

# In the Public Interest



## Reforming the Crown Prosecution Service

Karen Sosa



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## About the Author

**Karen Sosa** joined Policy Exchange's Crime and Justice Unit as a research intern in February 2011 and became a Research Fellow in December 2011. Most recently, she authored the Policy Exchange publication, *Proceed with Caution: Use of Out-of-Court Disposals in England and Wales* (2012).

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# Executive Summary

## Overview

- The Crown Prosecution Service (CPS) is responsible for the vast majority of criminal prosecutions in England and Wales and is therefore a key player in the criminal justice system.
- Despite the importance of its role, the CPS is often overlooked in policy discussions and debate about the criminal justice system, overshadowed by public and media interest in the police.
- Systemic inquiries into the CPS have been rare. The last Parliamentary report was in 2009, and the most extensive independent inquiry – the Glidewell Review – was in 1998. Infrequent inspections at a local level – whilst valuable – have not led to fundamental reforms of the CPS.
- The growing pains of the CPS in its first decade and a half have largely been overcome, with generally improved relationships with the police and a greater level of respect from the judiciary for the CPS's role. Leadership quality has improved and performance standards have been raised.
- There is now an urgent need for the CPS to become more professional, more accountable, and more visible. Part of the answer is to give the CPS with more responsibility – not less – and to speed its development towards being a more public facing, professional prosecution service.
- The CPS must be prepared to become much more publicly answerable for its decisions – especially around charging and whether or not to prosecute – and more comfortable with the exposure that a professional prosecution agency attracts.
- A more professionalised service would involve the CPS earlier in investigations and would embed a culture of case ownership from preparation to presentation so that prosecutors who had invested in a case could be the advocate for that case in court and could be held more accountable for the outcome.
- The CPS should take on a greater advocacy role, and it should aspire to attract and retain a higher calibre of legal recruit. Only by assuming more in-house advocacy and seeing success at trial as a key measure of success will the CPS mature to become a professional prosecution agency.
- This report concludes that there is still a considerable way to go before the CPS will be a robust and effective prosecution service that inspires public confidence in a clearly defined role. Without reforms along these lines, the CPS is destined to remain misunderstood and overlooked.

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## The CPS Today

- The CPS enjoyed a decade of above-inflation spending increases after 2001 and is now adjusting to the reality of reduced budgets:
  - The CPS's net operating cost doubled from £332,760,000 in 2000/01 to a peak of £671,702,000 in 2009/10.
  - In real terms, the CPS's net operating cost increased from £432,279,353 in 2000/01 to a peak of £709,682,798 in 2008/09. The current spending reduction of 25% over four years (or about 6% reduction each year) follows an eight-year spending increase of 64%, or 8% in real terms each year.
  - CPS funding amounts to more than half a billion pounds annually and at the same time, the CPS is handling only two-thirds of the caseload it handled in 2002/03. CPS expenditure compared to its caseload remains higher than it was at any time prior to 2008/09.
  - Due to funding pressures, the CPS has recently undergone a major organisational restructure, and reverted to 13 groups – moving away from the 42 local areas that had previously been co-terminous with local police areas.
- The workload of the CPS has also evolved:
  - In 2011/12, the CPS prosecuted 894,791 defendants: 787,547 in Magistrates' Court and 107,244 in Crown Court. This represents a 6.6% drop over the previous year, and a 35% drop since 2003/04, when the CPS prosecuted its largest caseload.
  - A larger share of all prosecutions now take place in the Crown Court: in 2001/02, Crown Court work constituted 6.6% of the CPS caseload. In 2011/12, 12% of the CPS's caseload was prosecuted in the Crown Court.
  - The CPS now has a reduced workload, largely as a result of a decline in Magistrates' Court work driven by the rise of out-of-court disposals and guilty pleas over this decade.

## Performance of the CPS

- In 2011/12, the CPS achieved a headline 'conviction rate' (including convictions after trial as well as guilty pleas) of 87% in the Magistrates' Court, and 81% in the Crown Court. The trend has shown an increase over the decade, especially after 2004/05.
- The apparent rise in the official conviction rate of the CPS since 2004/05 coincides with a significant rise in guilty pleas, which almost entirely explains the apparent improvement in CPS performance.
- As a measure of the performance of the CPS, the official conviction rate gives no real indication of whether the CPS is becoming more adept at winning cases in court, and it is therefore flawed.
- Excluding guilty pleas from conviction rates allows the data to reflect the CPS's performance when its case is actually tested.
  - Excluding guilty pleas, the CPS had successful outcomes in only 60% of its Magistrates' Court cases and in fewer than one-third of its Crown Court cases.



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- When a case actually progresses to trial (excluding guilty pleas and dropped prosecutions), the chance of the CPS obtaining a conviction is about 2 in 3 in the Magistrates' Court and close to even odds in the Crown Court. These statistics demonstrate why it is important to assess CPS performance outside of the cushion provided by the high guilty plea rate.
  - In 2011/12, when the CPS's case was tested at trial, they achieved an overall success rate of just 60.7%.
  - Other CPS performance measures give cause for concern:
    - In 2011, one-third of cracked trials in England and Wales were the result of the prosecution offering no evidence. Nearly one-third of ineffective trials (30%) were the result of the prosecution not being ready or a prosecution witness being absent.
    - Statistics for 2012 indicate that, 16% of ineffective trials in Magistrates' Court are due to a prosecution witness not appearing, and this rises to 21% of ineffective trials in the Crown Court. Over 6,000 cases had to be relisted because the CPS could not get its witnesses to attend court.
    - In Crown Court, over one-third of ineffective cases in 2011 were due to the prosecution not being ready, and this has remained flat from 2006 (38%) through 2011 (38%).
    - CPS responsibility for cracked trials has remained steady in both the Magistrates' Court, between 35% and 36%, and the Crown Court, between 16% and 18%.
  - The CPS dropped, or took no further action in 176,097 prosecutions in 2011/12 – including 87,992 pre-charge decisions and 88,105 post-charge prosecutions, or 24% and 10% of the respective caseload at those stages of prosecution. Post-charge, 12% of Crown Court prosecutions were dropped and 10% of Magistrates' Court prosecutions were dropped.
    - In 2011/12, a total of 35,494 prosecutions were unsuccessful because the CPS offered no evidence. Nearly one in ten (10,543) Crown Court cases resulted in no evidence offered. This is an increase both in raw numbers and in the rate since 2009, when 8.7% of Crown Court prosecutions (9,047) resulted in no evidence offered.
    - In Crown Court, as many as 1 in 8 offences against the person in 2011 came to nothing because the CPS offered no evidence.
    - In 2011/12, the CPS was “unable to proceed” in nearly 20,000 prosecutions that had sufficient evidence to proceed and were in the public interest.
  - The costs associated with prosecution failings are significant, In 2011/12, dropped prosecutions incurred a cost of £25.1m, or 4.3% of the CPS's net operating cost.
  - Together, the CPS responsibility for cracked and ineffective trials and dropped prosecutions represents a tremendous waste of court, police, and prosecution resources.
  - Taking account of 2011/12 prosecution outcomes, a hypothetical scenario shows that of 100 robbery offenders arrested, it is likely that 25 will not be charged, and the CPS will drop a further 9 cases. 55 will plead guilty and 5 will be acquitted, leaving just 6 who would be successfully convicted by the CPS following a contested trial. This scenario demonstrates the high attrition
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rate in the criminal justice system and the extent to which many cases drop out of the process at an early stage because of CPS decisions.

## The Role of the CPS

- Overall, CPS staff appear to have a clear understanding of their duty to weigh the evidence and decide appropriate charges, and then to ensure sufficient case preparation to deliver success at trial. However, the self-conception of the CPS's role by some senior figures within the CPS does not properly accord with the purpose of prosecution.
- Some senior prosecutors and public statements from the CPS avow their overriding commitment to “justice” as their primary responsibility, when in fact it is the purpose of prosecution to see the defence as adversaries and to secure a conviction, while leaving the determination of justice to the court that hears the evidence.
- The relationship between the CPS and the police is a frequent source of friction in the criminal justice system. Many officers joined the ranks during the first 10–15 years of the CPS's existence; years during which the CPS was characterized by endemic failure and internal struggle. While the CPS has improved significantly since then, police attitudes to the CPS have been slow to respond.
- A survey of Chief Crown Prosecutors by Policy Exchange found that, of the 11 respondents, seven identified the quality of police files/investigation as one of three biggest challenges routinely encountered by the CPS.
- There is a strong undercurrent of mistrust and blame-assigning between police and the CPS. Sometimes the tension spills onto the public stage, with police blaming the CPS for dropped prosecutions.
- One Chief Crown Prosecutor observed, “The problem [with public understanding of the CPS] is that those who explain CPS decisions to the victims and witnesses are the police, who do not necessarily support our reasons for not pursuing cases. A police officer is hardly likely to blame his/her own organisation for the quality of investigation, for example.” Similarly, the CPS will sometimes blame the police for poor investigations leading to dropped prosecutions.
- All parts of the CPS have much to learn from the conditions and practices that allow the Complex Casework Units and Casework Groups to enjoy cooperative relationships with the police.
- Public awareness of the CPS is not as high as it should be for a national prosecution agency in its fourth decade of existence.
  - The CPS receives half the exposure – measured in annual media mentions – than the largest police force, and annual mentions since 2002/03 suggest that media coverage of the CPS has declined over the last decade.
  - In a YouGov poll for Policy Exchange, when asked which agency is responsible for securing convictions at trial, a third of the public either did

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not know or thought it was the responsibility of someone other than the CPS (10% thought the police).

## Decisions to Prosecute

- A decision to drop cases either occurs on evidential grounds (when there is not felt to be enough evidence to provide a “realistic prospect of conviction”), or more rarely, on public interest grounds, either before or after a charge is laid.
  - In total in 2011/12, 83,996 cases were dropped at the pre-charge stage and 43,990 post-charge on evidential grounds.
  - Added to this should be the number of cases discontinued for public interest reasons. In 2011/12, 3,996 cases were dropped at the pre-charge stage, and 20,533 at the post-charge stage on public interest grounds, despite there being in the “vast majority of cases” sufficient evidence to take the case to court. This means that there were 152,515 cases where victims of crime do not see their case taken to court because the CPS decides not to prosecute.
  - Of the nearly 367,067 cases given to the CPS for pre-charge decisions, approximately one quarter (24%) resulted in No Further Action (NFA) in 2011/12.
  - Robbery is the most common offence to be dropped on evidential grounds – with over 1 in 10 robbery cases being dropped because the CPS was not confident enough of a conviction. Public order offences were most frequently dropped on public interest grounds (4.2%), closely followed by criminal damage offences (3.9%).
  - Regional variations also suggest that these factors are at play to a larger extent in some areas than in others. For instance, Merseyside saw no further action in 36% of its pre-charge decisions, compared with Dyfed Powys, where only 15% of pre-charge decisions resulted in no further action.
- For the CPS to decide that one in four of the cases presented to them by the police ought not to be proceeded with begs serious questions. Either it indicates continuing problems over the quality of police case file preparation, or the CPS – being too “risk averse” – is setting the bar at a level that means that cases that should be taken forward are being screened out unnecessarily, or more likely, a result of both of these factors.
- A large proportion of the criticism faced by the CPS arises from decisions not to prosecute, and this is an especially strong reason for police dissatisfaction with the CPS. Tim Godwin, then Acting Deputy Commissioner, Metropolitan Police, described charging as “the biggest issue between the two agencies.”
- Although police have recovered some charging powers for lower level offenses, statutory charging remains a wedge between police and the CPS. Police Federation vice-chairman Simon Reed has said, “We know there are people who are not being prosecuted when they could be. It leads to a lot of angst for the police.”
- In 2011/12, 41% of cases dropped on public interest grounds are dropped for reasons relating to the likely severity of the sentence, which together include a number of grounds that are essentially proxies for cost – in that the expense of a prosecution would not be warranted by the likely sentence that any conviction would result in.

- The Draft Code for Crown Prosecutors issued for consultation in 2012 explicitly states that “cost is a relevant factor when making an overall assessment of the public interest.”
- When asked which factors they felt were “acceptable grounds” to discontinue a prosecution, two thirds of the public (64%) told YouGov that no reason should ever justify a case being dropped if the evidence for a charge was sufficient.

**Table ES 1: Public Opinion on Grounds for Public Interest Decisions**

<b>Q: On occasion, even if a suspect has been arrested for a crime and there is enough evidence to convict them in court, the Crown Prosecution Service may decide to drop the case on grounds of public interest. Which of the following reasons, if any, do you think are acceptable grounds for dropping a criminal case? Please tick ALL that apply:</b>	<b>% Respondents in favour</b>
Dropping a case because the likely sentence if found guilty is too low to warrant it	14%
Dropping a case because the suspect is only young	8%
Dropping a case because the loss or harm to the victim was only minor	7%
Dropping a case because the suspect has no prior criminal record	7%
Dropping a case because the crime took place a long time ago	4%
Dropping a case for some other reason	7%
None of the above reasons should ever justify a case being dropped	64%
Don't know	9%

- The results of this June 2012 YouGov poll for Policy Exchange suggest that a more representative public interest test will have no place for many of the considerations the current Code permits.
- In the case of the Fortnum & Mason trespass and criminal damage during the student protests in London in March 2011, the CPS explanation for not prosecuting 109 of the 139 suspects cited reasons relating to youth (and implied cost), however prosecutors told Policy Exchange that a key factor was the desire not to ‘criminalise’ the young people involved. It is far from clear that this justification would accord with the letter of the public interest test, let alone be acceptable to the public in London.
- A good public interest test should be narrow in scope and should exist only to avoid the rare prosecution that runs counter to the spirit of the law or from which the public derives no benefit.

## Professional Prosecution

- Currently, the CPS instructs independent barristers and solicitors for both Crown Court and Magistrates’ Court cases. In 2011/12, the CPS spent around

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a fifth of its whole budget (a total of £106,622,400) on outsourced advocacy work, £21,422,780 less than in 2010/11. This represents approximately 18% of the CPS's net expenditure and 20% of all non-administrative cost. Every year from 2008/09 to 2011/12, external advocacy costs have accounted for 20% of the CPS's annual net expenditure.

- Some progress has been made in moving advocacy in-house. For example, in 2011/12 just 8.8% of half-day Magistrates' Court sessions were handled by agents, compared to 30.1% ten years ago. The rate of in-house advocacy varies by area, with some Chief Crown Prosecutors clearly prioritising advocacy more than others.
- Many of the CPS's more pressing problems can in some way be addressed with a service-wide shift in focus to advocacy.
  - The quality of CPS advocates would improve as they gained greater advocacy experience. In-house advocacy would also improve case ownership, as files would not be passed over at the point of trial to an advocate who had never seen the case before, and this would also improve relations with and the care provided for victims and witnesses, who would have a single lead person managing their case from charge until a verdict at trial.
  - There is a strong strategic advantage for the CPS ending its 'dependence' on the independent Bar and doing more of its own advocacy. The shift would help to attract and retain a better quality of legal graduate and ensure that they had a full career in prosecution, allowing recruits to rise to become accomplished advocates in their own right, working exclusively for the Crown.
  - A shift to 100% in-house advocacy cannot and should not happen overnight. However, as the CPS steadily places increasing emphasis on the advocacy role, the benefits described above will slowly accrue, allowing them to attract and retain a higher calibre of advocate.
- The nature of civil service employment terms for CPS staff is a barrier to creating a more professional and skilled agency. The outdated pay and conditions of CPS staff based on time served and inflexible terms, prevents the CPS from attracting the best graduates and makes it more arduous to remove underperforming staff.

## Accountability of the CPS

- The Crown Prosecution Service must at all times retain its independence from political direction. However, the CPS is a major public service that spends hundreds of millions of pounds each year, and it cannot be immune from democratic oversight and accountability for its performance.
- At a national level, CPS staff are held to account internally by the bureaucratic oversight of their local Chief Crown Prosecutors and ultimately the DPP. The DPP is overseen by the indirect ministerial accountability provided by the 'superintendence' of the Attorney General.
- To command public support and to be seen as legitimate, it is critical that the CPS considers and satisfies the needs of the public they represent. Stronger accountability of the CPS must be achieved by:
  - increased public accountability through community involvement, media visibility and formalised relations with elected Police & Crime Commissioners;

- increased local accountability through co-terminous police and CPS areas; and
- increased internal accountability for the CPS to the Director of Public Prosecutions, Attorney General and ultimately to Parliament.
- As a public prosecution service, the CPS will be expected to cooperate with the public priorities expressed through Police & Crime Commissioners, the only governing authority in the local criminal justice system with a democratic mandate.
- The new role of PCC will require a new working relationship with the CPS, whilst providing a new opportunity to improve collaboration between the CPS and local police forces.
- Presently no role is envisaged for PCCs to have a role in the selection of local CPS leadership, but it would be beneficial to formalise a limited process for PCC input into CCP appointments.
- Involving the local PCC in these decisions will increase democratic accountability of the CPS and will provide a degree of local input over this choice, whilst leaving the decision in the hands of the DPP, to whom the Chief Crown Prosecutor will ultimately be answerable.
- Democratic accountability for the prosecution service is only at the level of the Attorney General; the DPP is an appointed role with no established Parliamentary oversight of that process, and no fixed term limit.
- Limited scope exists for the Attorney General to control the operation of the Crown Prosecution Service. Consequently, the CPS's accountability to Parliament and the public is tenuous at best, and by extension, the DPP is, in fact, one of the most powerful and least accountable governing officials in public life.
- Accountability for Chief Crown Prosecutors is achieved primarily through quarterly Area performance reviews and biannual reviews of individual CCP performance. Surveillance and written reprimands only provide limited accountability, however. No CCP has ever been removed from the CPS for poor performance in 26 years. There must be incentives for strong performance and consequences for CCPs who do not meet expectations and cannot deliver improvements to their local service.
- Chief Crown Prosecutors are the local leadership of the CPS, and they should be as familiar to a local area as a Chief Constable. However, Chief Crown Prosecutors are often unseen aside from when they must respond to criticism or explain an unpopular decision.
- Local accountability of the CPS has been weakened – and the potential leadership tensions between elected PCCs and Chief Crown Prosecutors further complicated by – the fact that the CPS Groups no longer align with police force boundaries. While the old, 42-area boundaries are still in effect to some extent, the primary level of CPS authority is at the new, larger group level. Thus, one Chief Crown Prosecutor may be collaborating with as many as five elected PCCs, all with different priorities.

