution Service is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court.
- 2.3 Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must also not be affected by improper or undue pressure from any source.

### 3. REVIEW

- 3.1 Proceedings are usually started by the police. Sometimes they may consult the Crown Prosecution Service before charging a defendant. Each case that the police send to the Crown Prosecution Service is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in this Code. Crown Prosecutors may decide to continue with the original charges, to change the charges or sometimes to stop the proceedings.
- 3.2 Review, however, is a continuing process so that Crown Prosecutors can take into account any change in circumstances. Wherever possible, they talk to the police first if they are thinking about changing the charges or stopping the proceedings. This gives the police the chance to provide more information that may affect the decision. The Crown Prosecution Service and the police work closely together to reach the right decision, but the final responsibility for the decision rests with the Crown Prosecution Service.

### 4. THE CODE TESTS

- 4.1 There are two stages in the decision to prosecute. The first stage is **the evidential test**. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does pass the evidential test, Crown Prosecutors must decide if a prosecution is needed in the public interest.
- 4.2 This second stage is **the public interest test**. The Crown Prosecution Service will only start or continue a prosecution when the case has passed both tests. The

evidential test is explained in section 5 and the public interest test is explained in section 6.

## **5. THE EVIDENTIAL TEST**

- 5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a “realistic prospect of conviction” against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.
- 5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.
- 5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

### **Can the evidence be used in court?**

- (a) Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against using hearsay as evidence? If so, is there enough other evidence for a realistic prospect of conviction?

### **Is the evidence reliable?**

- (b) Is it likely that a confession is unreliable, for example, because of the defendant’s age, intelligence or lack of understanding?
  - (c) Is the witness’s background likely to weaken the prosecution case? For example, does the witness have any dubious motive that may affect his or her attitude to the case or a relevant previous conviction?
  - (d) If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?
- 5.4 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

## **6. THE PUBLIC INTEREST TEST**

- 6.1 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: “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”. (House of Common Debates, volume 483, column 681, 29 January 1951.)
- 6.2 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.

- 6.3 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

***The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.***

**Some common public interest factors in favour of prosecution**

- 6.4 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:
- (a) a conviction is likely to result in a significant sentence;
  - (b) a weapon was used or violence was threatened during the commission of the offence;
  - (c) the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
  - (d) the defendant was in a position of authority or trust;
  - (e) the evidence shows that the defendant was a ringleader or an organiser of the offence;
  - (f) there is evidence that the offence was premeditated;
  - (g) there is evidence that the offence was carried out by a group;
  - (h) the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
  - (i) the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference;
  - (j) there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
  - (k) the defendant's previous convictions or cautions are relevant to the present offence;
  - (l) the defendant is alleged to have committed the offence whilst under an order of the court;
  - (m) there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
  - (n) the offence, although not serious in itself, is widespread in the area where it was committed.

**Some common public interest factors against prosecution**

- 6.5 A prosecution is less likely to be needed if:
- (a) the court is likely to impose a very small or nominal penalty;
  - (b) the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
  - (c) the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;

- (d) there has been a long delay between the offence taking place and the date of the trial, unless:
    - the offence is serious;
    - the delay has been caused in part by the defendant;
    - the offence has only recently come to light; or
    - the complexity of the offence has meant that there has been a long investigation;
  - (e) a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
  - (f) the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;
  - (g) the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or
  - (h) details may be made public that could harm sources of information, international relations or national security.
- 6.6 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

### **The relationship between the victim and the public interest**

- 6.7 The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.

### **Youth offenders**

- 6.8 Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a youth offender or a young adult. Young offenders can sometimes be dealt with without going to court. But Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the offender's past behaviour may make prosecution necessary.

### **Police cautions**

- 6.9 The police make the decision to caution an offender in accordance with Home Office guidelines. If the defendant admits the offence, cautioning is the most common alternative to a court appearance. Crown Prosecutors, where necessary, apply the same guidelines and should look at the alternatives to prosecution when they consider the public interest. Crown Prosecutors should tell the police if they think that a caution would be more suitable than a prosecution.

## **7. CHARGES**

### **7.1 Crown Prosecutors should select charges which:**

- (a) reflect the seriousness of the offending;
- (b) give the court adequate sentencing powers; and
- (c) enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always continue with the most serious charge where there is a choice. Further, Crown Prosecutors should not continue with more charges than are necessary.