## Recommendations

### Improved Performance

- The CPS's headline performance metric for convictions is flawed, and new sub-metric should be developed. The new measure should clearly show the conviction rate achieved by the CPS excluding guilty pleas.
- More detailed conviction data should be made available in the new format, to show success achieved at trial for key offences. The CPS should also publish in a clear format the information they already hold on dropped prosecutions by reason and offence category, and cost spent on dropped prosecutions should be included in CPS annual performance statistics.
- Given the resources consumed by cracked and ineffective trials, the proportion of cracked and ineffective trials attributable to prosecution failings must become a key performance measure of the CPS.

### Stronger Public Focus

- The DPP and Attorney General should together re-evaluate the purpose of the public interest test. The test should be more concerned with avoiding prosecutions that contradict the spirit of the law than with avoiding minor prosecutions.
- The police should have a greater say in determining the public interest with respect to decisions not to prosecute. Where the police cannot agree that a prosecution should be dropped, they should have the opportunity to present their opinion before a judge or panel of magistrates, who can instruct the CPS to reconsider the decision. This process should be less formal than traditional judicial review, and the bar to review of prosecutorial decisions in these cases should be low.
- The Director of Public Prosecutions should establish guidelines as to the overall use of the public interest test, in addition to the current guidelines for individual cases. This will prevent numerous "appropriate" decisions from collectively amounting to an inappropriate practice (e.g. never prosecuting a particular offence).
- The Director of Public Prosecutions should revisit the factors tending against prosecution in the public interest to shift the focus away from the likely outcome at trial or the comparative value of the prosecution.
- Charging decisions should be regularly evaluated before cases proceed to trial to ensure that undercharging is not permitted. The CPS should ensure open communication with police officers who feel a particular case has been undercharged.
- The CPS should reaffirm its commitment to the prosecution role rather than a desire to maintain impartial observer status. One way to affect this is to calculate the conviction rates of individual prosecutors and to use this as a key performance metric for staff appraisal.
- Local CPS and police leadership should seek to increase the opportunities for interaction between lower level staff in both agencies. Joint training sessions can achieve this while also allowing each service to explain their expectations and needs.
- CPS and police leadership should continue to explore the benefits of co-location and should identify geographic areas where this might be arranged.

- The CPS needs to provide public relations training for all leadership personnel. This training should cover how to handle unsuccessful outcomes or dropped prosecutions as well as how to promote the agency's success.
- Chief Crown Prosecutors should be encouraged to maximize their public visibility through a range of community engagement activities, and their success should be reviewed by the DPP.
- The CPS should become an advocate for televising court proceedings, and they should guide CPS staff in tackling the challenges presented by increased media coverage of trials.

### Greater Professionalism

- The Director of Public Prosecutions should recommit to a push toward increased in-house advocacy, even if this must be done at the expense of the CPS's relationship with the Bar. The CPS should establish new goals of 100% of Magistrates' Court advocacy to be performed by in-house advocates within 5 years and 50% of Crown Court advocacy to be performed by in-house advocates within 10 years.
- Recruitment procedures should ensure that all new hires are talented advocates, able to succeed in court against the self-employed Bar. The CPS should promote its advocacy plans in recruitment materials so that talented new advocates will consider applying for a position at the CPS. In addition, all Crown Advocates should be given the opportunity to voluntarily move to a Crown Prosecutor role in light of the increased expectations of Crown Advocates.
- The Attorney General should instigate an independent review of the remuneration and terms and conditions of CPS staff to see what changes may be needed to support a professionalisation agenda. All lawyer employees should be given the opportunity to take Voluntary Early Leave options over the course of the next five years in light of increased advocacy expectations.
- All Crown Advocates should undergo an annual Advocacy Assessment. Those receiving the lowest score should be prohibited from advocating cases in any court until their performance improves.
- Summary motoring offences should routinely be taken to court by police forces. Only in exceptional cases should the CPS be responsible for a summary motoring prosecution.
- The CPS should allow police to prosecute the majority of cases for which the police have prosecutorial powers. Only in special circumstances should the CPS be responsible for these cases.

“The CPS should establish new goals of 100% of Magistrates' Court advocacy to be performed by in-house advocates within 5 years and 50% of Crown Court advocacy to be performed by in-house advocates within 10 years”

### Enhanced Accountability

- After the Attorney-General has nominated a candidate for Director of Public Prosecutions, that candidate should appear before the Justice Select Committee



for approval before he or she is appointed. The Justice Select Committee should also be permitted to invite all short-listed candidates for the role of DPP to a public hearing.

- Chief Crown Prosecutors should have a very public-facing role in their communities. The DPP should monitor public engagement by CCPs, and failure to be sufficiently active in the community should be taken as a mark of poor performance.
- CCPs should be pointed towards opportunities for public engagement, and they should receive continued media and public relations training to ensure they perform this role effectively. CCPs who have successfully embraced their responsibilities as a public figure should be incentivized to share their knowledge and experience with other CCPs.
- All CPS leadership should be actively considering how to cooperate with Police and Crime Commissioners in order to improve collaboration with other criminal justice agencies.
- PCCs should be included in decisions to appoint or remove Chief Crown Prosecutors and invited to attend selection interviews for the role. Performance evaluations for Chief Crown Prosecutors should consider how well he or she has engaged with local PCCs.
- Resurrecting the old CPS regions may be a flawed strategy, and Chief Crown Prosecutors and the DPP should be extremely mindful of the value of permitting the smaller, 42 CPS Areas to set priorities and engage with law enforcement.

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# 1

## Overview and History of the CPS

### The Prosecution Function in England and Wales

England and Wales do not have a long tradition of public prosecution for criminal offences. Before the creation of police forces in 1829, individuals were required to hire their own lawyers to bring criminal cases to court, just as they must do today in civil disputes. Once police forces came into being, they began to take responsibility for the prosecution of criminal offences, hiring independent barristers and solicitors to proceed with their cases in court. However, the majority of prosecutions continued to be undertaken by private citizens.

The Prosecution of Offences Act 1879 established the first public prosecutor office in England, that of the Director of Public Prosecutions (DPP). The DPP's primary function was to decide whether or not to prosecute in a handful of particularly challenging cases. Once that decision was made, prosecutions continued to be undertaken by police forces or the Treasury Solicitor, not the DPP. The roles of Treasury Solicitor and DPP were briefly combined in 1884, before being separated again in 1908.

In 1962, a Royal Commission on the Police reported that it was not suitable for investigators to be responsible for the prosecution of their own cases.<sup>1</sup> The Commission recommended that police forces establish independent prosecution units in order to separate the prosecution role from the investigation role. Many forces did create their own prosecuting solicitors officers, however not all forces followed the Commission's advice.<sup>2</sup> Even under this new arrangement, police remained under no obligation to heed the legal advice of their solicitors.

In February 1978, a Royal Commission on Criminal Procedure, led by Sir Cyril Phillips, was established to evaluate the procedure for prosecuting criminal cases. On publication in 1981, its final report recommended the creation of a fully independent, national prosecution authority to handle the prosecution of all criminal offences in England & Wales.<sup>3</sup> "It is a central feature of our proposals," wrote the Commission, "that there should be a division of functions between the police and prosecutor."<sup>4</sup>

The report stated that the police who investigated a case could not be relied upon to make unbiased decisions as to whether to prosecute. As a result, the police were bringing too many cases to court with insufficient evidence to secure a prosecution. Furthermore, there was no consistent standard across police forces for deciding when to prosecute.

Four years later, the Prosecution of Offences Act 1985 created the Crown Prosecution Service (CPS) – essentially a civil service agency – which launched

1 Royal Commission on the Police, Final Report, Cmnd 1728, 1962.

2 As late as 1980, approximately one-third of police forces continued to rely on external solicitors for prosecutions. (Roshier, R. and H. Teff, Law and Society in England, 1980). At the time of the introduction of the Prosecution of Offences Act in 1985, six police forces still did not have a prosecuting solicitors' office. (HC Deb 16 Apr 1985 vol 77).

3 Royal Commission on Criminal Procedure (RCCP), Report (Cmnd 8092), 1981.

4 Ibid.

in 1986. The existing Director of Public Prosecutions became head of the CPS, and lawyers working in the various prosecuting solicitors’ offices around the country were largely recruited to join the new organisation.

### History of the Crown Prosecution Service, 1986–2012

In 1986, the CPS began operating under its first Director of Public Prosecutions, Sir Thomas Heatherington QC. It was designed to be a national organisation with local discretion and with all services provided at the local level. It was originally arranged into 31 areas, each area led by its own Chief Crown Prosecutor (CCP), appointed by the DPP. The Chief Crown Prosecutor’s job was to “supervise the operation of the Service in his area”.<sup>5</sup> The DPP was required to make an annual report to the Attorney General on the operations of the CPS. The Attorney General would then present these reports to Parliament.

**Table 1.1: Timeline of CPS development**

1985	1986	1993	1998	1998-99	2003	2006	2011
Prosecution of Offences Act creates CPS	CPS becomes operational	Reorganised from 31 areas to 13 areas	Glidewell Review of CPS published	Reorganised from 13 areas to 42 areas	Criminal Justice Act 2003 gives CPS charging authority	CPS Direct introduced	Reorganised from 42 areas to 13 areas

#### Growing Pains

The organisation’s first year was described by the DPP as one in which “our prevailing style could best be described as crisis management and our early problems received some media coverage which was by no means always well-deserved or well-balanced.”<sup>6</sup> The “crisis management” did not stop in 1987, as the CPS struggled for over a decade to establish its identity and its authority. There was significant friction with police forces who keenly felt the loss of their prosecution powers and who felt that the new arrangement stopped them from pursuing prosecutions that ought to be pursued. In addition, because the CPS grew out of the need for independence from the police, the division between the CPS and police became an overarching characteristic of their relationship, significantly hampering cooperation between the two organisations. Further challenges were posed by the fact that police still had the responsibility for charging decisions, which then had to be acted on, or not, by the CPS.

Through the 1990s, the CPS struggled with low conviction rates, high cracked and ineffective trial rates, and a poor track record of public visibility. During this time, the CPS reorganised from 31 areas down to 13, a centralisation move that made working relationships with local police forces more difficult. During this time, the Chairman of the Metropolitan Police Federation referred to the CPS as the “Criminal Protection Agency”<sup>7</sup> and *The Lawyer* magazine described it as “An organisation so manifestly beset by bureaucracy and demoralisation.”<sup>8</sup> Dame Barbara Mills, the DPP of the CPS during these troubled years took early retirement in 1998 as a result of her failure to properly direct the prosecution service.

<sup>5</sup> Prosecution of Offences Act 1985, Sec. 1(1)(b).

<sup>6</sup> Crown Prosecution Service, Annual Report 1986-87.

<sup>7</sup> ‘Obituary: Dame Barbara Mills’, *The Telegraph*, 29 May 2011.

<sup>8</sup> ‘Counting the cost of Mills’ free rein at the CPS’, *The Lawyer*, 6 September 1998.

### Box 1.1: Directors of Public Prosecutions since 1986

Since 1986, the CPS has been led by six different Directors. None has come from within the CPS – which is remarkable for an organisation that has been in existence for over a quarter of a century. The DPPs who have been appointed from outside the CPS have brought to the post a variety of criminal law backgrounds, but all have been members of the Bar:

- **Sir Thomas Hetherington QC** (1977-1987): First head of CPS; life-long government attorney; appointed from Treasury Solicitor’s Office.
- **Sir Allan Green QC** (1987-1992) Specialised in criminal prosecutions and served as a recorder.
- **Dame Barbara Mills DBE QC** (1992-1998); Barrister specialising in criminal prosecution; served as Director of Serious Fraud Office, 1990-92.
- **Sir David Calvert-Smith QC** (1998-2003): Chairman of Criminal Bar Assoc. when appointed; prosecuted cases in private practise.
- **Sir Ken Macdonald QC** (2003-2008): Barrister specialising largely in defence and human rights law. Co-founder of Matrix Chambers.
- **Keir Starmer QC** (2008-Present): Primarily defence counsel specialising in human rights law.

The failures of the CPS in its first ten years led to a formal review of the organisation. In 1998, Sir Ian Glidewell, a former Lord Justice of Appeal, published his Review of the CPS, in which he offered three primary recommendations for improving the functioning of this nascent agency.<sup>9</sup> First, he argued that the CPS was too encumbered by low-level cases and that it needed to focus more of its resources on higher level offences. Second, he identified the need for the CPS and police to work cooperatively rather than against one another. Finally, the Glidewell Review criticised the CPS’s lack of sufficient electronic case management systems. Some of the strategic recommendations made in the Glidewell Review were followed, but some remain valid and are as yet unrealised.

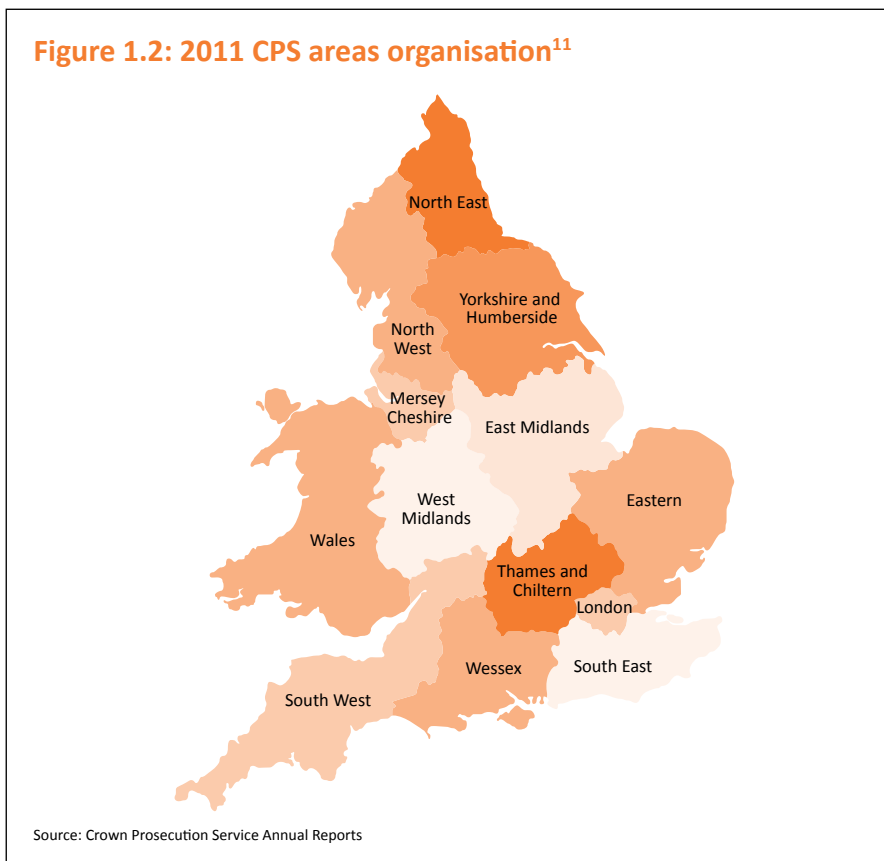
### Structural Reorganisations

Following the Glidewell Review, the CPS underwent its second reorganisation in five years, this time from 13 areas to 42 areas, so that its geographic organisation was now fully congruous with the 42 police areas. This change was made, and justified publicly by the CPS itself, “to create a service much more locally based and therefore much better structured to cooperate with the police in ensuring an effective prosecution system.”<sup>10</sup> From 1999 until 2011, the CPS was organised in alignment with police force areas, meaning there were 42 CPS Areas with 42 Chief Crown Prosecutors. The co-terminosity was claimed to have improved joint-working and made the criminal justice process more speedy and efficient, building stronger local working relationships and staff connections. However, in April 2011, following the 2010 Comprehensive Spending Review and largely as a means of absorbing significant spending reductions of 25% over four years, the CPS reorganised itself a third time, deciding to reconsolidate back to 13 areas.

<sup>9</sup> Rt Hon Sir Iain Glidewell, *The Review of the Crown Prosecution Service: A Report*, June 1998, Cm 3960.

<sup>10</sup> Crown Prosecution Service Press Release, 21 May 1997.

**Figure 1.2: 2011 CPS areas organisation<sup>11</sup>**



This decision was said to promote resource pooling and economies of scale, and no mention was made of the earlier benefits that the CPS previously claimed from a localised prosecution structure aligned with local police areas. The CPS now operates out of 13 Areas, with ‘CPS Direct’ (a 24-hour telephone service to provide charging advice to police officers outside of ordinary working hours) considered a 14th ‘virtual’ area, with each area encompassing between two and five police force areas.

### New Powers

Beginning in 2003, the CPS undertook a “statutory charging” scheme, whereby they, rather than the police, would make the charging decisions in all but the most minor cases.<sup>12</sup> The CPS claimed the scheme allowed them to ensure the correct charge was filed from the beginning, decreasing the rate of unsuccessful outcomes. Police, however, claimed that CPS charging decisions always erred on the side of caution, choosing the charge on which it would be easiest to obtain a conviction and boost conviction rates. In 2006, statutory charging was installed nationwide. However, it is not clear that granting charging authority to the CPS led to improvement in the quality of charging decisions. A November 2008 study by the CPS Inspectorate into statutory charging found that the move coincided with improvements in many prosecution metrics, but the extent to which this improvement was due to statutory charging was uncertain.<sup>13</sup> The Inspectorate noted that CPS charging placed greater strain on already ineffective communication and work processes between police and prosecutors.<sup>14</sup>

11 Image from [http://www.cps.gov.uk/your\\_cps/our\\_organisation/the\\_cps\\_areas.html](http://www.cps.gov.uk/your_cps/our_organisation/the_cps_areas.html).

12 Criminal Justice Act 2003.

13 HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, *The Joint Thematic Review of the New Charging Arrangements*, November 2008 (pg. 6).

14 *Id.* at 2.

With an eye to improving and standardising decisions to prosecute, in 2010 the Director of Public Prosecutions, Keir Starmer QC, issued a revised Code for Crown Prosecutors, which sets out the legal test that must be met when making the decision to prosecute. By articulating the test that must be met and the factors that prosecutors should take into consideration when assessing a case, the new Code was an attempt to increase transparency and accountability for prosecution decisions – a process that prior to the introduction of the code had been largely hidden from public view and debate.

### The CPS Today

Like other criminal justice agencies, the CPS is absorbing unprecedented reductions in expenditure over the next few years, although it starts from a strong position – fewer caseloads overall and the advantage of a decade of sustained, above-inflation increases in funding.

#### CPS budget reduction, 2010–2015

In 2010, the Chancellor of the Exchequer issued a Comprehensive Spending Review in response to the growing budget deficit. On average, departmental budgets would be cut by 19% between 2011/12 and 2014/15.<sup>15</sup>

For the CPS, the Comprehensive Spending Review has meant a budget reduction of 25% in real terms by 2014/2015. The Review called for the CPS to “radically reduce its cost base while maintaining and strengthening its capability to protect the public by robust and effective prosecutions.”<sup>16</sup>

The organisation is planning to reduce its budget steadily, by 6.25% each year over the four years. One source of this savings will be Headquarters spending, which the service predicts will, in 2014/15, be 50% what it was in 2008/09.<sup>17</sup> Another significant proportion of the saving will be made through staff reductions.

As a result of the CSR spending reductions announced in October 2010, total staff numbers have reduced in recent years and are expected to fall further, but as an agency, the CPS currently employs over 7,000 employees on civil service contracts of employment. Around a third of these are fully-licensed prosecutors, split between around 2,000 solicitors and 700 barristers. Even accounting for 6% reductions in spend year on year between 2010/11 and 2014/15, annual net expenditure of the CPS remains more than half a billion pounds.<sup>18</sup>

15 ‘Spending Review 2010: Key points at a glance’, BBC News, 21 October 2010.

16 2010 Comprehensive Spending Review 2.75 (p. 56)

17 Crown Prosecution Service, Annual Report 2011-12 (pg. 7).

18 For more detail see Annex A.

# 2

## Performance of the CPS

### Caseload and Operating Cost

The CPS's primary responsibility is the successful prosecution of offenders. While some CPS leaders are unconcerned with conviction rates, successful outcomes are nonetheless valuable as a measure of the performance of the service. Examination of the CPS's performance, particularly its performance at trial, demonstrates a continued need for reform and improvement of the service.

In April 2007, the CPS amended its caseload and outcome counting rules to avoid double counting of cases with multiple charges.<sup>19</sup> In the figures below, data from 2005/06 forward reflects these counting rules. For completeness, the figures provide data for the ten years to 2001/02, but note that, where indicated, this data is not directly comparable with data from 2005/06 onward.

#### Caseload

In 2011/12, the CPS prosecuted 894,791 defendants: 787,547 in Magistrates' Court and 107,244 in Crown Court.<sup>20</sup> This represents a 6.6% drop over the previous year, and a 35% drop since 2003/04, when the CPS prosecuted its largest caseload.<sup>21</sup> The declining caseload is due almost entirely to a steady drop in Magistrates' Court cases that began in 2003/04, partially as a result of the increasing use of out-of-court disposals.<sup>22</sup> While the CPS's Crown Court caseload increased from 2006/07 to 2010/11, it dropped in 2011/12 by 8.3%.<sup>23</sup> In 2002/03, Crown Court work constituted 7% of the CPS caseload.<sup>24</sup> In 2011/12, more than 1 in 10 cases (12% of the CPS's caseload) was prosecuted in the Crown Court.<sup>25</sup>

19 Crown Prosecution Service, Annual Report 2007-08 (pg. 7).

20 Completed prosecution outcomes comprise convictions (guilty pleas, convictions after trial and cases proved in the absence of the defendant) and unsuccessful outcomes (prosecutions dropped by the CPS, discharges, acquittals after trial and administrative finalisations).

21 Crown Prosecution Service Annual Reports.

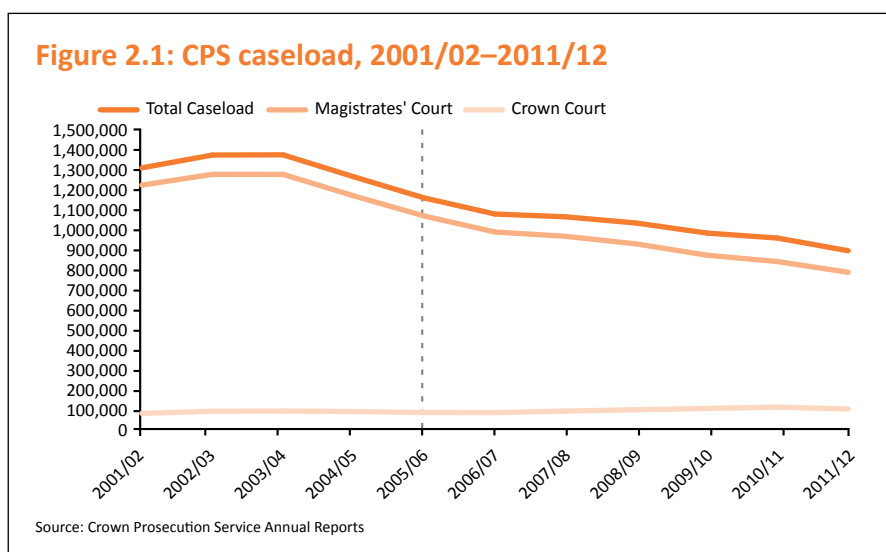
22 See: Policy Exchange, 'Proceed With Caution – Use of Out-of-Court Penalties in England & Wales', 2012.

23 Crown Prosecution Service Annual Reports.

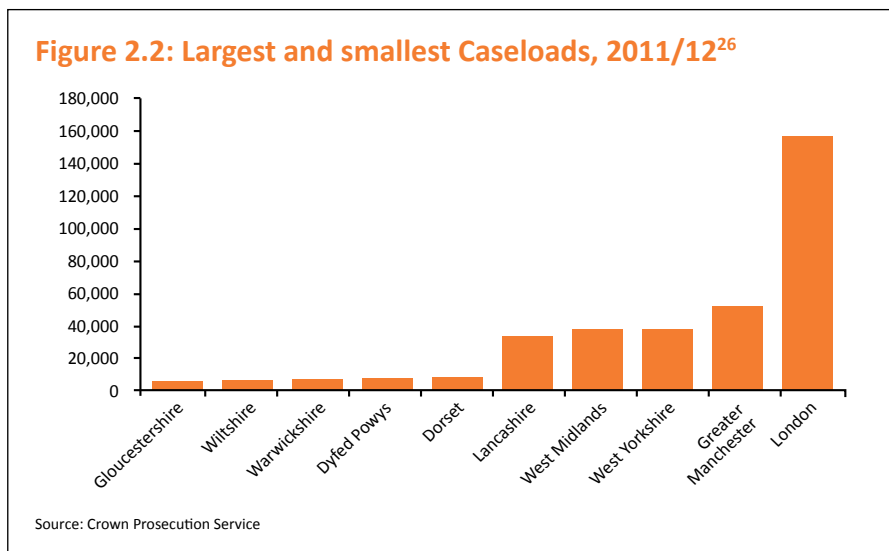
24 Crown Prosecution Service, Annual Report 2002-03.

25 Crown Prosecution Service, Annual Report, 2011-12.

Figure 2.1: CPS caseload, 2001/02–2011/12

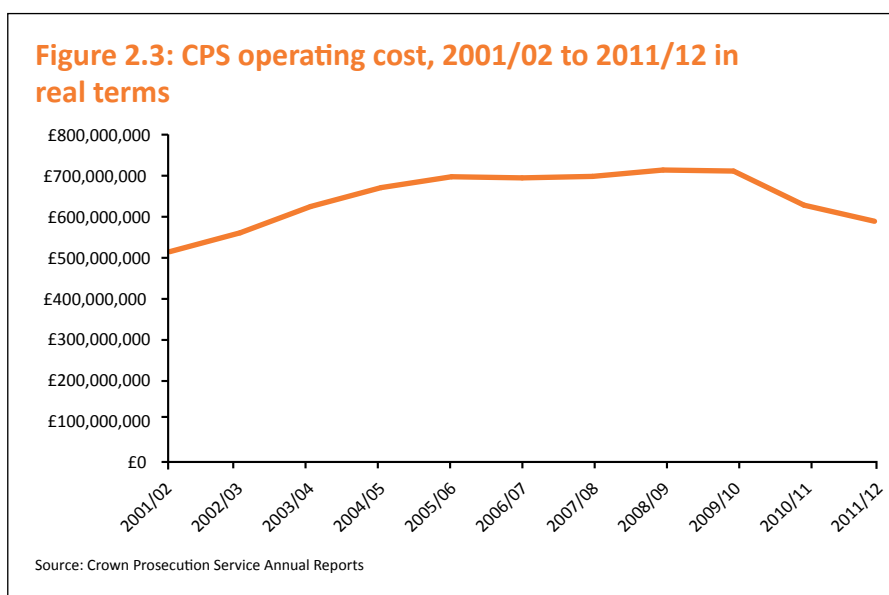


Caseloads vary greatly across CPS areas. In 2011/12, London had by far the largest caseload, with 156,232 completed prosecutions. By comparison, Greater Manchester, the second busiest area, had 51,461 completed prosecutions. Gloucestershire had the smallest caseload, with only 5,459 completed prosecutions. Figure 2.2 demonstrates the variation among areas, comparing the CPS areas with the smallest and largest caseloads in 2011/12.



### Operating Cost

From 2000/01, the CPS’s net operating cost rose steadily each year for nine years, culminating in a peak in 2009/10.<sup>27</sup> In raw numbers, the CPS’s net operating cost doubled in this period, from £332,760,000 in 2000/01 to £671,702,000 in 2009/10.<sup>28</sup> In real terms, the operating cost increased from £517m in 2001/02 to a peak of £709.6m in 2008/09.<sup>29</sup> The budget reduction that began in 2010/11 must therefore be viewed in the context of a decade of rapidly increasing spend.



26 These numbers exclude the small number of cases for which no principal offence category is allocated (less than 4% of the CPS’s 2011/12 caseload).

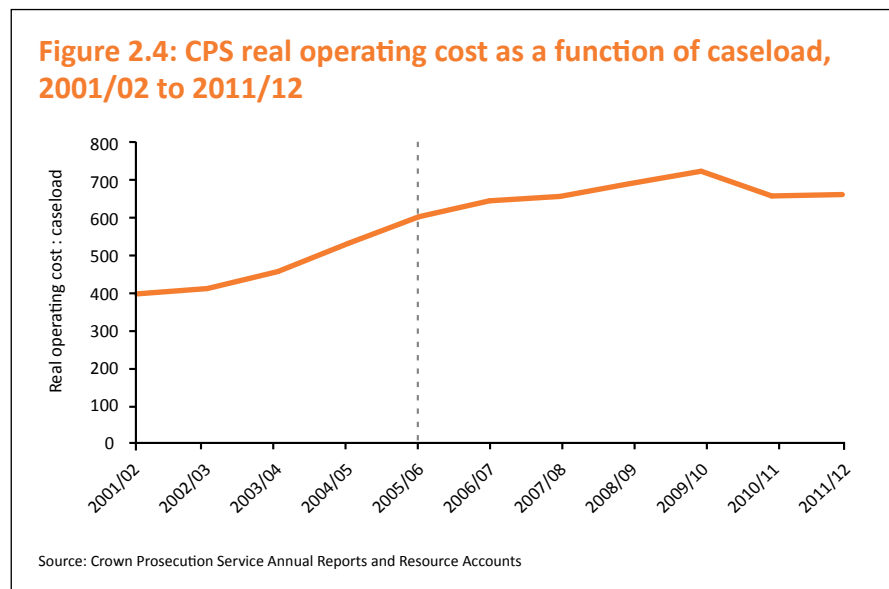
27 Crown Prosecution Service Annual Resource Accounts.

28 Ibid.

29 Ibid., calculated using 27 September 2012 GDP Deflator as at [http://www.hm-treasury.gov.uk/data\\_gdp\\_fig.htm](http://www.hm-treasury.gov.uk/data_gdp_fig.htm).



The current spending reduction of 25% over four years (or about 6% reduction each year) follows an eight-year spending increase of 64%, or 8% in real terms each year. This is an even greater real terms funding increase than the police received over the same period (+28.5%). The 2011/12 cost of £588,767,000 brings the CPS cost back between the 2002/03 and 2003/04 real spend. At the same time, the CPS is handling roughly only 65% of the caseload it handled in 2002/03.



The CPS is handling approximately two-thirds of the caseload it handled in the early 2000s, and it is doing so with around the same operating cost. CPS expenditure compared to its caseload remains higher than it was at any time prior to 2008/09. The service’s performance should reflect this relative increase in expenditure per case.

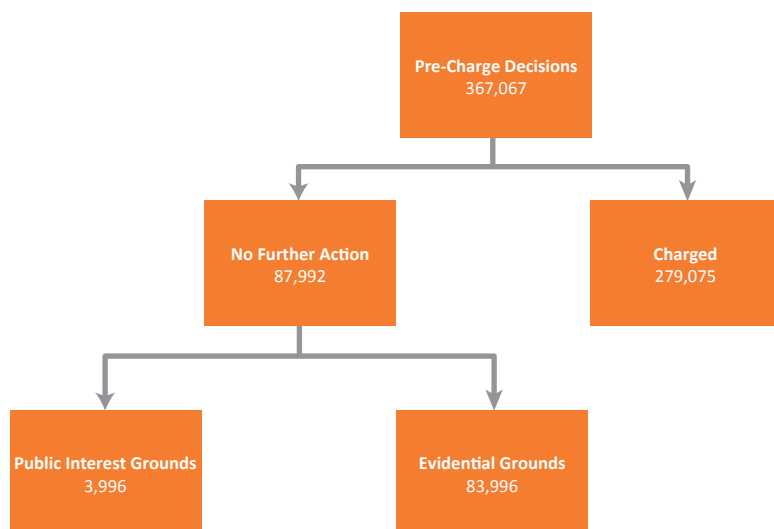
## Prosecution Outcomes

### Pre-Charge Decisions

Some cases come to the CPS before a charge is laid because the police lack the authority to charge that offence or wish to seek charging advice. At this stage, the CPS can advise either that a charge be laid or that “no further action” (NFA) be taken. This decision will be made based on the Code for Crown Prosecutors, which requires prosecutors to assess the quality of the evidence and whether the public interest supports a prosecution. In a small number of cases, the CPS will advise the police to issue an out-of-court disposal.

Figure 2.5 demonstrates cases that the police give to the CPS for a pre-charge decision. Of the nearly 370,000 cases given to the CPS for pre-charge decisions, approximately one quarter (24%) resulted in no further action (NFA) in 2011/12.<sup>30</sup> About 3% of pre-charge decisions recommended an out-of-court disposal.

<sup>30</sup> Figures obtained from a Freedom of Information request to the Crown Prosecution Service.

**Figure 2.5: Pre-charge decisions, 2011/12**

Source: Crown Prosecution Service

### Overall Prosecution Outcomes

Less than a third of CPS prosecutions receive pre-charge decisions. Most cases go directly from the police to the CPS for prosecution. All prosecutions that are no longer ongoing are classified as “completed prosecutions”, which is measured by defendant rather than by charge. One defendant may incur many charges, but his or her case will count as one completed prosecution for the most serious offence with which he or she was charged. Figure 2.6 illustrates the outcomes of CPS prosecutions in 2011/12.

### CPS Prosecution outcome classifications

**Prosecution Dropped:** In the Magistrates’ Court, dropped prosecutions take four forms: cases that are discontinued, cases where the CPS offers no evidence, stayed prosecutions, or withdrawn prosecutions. In CPS Annual Reports, *all* of these dropped prosecutions are recorded as “Discontinuances”. In the Crown Court, dropped prosecutions (called Judge Ordered Acquittals) also come in four forms: prosecutions that are discontinued, indictment stayed, indictment left to lie on file, or prosecutions where the CPS offers no evidence.

In both courts, any of these types of dropped prosecution can be because (1) the prosecution failed the public interest test; (2) the prosecution failed the evidential test; (3) the prosecution passed both of these tests but CPS was nonetheless unable to proceed; or (4) other reasons.

**Warrants:** The prosecution cannot proceed because the defendant does not appear at court and a Bench Warrant is issued for his or her arrest. This category includes cases where a defendant has died or is found unfit to plead. It also includes Magistrates’ Court cases where proceedings are adjourned indefinitely.

**Discharge:** Committal proceedings in Magistrates’ Court where the defendant is discharged.

**Dismissal no case to answer/Judge directed acquittal:** After the prosecution’s case is heard, if the evidence is insufficient to support a conviction, the magistrates or judge can dismiss the case (in Magistrates’ Court) or direct an acquittal (Crown Court) without hearing the defence’s evidence.

**Dismissal after trial/Acquittal after trial:** A verdict of not guilty issued after a trial by magistrates (dismissal) or a jury in Crown Court (acquittal).

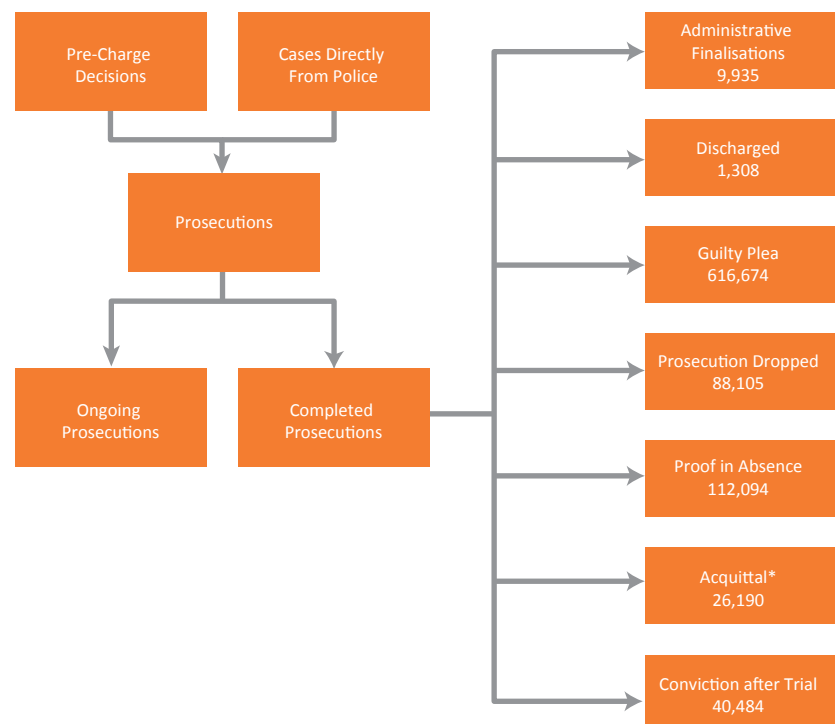
**Proofs in absence:** In minor motoring offences, the CPS may prosecute the defendant without the defendant being present.