### **7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.**

### **7.3 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.**

## **8. MODE OF TRIAL**

### **8.1 The Crown Prosecution Service applies the current guidelines for magistrates who have to decide whether cases should be tried in the Crown Court when the offence gives the option. (See the “National Mode of Trial Guidelines” issued by the Lord Chief Justice.) Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.**

### **8.2 Speed must never be the only reason for asking for a case to stay in the magistrates’ courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.**

## **9. ACCEPTING GUILTY PLEAS**

### **9.1 Defendants may want to plead guilty to some, but not all, of the charges. Or they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant’s plea if they think the court is able to pass a sentence that matches the seriousness of the offending. Crown Prosecutors must never accept a guilty plea just because it is convenient.**

## **10. RE-STARTING A PROSECUTION**

### **10.1 People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.**

### **10.2 These reasons include:**

- (a) rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;
- (b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again;



- (c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

## **11. CONCLUSION**

- 11.1 The Crown Prosecution Service is a public service headed by the Director of Public Prosecutions. It is answerable to Parliament through the Attorney General. The Code for Crown Prosecutors is issued under section 10 of the Prosecution of Offences Act 1985 and is a public document. This is the third edition and it replaces all earlier versions. Changes to the Code are made from time to time and these are also published.
- 11.2 The Code is designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. Police officers should take account of the principles of the Code when they are deciding whether to charge a defendant with an offence. By applying the same principles, everyone involved in the criminal justice system is helping the system to treat victims fairly, and to prosecute defendants fairly but effectively.
- 11.3 The Code is available from:  
Crown Prosecution Service  
Information Branch  
50 Ludgate Hill  
London  
EC4M 7EX  
Telephone: 0171-273 8078  
Facsimile: 0171-329 8377

# **APPENDIX D**

## **LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON THE CONSULTATION PAPER**

### ***Individuals***

Mr Charles G Blake

Lord Justice Buxton

Professor Jack Beatson QC

Mr Justice Longmore

Mr A Ullah

Mr J Hanning

Mr Mark Hardy

Lord Hope of Craighead

Mr Justice Smedley

Ms Nicola Padfield

Judge Rhys Davies QC

Judge Bathurst-Norman

Mr A H Hammond CB QC (H M Procurator General and Treasury Solicitor)

Mr Robert Aitken (Office of the Solicitor – Department of Health and  
Department of Social Security)

Judge Neil Denison QC, Common Serjeant of London

Mr George Staple QC

Judge Mark Dyer

Professor Sir John Smith CBE QC LL D FBA

Sir Thomas Hetherington

Professor Andrew Ashworth

Mr Stephen Williamson QC

Mr P B Carter QC

Sir Louis Blom Cooper (extract from speech)

Mr R White (Assistant Chief Constable, Royal Ulster Constabulary)

Mr T G Oswald

Mr Gwilym Harbottle

Professor Andrew Choo

Judge Harold Wilson

Sir Nicholas Lyell QC, MP

Mr Paul Roberts

Mr John Nutting QC

Lord Archer of Sandwell QC

Director of Public Prosecutions of Northern Ireland

Sir Alan Green QC

Lord Justice Brooke

Professor John Jackson

Mr Justice Coghlin

***Organisations***

The Law Society

Office of the Judge Advocate General

The Medical Defence Union Ltd

Serious Fraud Office

Magistrates' Association

Legal Committee of the Stipendiary Magistrates' Association

General Council of the Bar, Law reform Committee

Criminal Bar Association (Working Party Report)

BT Group Legal Services

British Music Rights Ltd

Mechanical Copyright Protection Society Ltd

South Eastern Circuit

Justices' Clerks' Society

Crown Prosecution Service

The Newspaper Society (Political, Editorial and Regulatory Affairs)

Stephens Innocent, Solicitors

The Law Society of Northern Ireland

H M Customs and Excise

Inland Revenue

Wales and Chester Circuit

Department of Trade and Industry

Police Federation of England and Wales

Patent Office

Joint Response – London Criminal Courts Solicitors' Association and JUSTICE

Lovell White Durrant

British Phonographic Industry Ltd