**Guilty Plea:** The defendant enters a guilty plea.

**Conviction after trial:** A verdict of guilty issued after trial.

Of the 894,791 completed prosecutions in 2011/12, 88,105 (10%) were dropped.<sup>31</sup> 26,190 (3%) resulted in an acquittal, either at the close of the prosecution’s case or at the end of a trial.<sup>32</sup> By far the most common outcome was a guilty plea; there were 616,674 in 2011/12, or 69% of completed prosecutions.<sup>33</sup> A further 40,484 were convicted after trial (5%), with 112,094 convicted of minor motoring offences when the defendant did not appear at trial (13%).<sup>34</sup>

**Figure 2.6: Illustration of prosecution outcomes, 2011/12**



Source: Crown Prosecution Service

\* Acquittal includes Dismissal After Trial (Magistrates’ Court), Dismissal No Case to Answer (Magistrates’ Court), Judge Directed Acquittal (Crown Court), and Jury Acquittal (Crown Court)

31 Data obtained from the Crown Prosecution Service.

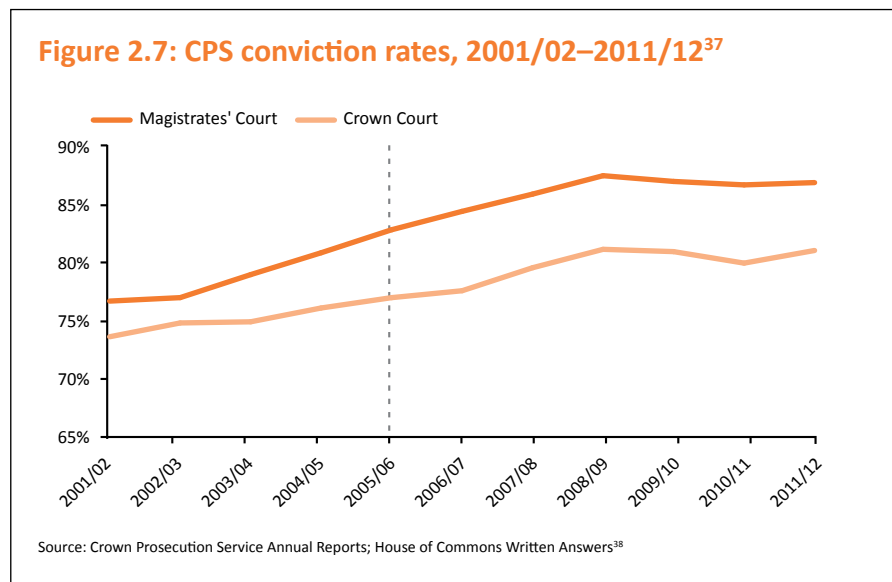
32 Ibid.

33 Ibid.

34 Ibid.

## Convictions

The official CPS conviction rate in Magistrates' Court has risen from 76.4% in 2001/02 to 86.7% in 2011/12.<sup>35</sup> In Crown Court, the reported conviction rate has risen over the same period from 73.3% to 80.8%.<sup>36</sup> However, this rise has not been continuous over the last decade. Conviction rates in both courts peaked in 2008/09 and have fallen in the years since. From 2010/11 to 2011/12, the conviction rates rose slightly.



CPS statistics on convictions includes convictions after trial as well as guilty pleas. In 2011/12, guilty pleas accounted for 68.4% of defendant cases in Magistrates' Court and 72.8% of defendant cases in Crown Court.<sup>39</sup> Thus, CPS conviction rates are heavily impacted by the rate of guilty pleas, which are extremely common and are themselves highly influenced by other factors.

This means that if a defendant chooses to plead guilty, even at a very late stage – for instance at the first hearing or on the first day of trial – the CPS counts that as a conviction, even though a host of external factors may have played a part in that decision to plead guilty. Guilty pleas are not convictions secured as a result of a contested trial where the prosecution had to prove guilt through their own advocacy, the marshalling of witnesses, and presentation of the evidence.

The apparent rise in the official conviction rate of the CPS since 2004/05 coincides with a significant rise in guilty pleas, which almost entirely explains the apparent improvement in CPS performance. For instance, the rate of guilty pleas in both Magistrates' Court and Crown Court jumped significantly following 2004, when the Sentencing Guidelines Council first issued definitive guidance on sentence reductions for guilty pleas. After reaching a low of 61.3% in 2004/05, the overall guilty plea rate reached a peak of 69% in 2008/09.<sup>40</sup> Since then, however, guilty plea rates have held nearly steady or declined in both Magistrates' Court and Crown Court. Only in 2011/12 are the guilty plea rates nearing the peak achieved in 2008/09.

35 Crown Prosecution Service Annual Reports.

36 Ibid.

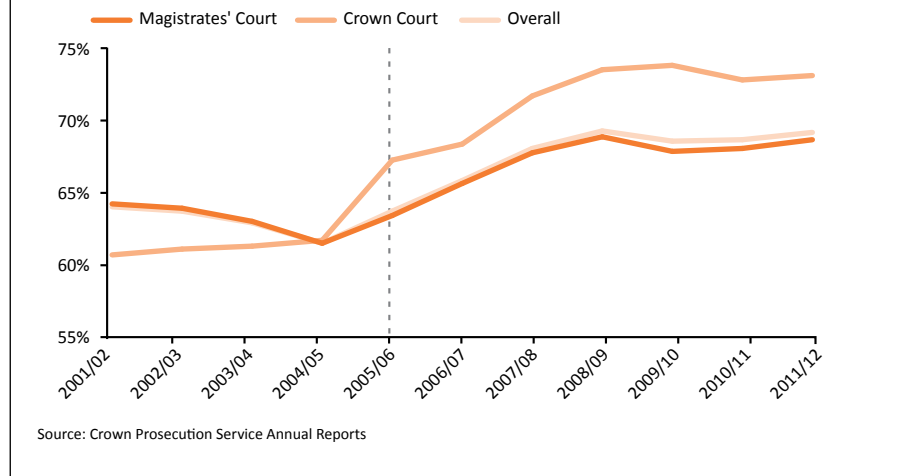
37 Figures follow the 2007 counting rules for all years of Magistrates' Court data, but only from 2005/06 onward for Crown Court data.

38 HC Written Answers, 15 September 2003, cc498-499.

39 See n.23.

40 Crown Prosecution Service Annual Reports.

Figure 2.8: Guilty plea rate, 2001/02–2011/12



Guilty pleas can save resources and spare victims, witnesses, and relatives the trauma of a full trial, and they will always be a feature of an adversarial court system. Guilty pleas are almost always a desirable outcome – and CPS’s work in obtaining them should not be ignored. However, registering such outcomes as a “win” for the CPS gives credit to the prosecution where it is not always due and does not accurately reflect CPS’s ability to obtain convictions in contested cases. In fact, the rise in guilty pleas since 2003/04 has masked a deteriorating performance by the CPS when judged by convictions secured at trial.

As a headline measure of the performance of the CPS, the official conviction rate is therefore flawed, and gives no real indication of whether the CPS is becoming more adept at winning cases in court. Excluding guilty pleas from conviction rates allows the data to reflect CPS’s performance when its case is actually tested.

Table 2.1 demonstrates prosecution outcomes in 2011/12, ignoring cases which were resolved with a guilty plea. Table 2.2 reduces this data further to look only at outcomes after trial. The tables demonstrate that when a case

is not resolved with a guilty plea, the CPS’s performance is not nearly as strong as the conviction rate it presents. Excluding guilty pleas, the CPS had successful outcomes in only 60% of its Magistrates’ Court cases and in fewer than one-third of its Crown Court cases.<sup>41</sup>

When a case actually progresses to trial (ignoring guilty pleas and dropped prosecutions), the chance of the CPS obtaining a conviction is about 2 in 3 in the Magistrates’ Court and close to even odds in the Crown Court. These statistics demonstrate why it is important to assess the CPS’s performance outside of the cushion provided by the high guilty plea rate.

“The rise in guilty pleas since 2003/04 has masked a deteriorating performance by the CPS when judged by convictions secured at trial”

41 Data obtained from the Crown Prosecution Service.

**Table 2.1: Prosecution outcomes excluding guilty pleas, 2011/12**

Magistrates' Court		Crown Court	
Unsuccessful		Unsuccessful	
• Dropped		• Dropped	
• Discharges	95,930	• Judge directed	19,673 (69.5%)
• Dismissals no case to answer	(40%)	• Acquittals after trial	
• Dismissals after trial			
Successful		Successful	
• Proofs in absence	143,955	• Convictions after trial	8,623 (30.5%)
• Convictions after trial	(60%)		
<b>Total:</b>	<b>239,885</b>	<b>Total:</b>	<b>28,296</b>
Excluded		Excluded	
• Administrative Finalisations <sup>42</sup>	547,662	• Administrative Finalisations	78,947
• Guilty Pleas		• Guilty Pleas	

Source: Crown Prosecution Service

**Table 2.2: Prosecution outcomes at trial, 2011/12**

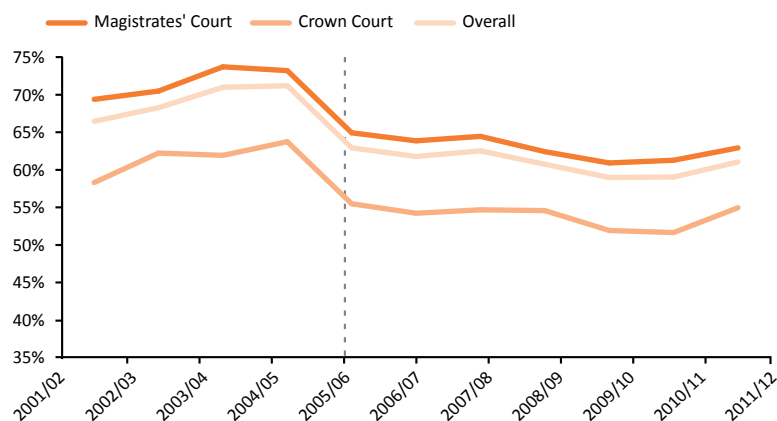
Magistrates' Court		Crown Court	
Unsuccessful		Unsuccessful	
• Dismissals no case to answer	19,043	• Judge directed	7,147 (45.3%)
• Dismissals after trial	(37.4%)	• Acquittals after trial	
Successful <sup>43</sup>		Successful	
• Convictions after trial	31,861	• Convictions after trial	8,623 (54.7%)
	(62.6%)		
<b>Total:</b>	<b>50,904</b>	<b>Total:</b>	<b>15,770</b>
Excluded		Excluded:	
• Administrative Finalisations		• Administrative Finalisations	
• Proofs in Absence	736,643	• Guilty Pleas	91,473
• Discharges		• Dropped	
• Guilty Pleas			
• Dropped			

Source: Crown Prosecution Service

42 Administrative Finalisations are excluded from these considerations because they can result from circumstances well beyond anyone's control, such as the defendant dying or being unfit to plead. It would be disingenuous to include these as either prosecution successes or failures, although it is worth noting that the CPS's figures count them as "unsuccessful outcomes".

43 Proofs in absence are not counted for this measure as they are cases which are heard in the absence of the defendant or defence counsel. They do not constitute a true adversarial test of the prosecution's case.

**Figure 2.9: CPS success rate at trial**



Source: Crown Prosecution Service Annual Reports

In 2011/12, when the CPS’s case was tested at trial, they achieved an overall success rate of just 60.7%, down from a seven-year high of 62.6% in 2005/06. This success rate has risen noticeably from 2010/11, when the CPS was successful in just 58.7% of cases contested at trial. In 2011/12, the success rate at trial in the Crown Court rose from the previous year, but was still just 54.7%, down from 55.2% in 2005/06. In Magistrates’ Court, the CPS’s success rate at trial also rose from the previous year to 62.6%, down from 64.6% in 2005/06.

The declining success rates at trial coincide with the jump in guilty pleas that began in 2004/05. The cases which would be most likely to be successful at trial are increasingly being resolved with a plea, leaving the more difficult prosecutions for trial and resulting in a lower success rate. However, the increased guilty plea rate means the CPS is prosecuting an ever-decreasing caseload. This should result in more time and resources available for each case. At the same time, the CPS should be maturing and its workforce becoming more skilled. Yet, the declining success rate at trial suggests that the CPS is not improving in this very important aspect of its service.

**Dropped prosecutions**

The CPS dropped or took no further action in 176,097 prosecutions in 2011/12 – including 87,992 pre-charge decisions and 88,105 post-charge prosecutions, or 24% and 10% of the respective caseload at those stages of prosecution.<sup>44</sup> Post-charge, 12% of Crown Court prosecutions were dropped and 10% of Magistrates’ Court prosecutions were dropped.

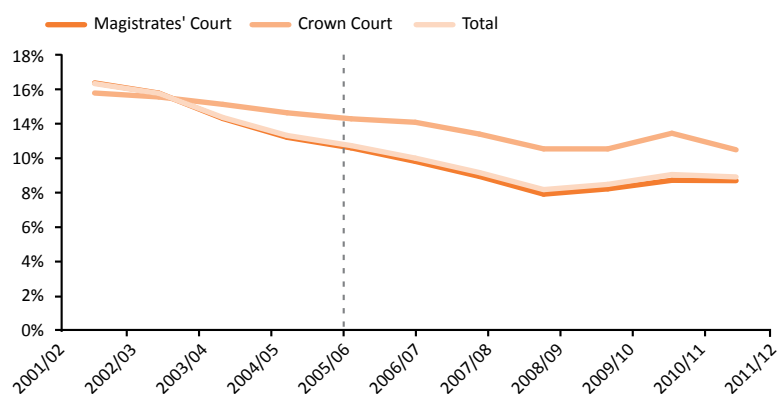
**Table 2.3: Dropped and no further action prosecutions in 2011/12**

No Further Action (Pre-Charge)	87,992
Dropped (Post-Charge)	88,105
<b>TOTAL:</b>	<b>176,097</b>

Source: Crown Prosecution Service

44 Data obtained from the Crown Prosecution Service.

**Figure 2.10: Rate of dropped prosecutions post charge, 2001/02–2011/12**



Source: Crown Prosecution Service Annual Reports

The majority of dropped prosecutions are dropped because they fail either the public interest or evidential tests from the Code for Crown Prosecutors.<sup>45</sup> Two other grounds exist for dropped prosecutions: where the prosecution is unable to proceed (such as the prosecution not being ready or a witness failing to appear) and a small group of other reasons, including bind overs.

Whatever the reason for the drop, dropped prosecutions fall into one of four categories in each court:

**Table 2.3**

**Magistrates' Court**

**Crown Court**

1. Discontinued – Proceedings are dropped by way of a written notice under s23 Prosecution of Offences Act 1985 in advance of the hearing. No plea is entered, and the case is not listed for trial.

1. Discontinued – Upon review in Crown Court (but before the case is served), it becomes apparent that a case sent for trial is unable to proceed or lacks sufficient evidence.

2. No evidence offered – When a prosecution is dropped at any stage after a not guilty plea is entered but before evidence is heard, the CPS is said to have offered no evidence.

3. Prosecution stayed – The defence applies for the prosecution to be stayed on the grounds of (1) previous acquittal or conviction for the same offence; (2) delay; (3) abuse of process of the court; (4) any other reason.

3. Indictment stayed – The judge quashes all counts on the indictment(s), usually due to a defect in the indictment. For example, an indictment may be quashed if it improperly alleges two separate counts in one indictment.

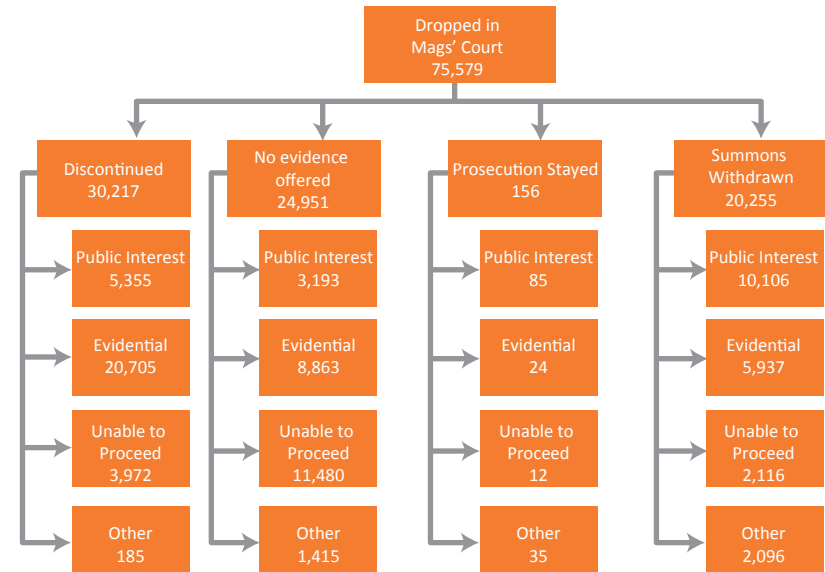
4. Summons withdrawn – Where a defendant has been summoned to court (there has been no arrest) and the court gives the prosecution leave to withdraw the case at court. This is used only for minor summary matters. Example: A defendant is summoned to court for failure to produce a driving license. When he produces his license at court, the CPS will withdraw the summons.

4. Lie on File – The Court makes an order that all charges be left to lie on file.

<sup>45</sup> These cases are discussed in depth in Chapter 3.

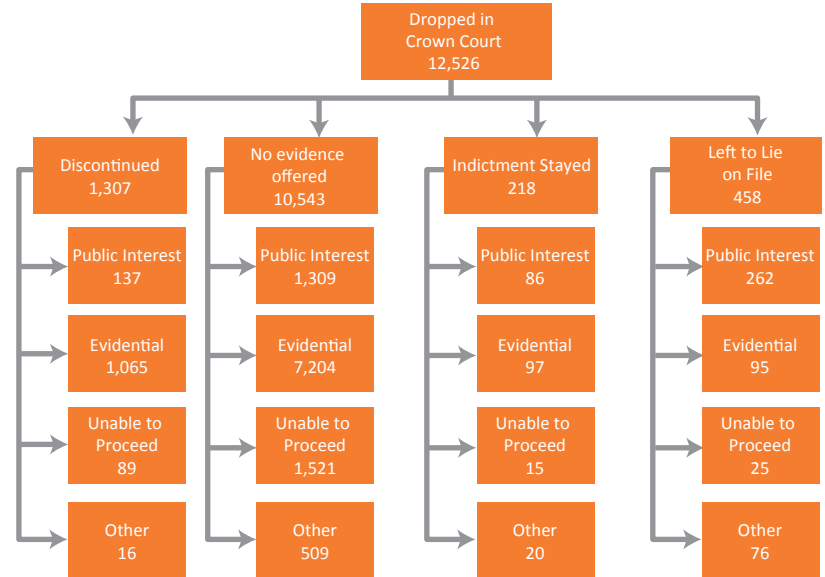


**Figure 2.11: Reasons for dropped prosecutions in Magistrates' Court, 2011/12**



Source: Crown Prosecution Service

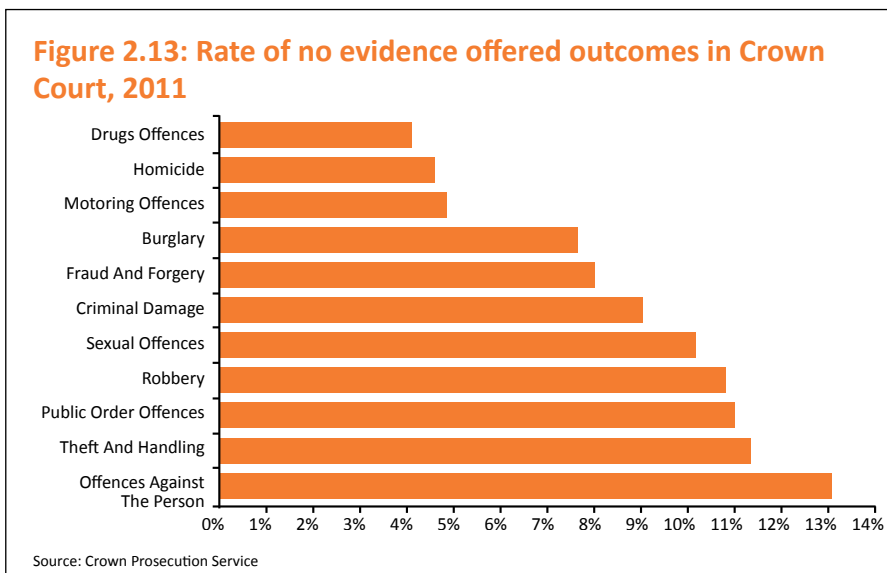
**Figure 2.12: Reasons for dropped prosecutions in Crown Court, 2011/12**



Source: Crown Prosecution Service

The charts above show that the CPS offered no evidence in 35,494 prosecutions: 10,543 prosecutions in Crown Court (9.8%) and 24,951 prosecutions in Magistrates' Court (3.2%). These cases are particularly troubling because the decision to offer no evidence comes after a charge has been laid and after a plea has been entered. Often times, it will come after the prosecution has already been listed for trial. Prosecutions dropped at this later stage mean a greater loss of resources for the criminal justice system.

In the Crown Court, the CPS offers no evidence at varying rates across offence types. Figure 2.13 shows the frequency with which the CPS offered no evidence for each offence type in 2011, and Table 2.4 details how many of each offence type resulted in no evidence offered in the Crown Court. Figures obtained through a Freedom of Information request show that as many as 1 in 8 cases of offences against the person came to nothing in 2011 because the CPS offered no evidence. These figures are not routinely published, despite the CPS recording the information internally.



**Table 2.4: Number of no evidence offered outcomes in Crown Court, 2011**

Homicide	40
Offences Against the Person	3,644
Sexual Offences	907
Burglary	906
Robbery	968
Theft and Handling	1,024
Fraud and Forgery	510
Criminal Damage	130
Drugs Offences	636
Public Order Offences	761
Motoring Offences	129
All Other Offences	775
<b>TOTAL</b>	<b>10,430</b>

Source: Crown Prosecution Service

The rate of no evidence offered in Crown Court has increased since 2009, when 8.7% of Crown Court prosecutions (9,047) resulted in no evidence offered.<sup>46</sup> In 2010 and 2011, 9.6% of Crown Court prosecutions (10,919 and 10,430 respectively) saw no evidence offered by the CPS.<sup>47</sup>

46 Figures obtained from a Freedom of Information request to the Crown Prosecution Service.

47 Ibid.

**Table 2.5: No Evidence Offered Outcomes in Crown Court, 2009–2011**

	No Evidence Offered in Crown Court
2009	9,047
2010	10,919
2011	10,430
2011/2012	10,543

Source: Crown Prosecution Service

Another concerning category of dropped prosecutions are those which are dropped because the CPS is “unable to proceed”. As Figures 2.11 and 2.12 show, any “type” of drop may be motivated because the prosecution was unable to proceed. In these cases, there is sufficient evidence to support a prosecution and the public interest requires a prosecution, but circumstances such as a witness not appearing prevent the prosecution from going forward. These cases represent not only a waste of time and money for the criminal justice system, but also mean that a prosecution that should have gone forward does not.

In 2011/12, the CPS was unable to proceed in 19,230 prosecutions (2.1%): 17,580 Magistrates’ Court prosecutions (2.2%) and 1,650 Crown Court prosecutions (1.5%). Although they are a small proportion of the overall caseload, nearly 20,000 prosecutions is not an insignificant number. Diminishing this group of prosecutions should be at the fore of the CPS’s efforts to improve its performance.

The costs associated with prosecution failings are significant. In 2011/12, dropped prosecutions incurred a cost of £25,148,391.<sup>48</sup> This is down from a five-year high of £32,286,259 in 2008/09.<sup>49</sup> However, it still represents approximately 4% of the net operating cost of an organisation needing to cut its spending by 25%.

The investment of over £25m in prosecutions that go nowhere is in addition to the costs incurred to other agencies, including the police resources devoted to investigation and the cost to HM Courts and Tribunals Service in listing a case for trial, not to mention the opportunity costs of advocate and judiciary time wasted and the personal impact on defendants and victims.

Figure 2.14 uses 2011/12 Crown Court data on outcomes and guilty pleas to demonstrate on a smaller scale what proportion of cases results in each outcome. The diagram assumes 100 offenders have each committed one robbery and are tried on that one charge. Because robbery is an indictable-only offence, the diagram assumes that the CPS does not recommend any out-of-court disposals and that the cases charged will be heard in Crown Court. These figures are not factual; rather, they are an illustration of the overall proportions of prosecution outcomes.

48 HC Written Answers, 10 September 2012, cc. 46W.

49 Ibid.

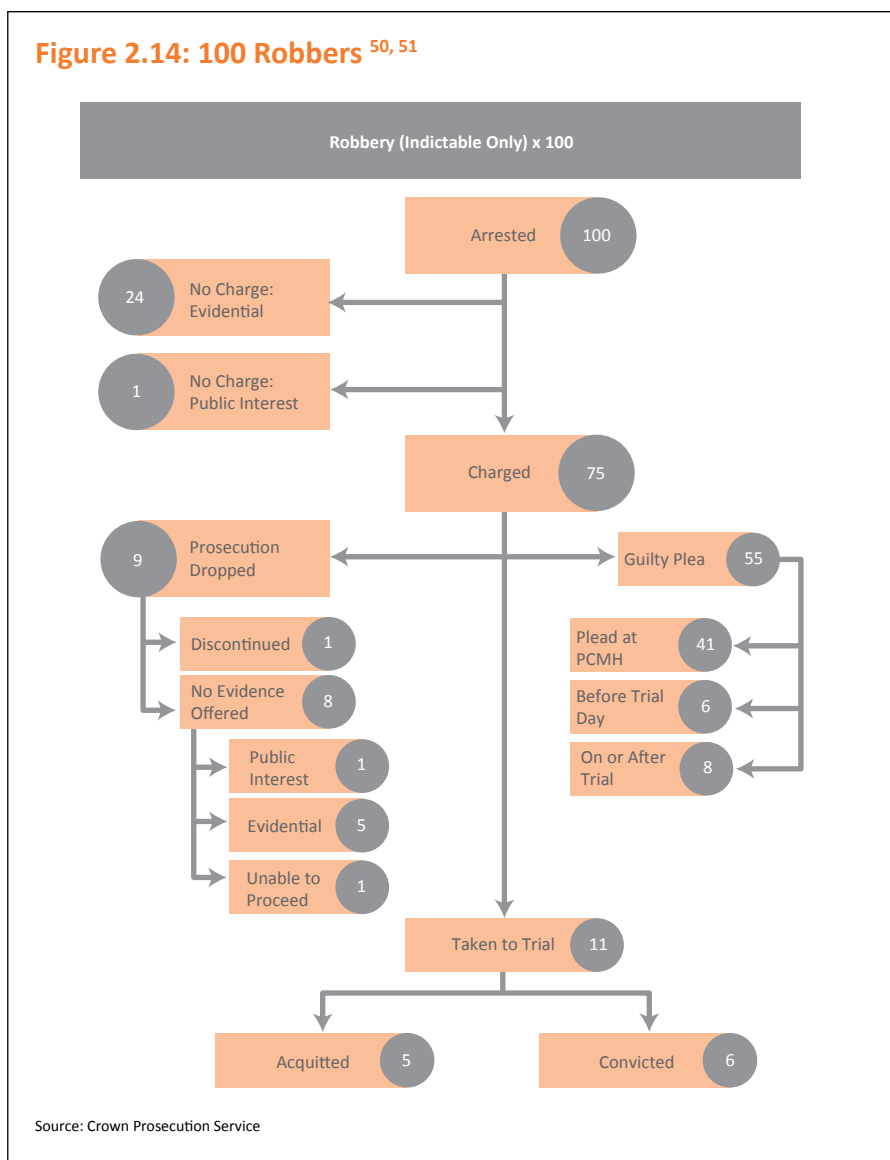


Figure 2.14 shows that, of 100 cases of robbery presented to the CPS for a pre-charge decision, one quarter will receive no further action. Of the 75 cases that proceed, only 11 will reach trial. 55 offenders will plead guilty. In nine cases, the charge will be dropped, and eight of those will be after the defendant has entered a not guilty plea. In the 11 cases that proceed to trial, five will be acquitted and only six of the 100 original offenders will be convicted.

### Cracked and Ineffective Trials

CPS performance is also measured by the rate of cracked and ineffective trials and the reasons for these outcomes. A trial is ‘cracked’ when a late guilty plea is accepted or the prosecution offers no evidence. The case is closed, and it will not be relisted for trial. By contrast, an ‘ineffective’ trial is one which does not start as scheduled and must be rescheduled for a later date. The CPS has tried to reduce the rate of both cracked and ineffective trials.

<sup>50</sup> Pre-charge decision proportions are calculated using the CPS's 2011/12 pre-charge decisions minus the number recommended for out-of-court disposals. “Acquittals” include judge directed acquittals and acquittals after trial.

<sup>51</sup> Data on the timing of guilty pleas is based on the results of the Sentencing Council's 2011 Crown Court Sentencing Survey. ([http://sentencingcouncil.judiciary.gov.uk/docs/CCSS\\_Annual\\_2011.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2011.pdf))

**Figure 2.16: Cracked and ineffective trials in all courts, 2003–2011<sup>52</sup>**

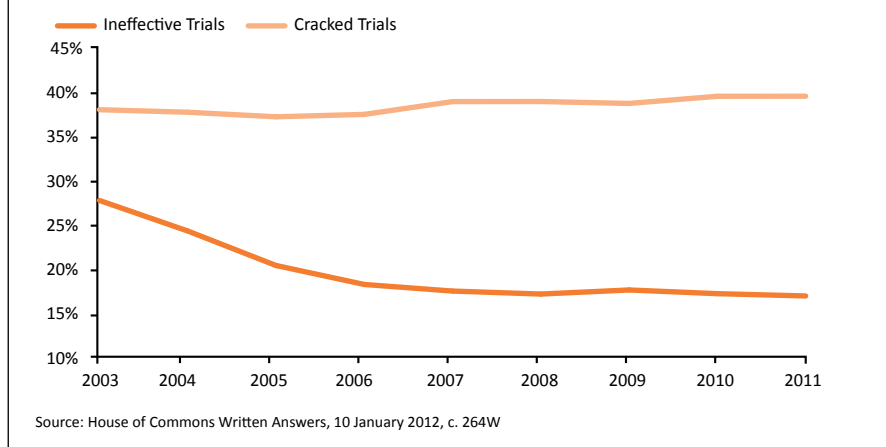


Figure 2.16 shows that there has been limited success in reducing the proportion of trials which are cracked or ineffective. Cracked trial rates have either remained stable or risen steadily in both the Magistrates’ Court and the Crown Court. In 2011, 39.2% of trials at the Magistrates’ Court were cracked, up from 38.6% the year before.<sup>53</sup> In the Crown Court, cracked trials made up 40% of the caseload, down from 42.5% the year before and a significant increase on the 36.3% rate a decade earlier (2002).<sup>54</sup>

The rate of ineffective trials has dropped significantly in both Magistrates’ Court and Crown Court, however, it has begun to rise again in the Crown Court. In the Magistrates’ Court, the ineffective trial rate has hovered between 18% and 19% since 2006, down from 29.4% in 2003, when this data first began to be recorded for Magistrates’ Court.<sup>55</sup> In 2011, the ineffective trial rate in Magistrates’ Court was 17.6%. In the Crown Court, the 2011 ineffective rate was 14.3%, down from 23.4% in 2002, but up from 2010 (13.7%) and up from the low of 11.6% in 2008.<sup>56</sup>

The reasons for cracked and ineffective trials are important. While a cracked trial due to a late guilty plea does not always reflect poorly on the CPS, a cracked trial due to the prosecution offering no evidence is a failing to be addressed, even if it is not always the direct fault of the prosecution (for instance, the withdrawal of a key witness). Similarly, trials may be ineffective due to the prosecution not being ready or missing a witness or due to the defence not being ready or missing a witness.

In 2011, one-third of cracked trials in England and Wales were the result of the prosecution offering no evidence. Nearly one-third of ineffective trials (30%) were the result of the prosecution not being ready or a prosecution witness being absent. Table 2.5 shows cracked and ineffective trials for the last five years attributable to prosecution fault.<sup>57</sup>

52 Prior to 2003, this data was not recorded for magistrates’ courts and is therefore not available.

53 Ministry of Justice, *Judicial and court statistics 2011*, 28 June 2012.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

**Table 2.5: Percent of ineffective and cracked trials attributable to prosecution fault**

	Magistrates' Court		Crown Court	
	Ineffective	Cracked	Ineffective	Cracked
2003	19,784 (38%)	22,907 (34%)	4,518 (40%)	3,770 (19%)
2004	17,408 (35%)	25,215 (35%)	3,219 (41%)	3,413 (19%)
2005	14,206 (36%)	23,545 (35%)	2,147 (41%)	2,311 (17%)
2006	12,457 (36%)	23,889 (36%)	1,745 (38%)	2,289 (16%)
2007	11,458 (33%)	25,669 (35%)	1,734 (38%)	2,653 (17%)
2008	10,323 (31%)	23,770 (34%)	1,627 (39%)	2,436 (17%)
2009	9,838 (29%)	23,198 (34%)	1,891 (38%)	2,826 (17%)
2010	9,057 (28%)	24,010 (35%)	2,202 (37%)	3,349 (18%)
2011	7,775 (27%)	23,894 (36%)	2,225 (38%)	3,010 (18%)

Source: Ministry of Justice

The proportion of ineffective trials in Magistrates' Court which are due to the prosecution not being ready or missing a witness has steadily reduced from 38% in 2003 to 27% in 2011. However, in the Crown Court, over one-third of ineffective cases have been due to the prosecution not being ready, and this has remained nearly flat from 2003 (40%) through 2011 (38%). Cracked trials due to prosecution fault have remained steady in both courts. This represents a tremendous waste of court, police, and prosecution resources and demonstrates the continued need for improvement in CPS performance.

## Recommendations

- **The CPS's headline performance metric for convictions is flawed, and new sub-metric should be developed. The new measure should clearly show the conviction rate achieved by the CPS excluding guilty pleas.**
- **More detailed conviction data should be made available in the new format, to show success achieved at trial for key offences. The CPS should also publish in a clear format the information they already hold on dropped prosecutions by reason and offence category, and cost spent on dropped prosecutions should be included in CPS annual performance statistics.**
- **Given the resources consumed by cracked and ineffective trials, the proportion of cracked and ineffective trials attributable to prosecution failings must become a key performance measure of the CPS.**

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# 3

## Public Role of the Prosecutor

During his tenure as Director of Public Prosecutions, Lord Macdonald QC proposed renaming the CPS the “Public Prosecution Service”. The idea was opposed by prosecutors who derived feelings of prestige from representing the Crown. Nonetheless, the aim was to signal to those working for the CPS that they are a public organisation under the leadership of the Director of Public Prosecutions and tasked with representing the public in the justice system. All other common law jurisdictions have an agency analogous to the CPS which is publicly funded and tasked with representing the public in criminal cases – with many of them having historic links to the Victorian English model of Attorney General and Director of Public Prosecutions, pre-CPS.

### Prosecution in other common law jurisdictions

Comparing the Crown Prosecution Service with prosecution systems in other common law jurisdictions demonstrates the uniqueness of this national prosecution system.

#### 1. Canada

Each province has its own Attorney General responsible for all criminal prosecutions in his or her province, and this office is answerable to Parliament. However, beyond this uniform feature, each Canadian province has its own unique prosecution system.

Broadly speaking, each province has a role similar to the Director of Public Prosecutions. In some provinces, he is an Assistant Deputy Attorney General; in others he is called the DPP. This person has functional oversight of criminal prosecutions in his province and is answerable to the Attorney General, although the role remains an independent, not subordinate, one. The DPP or ADAG is required to provide an annual report to the Attorney General for presentation in Parliament.

Parallel AG and DPP roles also exist at the federal level in Canada. The Minister of Justice serves as the Attorney General of Canada. The DPP for Canada is recommended by the Attorney General, submitted to an approval process in Parliament, and appointed by the Governor in Council. The DPP for Canada may serve up to seven years.

In 2006, the Public Prosecution Service of Canada was created. The PPSC operates under the DPP, handling all federal prosecutions.

#### 2. Australia

Similarly to Canada, each of Australia’s eight states and territories has developed its own prosecution system, while federal prosecutions are handled by a separate Commonwealth prosecution service.

At the Commonwealth level, the Attorney General is responsible for the criminal justice system and is answerable to Parliament for all prosecution decisions. Prosecutions at this level are led by the Commonwealth Director of Public Prosecutions (CDPP), appointed by the Governor General to serve up to seven years. The CDPP must present an annual report to the Attorney General, who presents the report to Parliament.

Generally, each individual state or territory prosecution system follows this same structure and chain of command.

The system in Victoria is unusual in that the public prosecutions system is divided into case preparation work in the Office of Public Prosecutions (OPP) and advocacy work in the Crown Prosecutors' Chambers. The Chambers will be instructed by the OPP to present cases on the Crown's behalf.

### 3. United States

The American system of prosecution is distinct from the systems of Canada, Australia, and England and Wales, in the level of democratic input into the selection of local prosecutors.

Federal prosecutions in the United States are handled by the Department of Justice. The Department of Justice is directed by the Attorney General, who is nominated by the President and confirmed by the Senate. The same appointment process is followed for the 93 United States Attorneys who oversee federal prosecutions in their district. These US Attorneys are appointed for fixed terms of four years and are accountable to the Attorney General, although the AG lacks the power to remove US Attorneys. The Assistant US Attorneys who handle the bulk of federal prosecution work are also appointed by the Attorney General.

Each state has its own prosecution system for handling non-federal crimes. In most states, a local county, city, or otherwise-defined district will elect its lead prosecutor, most frequently called the District Attorney.<sup>58</sup> The elected District Attorney is accountable only to the electorate. He or she, in turn, hires the Assistant or Deputy District Attorneys who perform the day-to-day work of criminal prosecutions. A state Attorney General is normally elected for a fixed term to represent the state in both criminal and civil matters, but this office is not responsible for District Attorneys in that state.

## CPS's Role in the Criminal Justice System

The Crown Prosecution Service plays a critical role in the criminal justice system, operating between the investigative role of the police and the adjudication role of the courts. Unfortunately, the CPS often struggles to claim its territory between the proud tradition of British policing and the centuries-old prestige of the court. In its 2009 report on the Crown Prosecution Service, the House of Commons Justice Committee wrote, "The CPS needs to take a bold and robust approach as the independent prosecutor. [...] The CPS is not a minor partner in the criminal justice system."<sup>59</sup>

<sup>57</sup> It is worth bearing in mind that these numbers account for all prosecutions, not just those handled by the CPS. However, the minute proportion of prosecutions handled by other authorities is unlikely to significantly alter the conclusions presented.

<sup>58</sup> Other names for this role include Commonwealth's Attorney, State Attorney, State's Attorney, County Attorney, and County Prosecutor.



### Relationship Between the CPS and Police

The relationship between the CPS and the police is a frequent source of friction. The CPS is still newer to the scene than a large minority of serving officers, who may carry lingering resentment over the loss of the police's prosecution function and freedom to make charging decisions. Many more officers joined the ranks during the first 10–15 years of the CPS's existence; years during which the CPS was characterised by endemic failure and internal struggle. While the CPS has improved significantly since then, police attitudes to the CPS have been slow to respond.

The loss of charging power in particular has led to significant rancour among the police. Tim Godwin, then Acting Deputy Commissioner, Metropolitan Police, described charging as “the biggest issue between the two agencies.”<sup>60</sup> One accusation frequently levied against the CPS is that prosecutors regularly undercharge defendants in order to boost their conviction rates with easier cases to prove, for example, charging GBH/wounding as common assault. Although evidence of this practice is hard to obtain, judges occasionally comment on the practice. In August 2012, a District Judge at Worcester Magistrates' Court who felt a wounding was incorrectly charged as an assault observed:

*“The charge is plainly wrong. Why don't the Crown Prosecution Service apply their own sentencing standards? [...] I'm sick and tired of coming to court and having cases under-charged so the court cannot impose a proper sentence.”<sup>61</sup>*

In addition to conflict over charging, the police often feel that CPS decisions not to prosecute are poorly considered and/or explained and that the prosecution service is overly risk-averse.<sup>62</sup> Police Federation vice-chairman Simon Reed has said:

*“We know there are people who are not being prosecuted when they could be. It leads to a lot of angst for the police. The criminal justice system is pulling in different directions. [...] We see very few charges of ABH anymore. They are prosecuted for common assault instead. It keeps the case away from Crown Court.”<sup>63</sup>*

Criminal lawyers in private practice have also commented on what they view as “a serious problem” of frequent undercharging by the CPS.<sup>64</sup> Although police have recovered some charging powers for lower level offences, statutory charging remains a wedge between police and the CPS.

The CPS has its complaints with the police, too. Many CPS lawyers complain about the poor quality of charging information they receive from the police. There are complaints that the police will often hide or exploit evidence in order to “twirl” the CPS into laying a charge they would not lay if they had all the evidence. The CPS also laments that the police are only concerned with securing a charge; police performance is evaluated by charge only, and performance statistics are not affected by whether or not a defendant is convicted. Therefore, the CPS often finds the police unavailable or uncooperative during the pre-trial and trial stages. Furthermore, some CPS lawyers feel that police are too wedded to their “gut” feelings about a case, and don't understand that the CPS must adhere to legal standards and the public interest rather than instincts.

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59 House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*, 6 August 2009 (pg. 16).

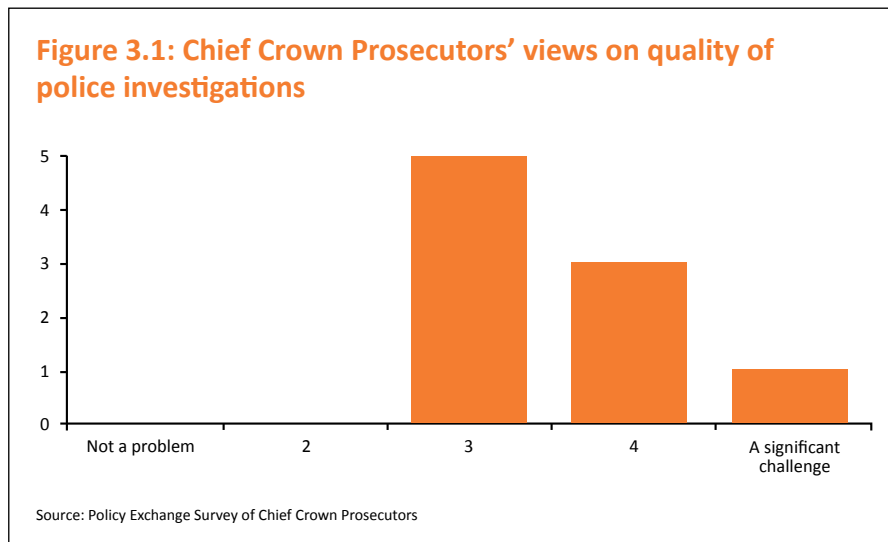
60 *Id.* at Ev 7.

61 ‘Judge slams CPS for ‘wrong’ assault charge’, *Worcester News*, 9 August 2012.

62 For example, a county council leader in Sussex said, “We need to give a boot up the backside of the CPS and get more people before the courts – they can be so risk-averse it's mind-boggling. It infuriates the public and infuriates the coppers who work their backsides off that the CPS sometimes cannot be bothered to push forward cases.” ‘Who's going to be our police chief? Sussex voters just don't care’, *The Guardian*, 17 June 2012.

63 ‘Our target culture is ‘harming justice’: Police accuse prosecutors of downgrading charges’, *Daily Mail*, 17 March 2009.

A survey of Chief Crown Prosecutors by Policy Exchange found that, of the 11 respondents, seven identified the quality of police files/investigation as one of three biggest challenges routinely encountered by the CPS. While most of the Chief Crown Prosecutors did not feel the working relationship between the CPS and the police was a problem, all identified the quality of police investigatory work as a challenge. Figure 3.1 shows their responses.



One frequent feature of successful cooperation is the police and prosecutors being co-located in the same facilities. Co-location has been encouraged since the Glidewell Report in 1998 as a way to build police-prosecutor relationships. Many practitioners in co-located facilities agree that all parties benefit.<sup>65</sup> In Norfolk, for example, police and prosecutors share the same building. Prosecutors there feel that this has allowed them to build the personal relationships that facilitate cooperation between the organisations. Unfortunately, co-location has recently been abandoned in many places as being too costly, or because teams have been relocated following the 2011 CPS reorganisation. The potential benefit to the criminal justice system of co-location should not be lost to the scramble to reduce administration costs. Co-location is one of the few practicable steps agencies can take toward the culture shift necessary for improved cooperation.

Another common theme in police-CPS relations is that contention is largely absent in more serious cases involving senior lawyers and investigators. In complex cases, the CPS begins working with the police pre-charge to provide legal guidance during the investigation. Most CPS areas have Complex Casework Units (CCUs), whose lawyers work solely on these cases. The relationship between police and the lawyers in these units tends to be very strong for a variety of reasons; the police and lawyers involved have worked together for many years and have built strong working relationships, the participants tend to be highly skilled and experienced, resulting in a higher level of trust and respect between the two sides, and the seriousness of the cases necessitates cooperation and professionalism.

There is a similar degree of collaboration between police and prosecutors in the specialist Casework Groups based at CPS Headquarters. One lawyer in the Counter

<sup>64</sup> See, e.g. The Politics Show, 'CPS 'undercharging'?', 15 March 2009 ([http://news.bbc.co.uk/1/hi/programmes/politics\\_show/7944791.stm](http://news.bbc.co.uk/1/hi/programmes/politics_show/7944791.stm)).

Terrorism group attributed their successful cooperation with the police to cradle-to-grave case ownership on the CPS side. With the same prosecutor on a case from start to finish, greater cooperation with the investigators can be achieved.<sup>66</sup>

Broadly speaking, there is a strong undercurrent of mistrust and blame-assigning between police and the CPS. Sometimes the tension spills onto the public stage, with police blaming the CPS for failures.<sup>67</sup> One Chief Crown Prosecutor observed, “The problem [with public understanding of the CPS] is that those who explain CPS decisions to the victims and witnesses are the police, who do not necessarily support our reasons for not pursuing cases. A police officer is hardly likely to blame his/her own organisation for the quality of investigation, for example.” Similarly, the CPS will sometimes blame the police for poor investigations leading to dropped prosecutions.

Both agencies too frequently lose sight of their position as teammates with a shared purpose: bringing offenders to justice. All parts of the CPS should seek to learn from the conditions and practices that allow the Complex Casework Units and Casework Groups to enjoy cooperative relationships with the police.

### Model police and prosecution relations: Scotland

In Scotland, police and prosecutors work much more cooperatively than in England & Wales. Public prosecutions in Scotland are undertaken by the Crown Office and Procurator Fiscal Service (COPFS). The origin of procurator fiscals is unknown, but they predate the police service by a significant period. According to one procurator fiscal, fiscals existed about 400 years before police forces, the first of which was founded in 1800.

In addition to being a much older role, procurator fiscals benefit from having the legal authority to direct police investigations; in criminal investigations the police answer to the procurator fiscals. To some extent, the police and prosecution relationship benefits from this historical and cultural tradition which is so different to that in England & Wales. However, 20 years ago, Scottish prosecutors nonetheless struggled with many of the same challenges that English and Welsh prosecutors face in working with the police. In 2000, then Crown Agent (the highest ranking member of the COPFS) Andrew Normand observed: “*There is a clear need to address problems of lack of mutual awareness and understanding of others’ work and of ‘organisational empathy’ on the part of staff within the Criminal Justice system agencies.*”<sup>68</sup>

Below is a summary of some key measures that the COPFS and the police have undertaken to promote a better working relationship with the police:

- Prioritising public confidence in the criminal justice system *as a whole* and establishing joint aims between procurator fiscals and police
- Regular joint training sessions with police and prosecutors on how to complete charging forms, how to investigate certain types of crime, etc.
- Improved supervision of investigation reports before they are passed on to the procurator fiscals. Reports are always checked by a sergeant and sometimes by an investigator.
- Since March 2005, a legal trainer has been seconded from the COPFS to the Scottish Police College at Tullillan for new officers. The intention is to help dispel myths about the prosecution among police officers before they become ingrained.

65 Glidewell Working Group, ‘An Early Assessment of Collocated Criminal Justice Units’, January 2001.

66 Case ownership will be discussed at length later in Chapter 3.

67 See, e.g., ‘Battered by a thug, betrayed by justice: Yob left girl in permanent agony but he avoids court’, Daily Mail, 21 August 2012.

68 Quoted in HM Inspectorate of Constabulary for Scotland, A Joint Thematic Inspection of Case Management, August 2006 (Chapter 12).

### Self-Conception of the CPS role

In some respects, the CPS also struggles with its own understanding of its role in the criminal justice system. While most CPS prosecutors are committed to their role as prosecutors, driven to secure convictions, there are some, particularly in leadership roles, who view the CPS as serving a more impartial role. They see the CPS as a referee in the administration of justice, rather than as an advocate for one of two opposing sides. When describing the CPS as an organisation committed to justice as opposed to prosecution, one top CPS prosecutor boasted, “I don’t even know my conviction rate” – because it was unimportant to that prosecutor’s assessment of his or her own success as a prosecutor.

“While most CPS prosecutors are committed to their role as prosecutors, driven to secure convictions, there are some, particularly in leadership roles, who view the CPS as serving a more impartial role”

This outlook is seen in the tone of some recent public statements. For example, in July 2012 the CPS failed to secure a conviction in the high-profile prosecution of footballer John Terry. Following the acquittal at the conclusion of the expensive five-day trial, Alison Saunders, Chief Crown Prosecutor for London said: “The Chief Magistrate agreed that Mr Terry had a case to answer, but having heard all of the evidence he acquitted Mr Terry of a racially aggravated offence. That is justice being done and we respect the Chief Magistrate’s decision.”<sup>69</sup> The CPS failed to prove its case and spent significant public resources doing so. The Chief Crown Prosecutor’s statement should have lamented the failed prosecution rather than, or at least in addition to, lauding “justice being done”.

Of course prosecutors must be committed to fair and just decision making. Prosecutors are sometimes referred to as the most powerful players in the justice system, and it is important that they exercise their power and discretion appropriately. Charges should only be brought when the evidence supports it and rules of evidence and procedure must be adhered to, even when it would disadvantage the prosecution.

But an adversarial legal system, such as the one in England & Wales, only works if each party plays its role to the fullest extent. The defence and prosecution are, in fact, *adversaries*, and justice is delivered by a third, impartial fact-finder. In such a system, justice is achieved when both sides vigorously and thoroughly pursue their position. After a charge is laid, the CPS is no longer an impartial fact-finder, but rather an adversary with a case to prove. It is the CPS’s role to put its full strength behind the prosecution to ensure that resources are not wasted on another failed case.

A commitment to justice is necessary and noble, and everyone working in the criminal justice system should share it. But it is important that the CPS recognises where it is placed in the criminal justice system. Courts, judges, magistrates, and juries have a long tradition of representing the interests of justice. The CPS must assume its proper role representing the public’s interest in vigorous prosecutions.

### The Public Interest Test

The CPS can decide not to prosecute a case if it fails either of two tests, as codified in the Code for Crown Prosecutors. The first test evaluates the extent and quality of the evidence and the second assesses the public interest

supporting or disfavoured prosecution. The decision to drop a case on either evidential or public interest grounds can be a pre-charge decision, meaning a charge is never laid, or the prosecution can be dropped after a defendant has been charged. A large portion of the criticism faced by the CPS arises from decisions whether or not to prosecute.

### What is the Public Interest Test?

Considering the public interest has been part of the role of the Director of Public Prosecutions since 1886, when a second set of Regulations pursuant to the Prosecution of Offences Act 1884 stated that the Director should pursue prosecution only “where it is required in the public interest.”<sup>70</sup> The specifics of this inquiry were first detailed a century later, in the first Code for Crown Prosecutors.

In the early 1950s, debate surrounding prosecutorial discretion and the public interest inquiry prompted the Daily Telegraph to note, “Is it not in fact a basic principle of the rule of law that the operation of the law is automatic [...] where the offence is known or suspected? Is not the arbitrary implementation of the law just as offensive to the elementary notion of justice as an arbitrary law?”<sup>71</sup> This public debate and a request for more information on prosecutorial discretion prompted an oft-quoted defence of the public interest test by Sir Hartley Shawcross, Attorney General from 1945 to 1951:

“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. [...] The very first regulations under which the Director of Public Prosecutions worked provided that he should prosecute [...] wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration.”

He continued:

“It is not always in the public interest to go through the whole process of litigating the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed.”<sup>72</sup>

The factors affecting the public interest inquiry were first laid out in the first Code for Crown Prosecutors, issued in 1986. The factors tending in favour of or against prosecution have remained similar through the most recent Code for Crown Prosecutors, issued in 2010.

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69 ‘John Terry cleared of racially abusing Anton Ferdinand’, The Guardian, 13 July 2012.

70 Roger Daw and Alex Solomon, ‘Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute’, Criminal Law Review, Issue 10, 2010 (pg. 738-739).

71 Ibid.

72 HC Deb Vol 483, 29 January 1951.

## Code for Crown Prosecutors

These lists are not exhaustive, but the 2010 Code for Crown Prosecutors enumerates these factors as common ones which tend in favour of or against prosecution.

### Public Interest Factors Tending in Favour of Prosecution

- A conviction is likely to result in a significant sentence
- A conviction is likely to result in an order of the court in excess of that which a prosecutor is able to secure through a conditional caution
- The offence involved the use of a weapon or the threat of violence
- The offence was committed against a person serving the public (for example, a member of the emergency service; a police or prison officer; a health or social welfare professional; or a provider of public transport)
- The offence was premeditated
- The offence was carried out by a group
- The offence was committed in the presence of, or in close proximity to, a child
- The offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of these characteristics
- The offence was committed in order to facilitate more serious offending
- The victim of the offence was in a vulnerable situation and the suspect took advantage of this
- There was an element of corruption of the victim in the way the offence was committed
- There was a marked difference in the ages of the suspect and the victim and the suspect took advantage of this
- There was a marked difference in the levels of understanding of the suspect and the victim and the suspect took advantage of this
- The suspect was in a position of authority or trust and he or she took advantage of this
- The suspect was a ringleader or an organizer of the offence
- The suspect's previous convictions or the previous out-of-court disposals which he or she has received are relevant to the present offence
- The suspect is alleged to have committed the offence in breach of an order of the court
- A prosecution would have a significant positive impact on maintaining community confidence
- There are grounds for believing that the offence is likely to be continued or repeated

### Public Interest Factors Tending Against Prosecution

- The court is likely to impose a nominal penalty
- The seriousness and the consequences of the offending can be appropriately dealt with by an out-of-court disposal which the suspect accepts and with which he or she complies
- The suspect has been subject to any appropriate regulatory proceedings, or any punitive or relevant civil penalty which remains in place or which has been satisfactorily discharged, which adequately addresses the seriousness of the offending and any breach of trust involved
- The offence was committed as a result of a genuine mistake or misunderstanding
- The loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement
- 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 wholly or in part by the suspect
  - The offence has only recently come to light
  - The complexity of the offence has meant that there has been a long investigation, or
  - New investigative techniques have been used to re-examine previously unsolved crimes and, as a result, a suspect has been identified
- A prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence and the views of the victim about the effect of a prosecution on his or her physical or mental health
- The suspect played a minor role in the commission of the offence
- The suspect has put right the loss or harm that was caused (but a suspect must not avoid prosecution or an out-of-court disposal solely because he or she pays compensation or repays the sum of money he or she unlawfully obtained)
- The suspect 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. Prosecutors apply Home Office guidelines about how to deal with mentally disordered offenders and must balance a suspect's mental or physical ill health with the need to safeguard the public or those providing care services to such persons
- A prosecution may require details to be made public that could harm sources of information, international relations or national security.

In 2009, Director of Public Prosecutions Keir Starmer described the exercise of prosecutorial discretion as “essential to” and “the underpinning principle of” the criminal justice system in England & Wales. At the same time, he identified the risk attached to the public interest test:

**“There are risks attached to the exercise of discretion. Whilst in appropriate circumstances it can be a force for good, poorly exercised discretion can mask corruption and malevolence.**

[...] It is the bad decisions which are taken on the basis of inappropriate factors [...] which may be hidden under the respectable cloak of discretion.”<sup>73</sup> (emphasis added)

### The Public Interest Test in Action

The CPS usually rules on the public interest test after considering the evidence, so most cases dropped on public interest grounds have already been deemed worthy on evidential grounds. Data shows that the overall rate of prosecutions dropped on public interest grounds is low, with pockets of higher rates in some areas and for some crimes. Overall, in England and Wales in 2011/12, 24,529 prosecutions were either dropped or not charged on public interest grounds, the vast majority of which (20,533) were dropped after a charge was laid.<sup>74</sup> In London, 3,447 prosecutions were dropped or not charged on public interest grounds. In Merseyside, the area with the highest rate of prosecutions dropped on public interest grounds, 1,782 cases were dropped on public interest grounds, either before or after charge.<sup>75</sup>

**Table 3.1: Pre-charge decisions, 2009/10–2011/12**

	2009/10	2010/11	2011/12
Total Pre-Charge Decisions	477,517	466,611	367,067
NFA, Public Interest Grounds	7,820 (1.6%)	5,515 (1.2%)	3,996 (1.1%)

Source: Crown Prosecution Service

Table 3.1 shows that the number of cases being handed over to the CPS for pre-charge decisions has declined dramatically as police regain more charging powers. Over the same period, the number and percent of cases in which no further action (NFA) is taken on public interest grounds has declined. In 2009/10, 1.6% of cases resulted in NFA on public interest grounds (7,820 cases), while in 2011/12, 1.1% of cases resulted in NFA on public interest grounds (3,996 cases).

Table 3.2 shows that the number of prosecutions dropped post-charge on public interest grounds has increased slightly over the last three years. In 2011/12, over 20,500 prosecutions were dropped on public interest grounds (2.3%).

**Table 3.2: Post-charge decisions, 2009/10–2011/12**

	2009/10	2010/11	2011/12
Total Completed Prosecutions	982,732	957,881	894,791
Dropped, Public Interest Grounds	20,910 (2.1%)	21,672 (2.3%)	20,533 (2.3%)

Source: Crown Prosecution Service

The charts below reflect the Group and Area variations in the rate of dropped prosecutions.<sup>76</sup> Merseyside stands out with a noticeably higher rate of dropped prosecutions on public interest grounds, both before and after charging. By

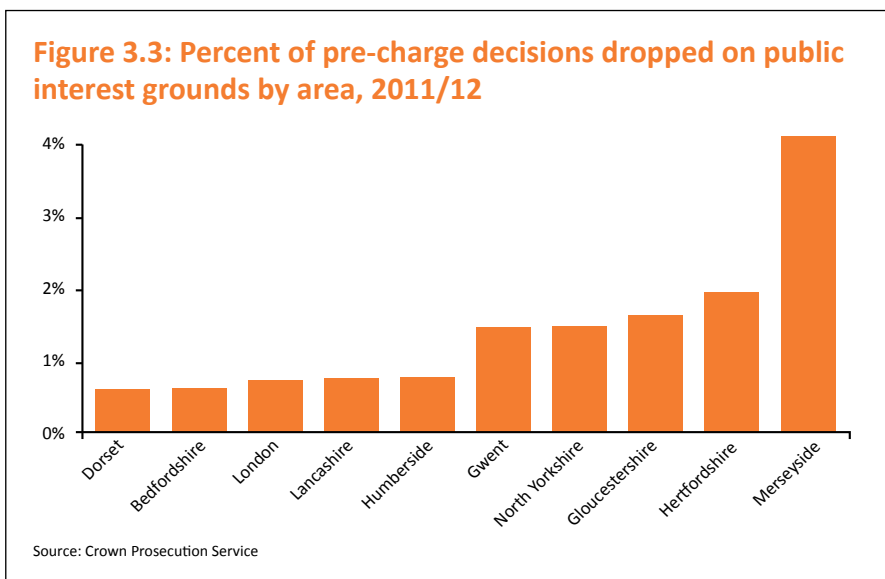
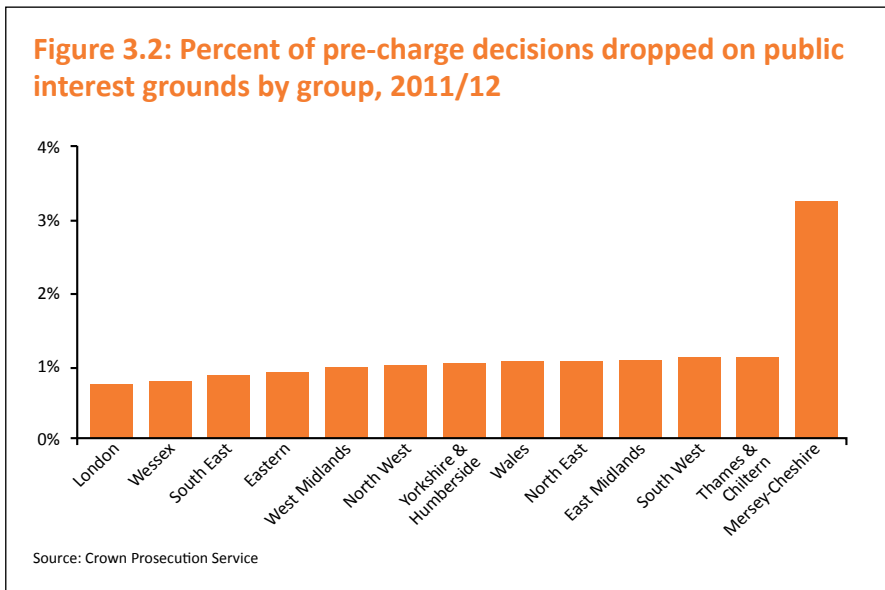
73 ‘Public prosecution service annual lecture – the role of the prosecutor in a modern democracy’, 21 October 2009 ([http://www.cps.gov.uk/news/articles/public\\_prosecution\\_service\\_annual\\_lecture\\_-\\_the\\_role\\_of\\_the\\_prosecutor\\_in\\_a\\_modern\\_democracy/](http://www.cps.gov.uk/news/articles/public_prosecution_service_annual_lecture_-_the_role_of_the_prosecutor_in_a_modern_democracy/)).

74 Data obtained from the Crown Prosecution Service.

75 Ibid.

76 Throughout this report, “Group” is used to refer to the CPS groupings of multiple areas (of which there are 13), and “Area” is used for the smaller areas that are largely contiguous with police force areas (of which there are 42).

contrast, Bedfordshire appears in the bottom five for dropped prosecutions on public interest grounds both before and after charge; in that area, only 105 cases were dropped post charge on public interest grounds in 2011/12, out of 8,033.<sup>77</sup>

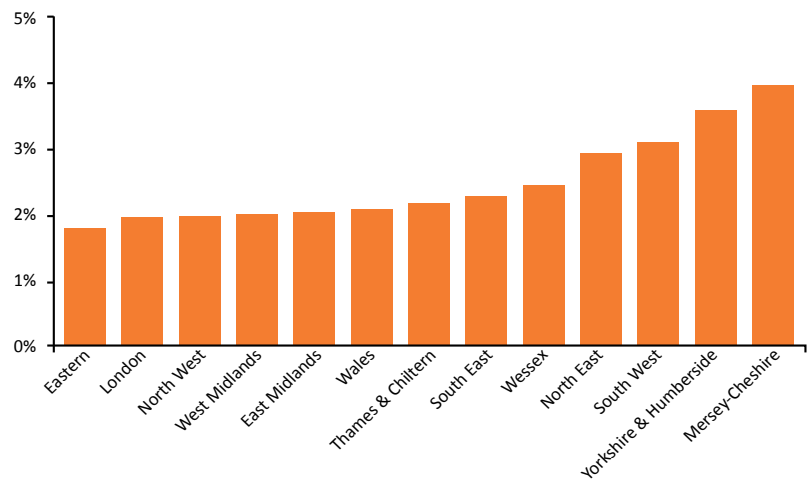


Figures 3.2 and 3.3 demonstrate that, at the pre-charge stage, Merseyside drops prosecutions on public interest grounds at a significantly higher rate than any other area. While all other groups drop approximately one out of 100 pre-charge decisions in the public interest, the Mersey-Cheshire group drops cases at three times that rate (3.2%). Prosecutors in London rarely decide pre-charge that the public interest does not warrant a prosecution (0.7%), while 4.1% of cases in Merseyside are dropped pre-charge for public interest reasons. Given that London and Merseyside are both urban areas with similar crime concerns, is it correct that the public interest in London warrants a charge 5.5 times more often than the public interest in Merseyside requires?

<sup>77</sup> Data obtained from the Crown Prosecution Service.

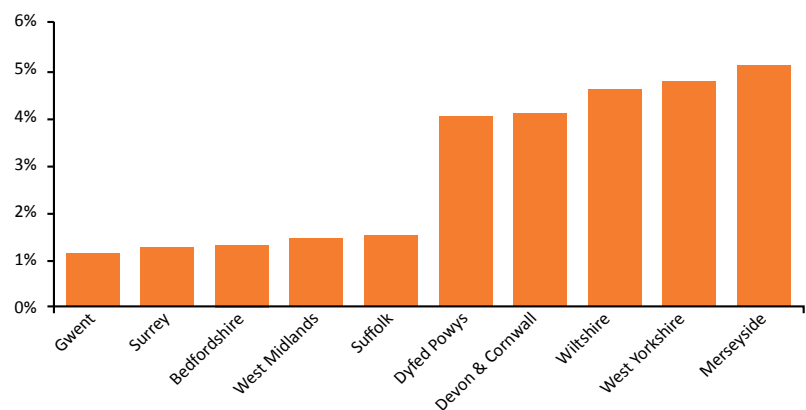


**Figure 3.4: Prosecutions dropped post-charge on public interest grounds by group, 2011/12<sup>78</sup>**



Source: Crown Prosecution Service

**Figure 3.5: Prosecutions dropped post-charge on public interest grounds by area, 2011/12**

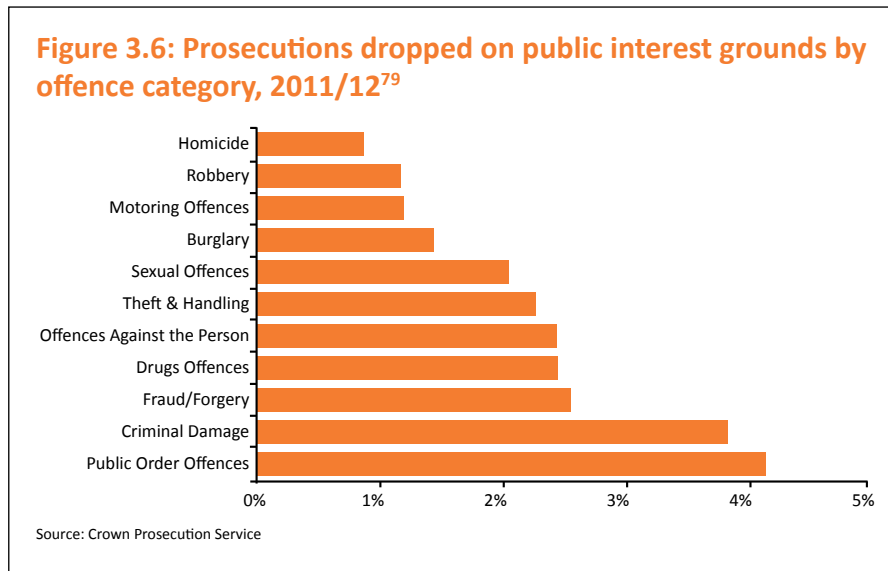


Source: Crown Prosecution Service

Merseyside stands out again as being more likely to drop a prosecution post-charge on public interest grounds, although the difference is less stark than in the pre-charge context. The Mersey-Cheshire group dropped 3.9% of prosecutions on public interest grounds after a charge was laid. The other groups dropped prosecutions at a rate of between 1.8 and 3.5%. The Merseyside area dropped over 1 in 20 prosecutions (5.1%) on public interest grounds post-charge. Between pre-charge and post-charge decisions, prosecutors in Merseyside dropped a total of 1,782 prosecutions on public interest grounds in 2011/12. That is not a tremendous number, but it represents nearly 1,800 offenders who were not taken to court even though the evidence supported a prosecution. In some cases, an out-of-court disposal may have been issued, but in many cases, there will have been no resolution.

<sup>78</sup> These rates are the number of prosecutions dropped on public interest grounds as a percentage of all completed prosecutions. These numbers do not take into consideration pre-charge decisions or on-going prosecutions.

Figure 3.6 and Table 3.3 illustrate the rate at which prosecutions for various offence types are dropped in the public interest. While only 1.2% of robbery prosecutions were dropped in the public interest in 2011/12 (159 offences), 3.9% of criminal damage offences (1,612) were dropped in the public interest.



Across England & Wales in 2011/12, the offence categories that most frequently saw prosecutions dropped in the public interest were public order offences (4.2%), criminal damage (3.9%), and fraud and forgery (2.6%).

**Table 3.3: Number of prosecutions dropped in the public interest in England & Wales, 2011/12**

Offence Type	Total Offences Dropped
Homicide	8
Offences Against the Person	3,576
Sexual Offences	242
Burglaries	423
Robberies	159
Thefts	3,352
Frauds and Forgeries	331
Offences of Criminal Damage	1,612
Drugs Offences	1,654
Public Order Offences	3,164
Motoring Offences	3,172

Source: Crown Prosecution Service

Table 3.4 highlights the ten highest rates of dropped prosecutions in the public interest by area and offence type. This demonstrates that some areas have a practice of routinely dropping certain types of offences because prosecution is deemed not in the public interest.

<sup>79</sup> Post-charge only.

**Table 3.4: Highest rates of prosecutions dropped in the public interest by area and offence<sup>80</sup>**

1. Wiltshire – Public Order Offences	9.9% (48 offences)
2. West Yorkshire – Public Order Offences	9.5% (234 offences)
3. Staffordshire – Public Order Offences	8.0% (112 offences)
4. Merseyside – Public Order Offences	7.3% (227 offences)
5. Merseyside – Fraud and Forgery	7.1% (23 offences)
6. Merseyside – Drugs Offences	6.8% (301 offences)
7. Merseyside – Criminal Damage	6.6% (66 offences)
8. Devon & Cornwall – Criminal Damage	6.6% (76 offences)
9. Devon & Cornwall – Public Order Offences	6.5% (150 offences)
10. Thames Valley – Public Order Offences	6.5% (62 offences)

Source: Crown Prosecution Service

When local CPS practice is to drop prosecution on public interest grounds in 1 in 10 or 1 in 12 offences of a particular type, after an unknown number of the same offence type was weeded out in the pre-charge stage, it can lead to the local police being less inclined to bring cases to the CPS for prosecution. If a force knows that there is a not insignificant chance of a particular case type being dropped, police have less incentive to spend valuable resources on pursuing leads and preparing the paper work necessary to pass a case over to the CPS. Thus, officers may be inclined to handle more of these offences with out-of-court disposals, which are quicker and easier to administer and still count as a “sanction detection” for the purposes of performance targets. The net result is that certain crimes in a given area may face prosecution at ever-decreasing rates. Without sufficient oversight and input into the use of the public interest test locally, this practice can create hidden pockets of neglect in the criminal justice system that let down victims of crime.

<sup>80</sup> Excluding motoring offences and homicide

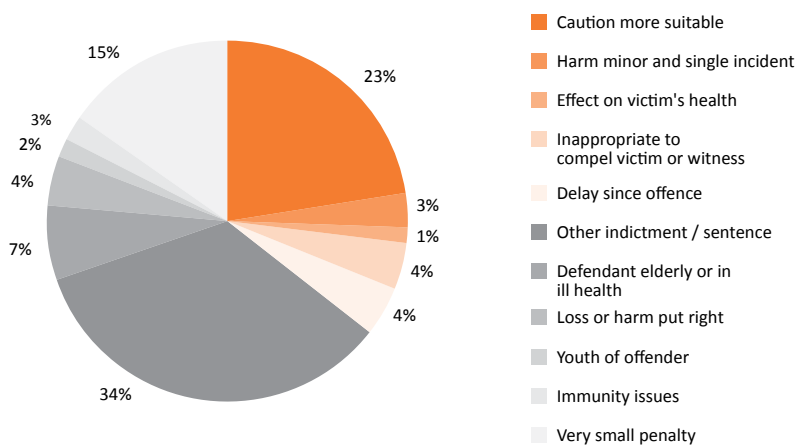
<sup>81</sup> Then Attorney-General Baroness Scotland QC said, “I think that allowing the prosecutor to be the gatekeeper, to be the guardian of the public interest ... is really important, but that means representing all the public interest, which is the victims, the witnesses and the defendant, and that fairness is something which I think is central to the prosecutorial role”. House of Commons Justice Committee, The Crown Prosecution Service: Gatekeeper of the Criminal Justice System, 6 August 2009 (pg. Ev 55).

### Concerns with the Exercise of the Public Interest Test

Although the portion of cases dropped on public interest grounds is relatively small, the manner in which this discretion is exercised is nonetheless important. The Director of Public Prosecutions is the sole arbiter of what is in the public interest in bringing an offender before the law. Thus, the manner in which he or she executes this responsibility must be subject to on-going scrutiny.<sup>81</sup> What public interest factors form an appropriate basis for these decisions? What mechanisms exist to hold the CPS to account for these decisions?

The ten most common reasons for dropping a prosecution in the public interest, either before or after charge, are as follows:

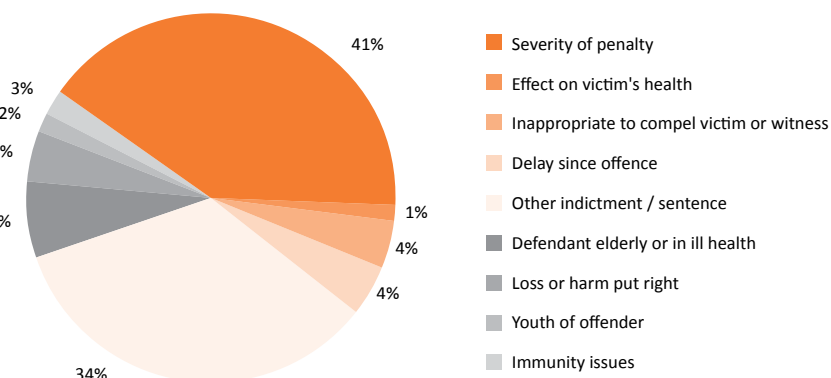
**Figure 3.7: Most common public interest reasons for dropped prosecutions, 2011/12**



Source: Crown Prosecution Service

Three of these common public interest factors have the same inquiry at their heart. “Caution more suitable”, “loss or harm minor and single incident”, and “very small or nominal penalty” all address the likely severity of the penalty. These three factors combined were responsible for 41% of prosecutions dropped on public interest grounds. In other words, over a third of prosecutions dropped on public interest grounds were dropped because they were minor offences likely to receive a low penalty at court.

**Figure 3.8: Portion of prosecutions dropped due to likely severity of penalty, 2011/12**



Source: Crown Prosecution Service

Prosecutions for “volume” crimes like criminal damage and drugs offences are among the most frequently dropped, and because these offences are relatively low-profile, these decisions rarely receive public scrutiny.

Some offences will genuinely be of such low seriousness that, even with unlimited resources to prosecute, an out-of-court disposal would be more appropriate than levying the full weight of the criminal justice system against the

offender. However, too often this decision is predicated on whether prosecution is “worth it,” in the words of one senior prosecutor. While many CPS leaders have denied that cost is part of the public interest evaluation, the July 2012 draft Code for Crown Prosecutors proves that, in fact, the cost of prosecution is a factor in whether a prosecution goes forward. The new Code, which explicitly references cost as a “relevant factor” states:

*Prosecutors should also consider whether prosecution is proportionate to the likely outcome, and in so doing the following may be relevant to the case under consideration:*

- *The cost to the prosecution service and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty. (Prosecutors should not decide the public interest on the basis of this factor alone. It is essential that regard is also given to the public interest factors identified when considering the other questions in paragraph 4.14 a) to g), but cost is a relevant factor when making an overall assessment of the public interest).<sup>82</sup> (emphasis added)*

While the criminal justice system does not operate with unlimited resources, it is undoubtedly troubling when prosecutions are dropped simply because the outcome is not worth the investment. The CPS’s responsibility is to conduct all prosecutions in a cost-efficient manner, not simply to abuse its discretion to reduce its workload. Furthermore, the value of a prosecution is not merely in the punishment of an offender. There is value in the fact-finding process, in the resolution of outstanding questions, and in giving victims “their day in court”. These values are too often lost in an inquiry that is unduly concerned with the cost of the ultimate outcome.

Where the public interest is exercised to drop a prosecution, it is important that the reasons given accord with public attitudes.<sup>83</sup> Minor crimes affect a larger percentage of the public than do more serious offences. Many would agree that the penalty for minor criminality is light; however, declining to prosecute such cases altogether is directly contrary to what the public feel is in their interest. A June 2012 poll by Policy Exchange presented respondents with a list of some common public interest factors that may result in a case being dropped. Two-thirds (64%) of respondents believed that none of the factors invoked by the CPS warranted a dropped prosecution. Only 14% of responses indicated support for dropping a prosecution on the grounds that the likely penalty would be minimal. Thus, the CPS’s view of what is in the public interest does not align with the public’s view of what is in its own interest.

<sup>82</sup> Draft Code for Crown Prosecutors 2012 ([http://www.cps.gov.uk/consultations/code\\_2012\\_consultation.html](http://www.cps.gov.uk/consultations/code_2012_consultation.html)).

<sup>83</sup> “Prosecutors need also to engage with their communities to ensure that their public interest decisions are properly informed by the public’s concern about crime”. Baroness Scotland QC in House of Commons Justice Committee, The Crown Prosecution Service: Gatekeeper of the Criminal Justice System, 6 August 2009 (pg. Ev 62).

### Table 3.5: Public opinion on grounds for public interest decisions

**Question: On occasion, even if a suspect has been arrested for a crime and there is enough evidence to convict them in court, the Crown Prosecution Service may decide to drop the case on grounds of public interest. Which of the following reasons, if any, do you think are acceptable grounds for dropping a criminal case? Please tick ALL that apply:**

	Percent of Respondents in Favour
Dropping a case because the likely sentence if found guilty is too low to warrant it	14%
Dropping a case because the suspect is young	8%
Dropping a case because the loss or harm to the victim was minor	7%
Dropping a case because the suspect has no prior criminal record	7%
Dropping a case because the crime took place a long time ago	4%
Dropping a case for some other reason	7%
None of the above reasons should ever justify a case being dropped	64%
Don't know	9%

Source: June 2012 YouGov Poll for Policy Exchange

In the case of the Fortnum & Mason trespass and criminal damage during the student protests in London in March 2011, the CPS explanation for not prosecuting 109 of the 139 suspects cited reasons relating to youth and implied cost. However, prosecutors told Policy Exchange that a key factor was the desire not to 'criminalise' the young people involved. It is far from clear that this justification would accord with the letter of the public interest test, let alone be acceptable to the public in London.

### Disorder at Fortnum & Mason, London, March 2011

On 26 March 2011, about 200 people forcibly entered and "occupied" luxury London store Fortnum & Mason during a political demonstration against spending cuts. The scene at Fortnum & Mason was televised live, as a large group broke off from the core of the political demonstration and attacked the store. They smashed windows, threw paint and fireworks at the front of the store, painted obscenities on the walls, scaled the façade, and entered through a broken upper storey window. Once inside the store, they refused to leave.

139 participants were arrested, however, in July, Alison Saunders, Chief Crown Prosecutor for London, announced that charges of aggravated trespass would be dropped against 109 of the participants.

She announced that these prosecutions were not in the public interest because *"the sit-in was a single incident, the defendants had not been involved in similar offences previously, and they only played a minor role in the offending behaviour. [In addition], the court would be likely to impose only a nominal penalty."*<sup>84</sup>

<sup>84</sup> 'Fortnum and Mason protest charges dropped by CPS', BBC News, 18 July 2011.

While Saunders received some public input urging her not to pursue prosecution, her decision was met with frustration from many who had been distressed by the footage of the events on the day. The Metropolitan Police issued a statement welcoming “broader debate on the issue of where the public interest lies in the context of disorder.”<sup>85</sup>

The 109 offenders who were not charged did not receive any alternative form of disposal. One senior London prosecutor supported the decision not to prosecute because it would have been inappropriate “to criminalize” the offenders, even though this justification goes beyond the remit of the CPS.

In addition to the public’s opinion not being reflected in the CPS’s public interest test, police can often feel that the CPS incorrectly wields its power as the sole arbiter of the public interest. This can be particularly true when charging decisions are made by CPS Direct prosecutors, who are not local and therefore do not know a local community’s priorities as well as the police on the ground. The perception that the public interest test is misused can lead to resentment on the part of the police and can weaken the prosecution-police relationship.

There is a good case for more means of public appeal against the CPS’s decisions relating to the public interest. Currently, formal Judicial Review is “the only means by which the citizen can seek redress against a decision not to prosecute.”<sup>86</sup> But applications are only successful in rare cases where prosecutorial decisions are counter to policy, are based on unlawful policy, or are “perverse.” This method of reviewing public interest decisions is “available, but... a highly exceptional remedy.”<sup>87</sup> In 2011, only 338 applications were made for Judicial Review of a criminal matter, and review was granted in only 86 cases.<sup>88</sup> In November 2012, David Cameron announced plans to further reduce the use of Judicial Review.<sup>89</sup>

The recent announcement (following a High Court ruling) by the DPP that crime victims would have a new right of appeal against a CPS decision to drop a prosecution is a welcome move that grants an additional means for the public to check the use of the public interest test.<sup>90</sup>

### Potential Solutions

There is value in having a public interest test, and it is inadvisable to require formal prosecution in every case. For example, the 2012 “twitter joke trial” of Paul Chambers was viewed by many as a waste of resources and a disproportionate response to what the public viewed as not a crime. Many countries that used to require prosecution in all cases, such as Austria and Italy, have since moved to a more discretionary system. However, a good public interest test should be narrow in scope and should exist only to avoid the rare prosecution that runs counter to the spirit of the law or from which the public derives no benefit. The public interest consideration should be a reflection of the public’s interest, and not the interest of individual Chief Crown Prosecutors or of a cash-strapped prosecution service.

Thus, any new Code for Crown Prosecutors should contain a reformulated public interest test that more accurately represents the public’s view of when prosecutions are not required. The results of the June 2012 YouGov poll for Policy Exchange cited earlier suggest that a more representative public interest test will have no place for many of the considerations the current Code permits.

<sup>85</sup> Ibid.

<sup>86</sup> R v DPP, ex p. Manning [2001] QB 330.

<sup>87</sup> R v DPP, ex p. C [1995] 1 Cr App R 136.

<sup>88</sup> ‘Judicial review statistics: how many cases are there and what are they about?’, BBC News, 19 November 2012.

<sup>89</sup> Ibid.

<sup>90</sup> ‘Victims to get right to challenge ‘no charge’ decisions’, BBC News, 27 July 2012.

In addition to a revised test, the prosecutor’s public interest consideration can be improved with increased input from the police. As stated earlier, the need for prosecutors that are independent from the police does not preclude cooperative working between the two partners. Often, police officers will have greater knowledge of the parties or communities affected by an offence. This familiarity should not be disregarded when deciding what is in the public interest. Instead of the decision being solely in the hands of the prosecutors, the police could be involved in that decision too. If public interest decisions are a discussion between the agencies rather than a unanimous decision, both sides can benefit from one another’s knowledge and expertise, increasing chances that the public interest truly will be represented.

If police and prosecutors cannot agree on whether it is in the public interest to drop a prosecution, more use should be made of an informal system of judicial review of prosecutorial decisions. Police can appeal prosecution decisions to a prosecutor’s manager, but the decision remains in the CPS’s hands. The criminal justice system would benefit from having an impartial third party on hand to resolve irreconcilable disputes over the public interest.

Regularly scheduled opportunities for informal judicial review would benefit the police and prosecution relationship, as the hardship of attending a judicial hearing would likely promote better conflict resolution by the parties themselves. The police would feel as though their opinion is considered, and the CPS can have the support of the court behind its more difficult public interest decisions. This could be a role for the magistracy as well, given their advantage as lay representatives of the public.

“Police can appeal prosecution decisions to a prosecutor’s manager, but the decision remains in the CPS’s hands”

### Other Decisions Not to Prosecute

In addition to decisions not to prosecute on public interest grounds, the CPS drops a greater number of prosecutions each year on evidential grounds. The evidential test requires prosecutors to be convinced that there is “sufficient evidence to provide a realistic prospect of conviction.”<sup>91</sup> Like the public interest test, prosecutions dropped on evidential grounds also give rise to a significant share of the CPS’s negative publicity.

**Table 3.6: Pre-charge decisions on evidential grounds, 2009/10–2011/12**

	2009/10	2010/11	2011/12
Total Pre-Charge Decisions	477,517	466,611	367,067
NFA, Evidential Grounds	119,682 (25.1%)	113,645 (24.4%)	83,996 (22.9%)

Source: Crown Prosecution Service



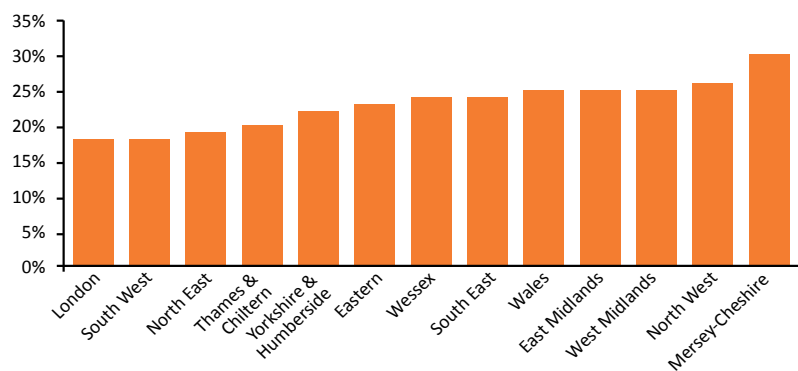
**Table 3.7: Prosecutions dropped on evidential grounds, 2009/10-2011/12**

	2009/10	2010/11	2011/12
Total Completed Prosecutions	982,732	957,881	894,791
Dropped, Evidential Grounds	46,315 (4.7%)	48,635 (5.1%)	43,990 (4.9%)

Source: Crown Prosecution Service

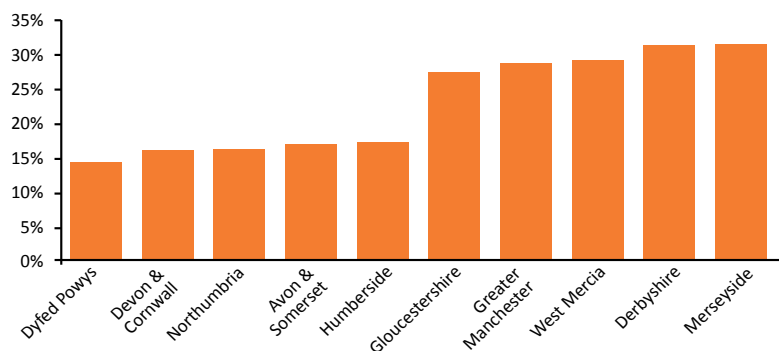
Nationally, about 44,000 prosecutions (4.9%) were dropped on the grounds of insufficient evidence in 2011/12. This is on top of 84,000 cases that the CPS decided not to charge due to insufficient evidence, approximately 1 in 4 CPS pre-charge decisions. Figures 3.9 and 3.10 illustrate each Group and each Area's rate of refusing to charge (No Further Action) on evidential grounds. Notably, London had the lowest rate of No Further Action on evidential grounds, at only 18.1% (10,773 prosecutions).

**Figure 3.9: Percent of pre-charge decisions dropped on evidential grounds by group, 2011/12**



Source: Crown Prosecution Service

**Figure 3.10: Percent of pre-charge decisions dropped on evidential grounds by area, 2011/12**



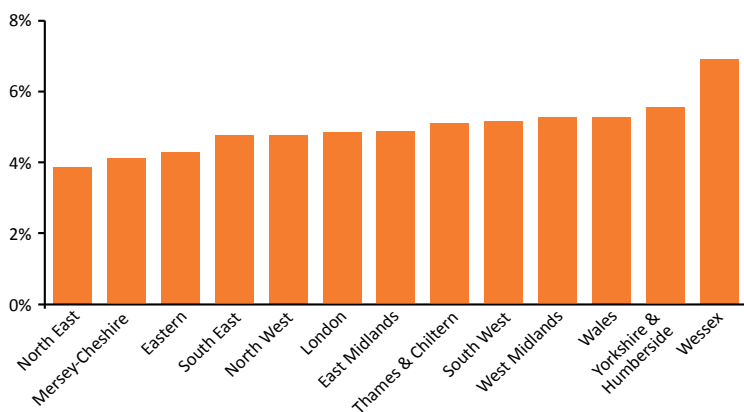
Source: Crown Prosecution Service

The Mersey-Cheshire Group stands out with the highest rate of pre-charge decisions dropped on evidential grounds, at 30%. Nearly one in three cases that the police bring to the CPS in Mersey-Cheshire result in no prosecution on the grounds of insufficient evidence. In the Merseyside area, this amounted to 3,966 offences. In Dyfed Powys, only 14.4% of cases are dropped pre-charge due to insufficient evidence (264 offences).

Some areas may have made a practice of being more ready to lay a charge based on the case files presented to them by police; prosecutors in Merseyside may be especially cautious. The quality of case files prepared by the police in London or Dyfed Powys may be stronger than those prepared in Merseyside. If so, CPS leadership in Mersey-Cheshire should seek to provide extra instruction to their local forces on effective MG-3 forms. The DPP should actively monitor performance gaps like these and promote opportunities for areas to learn from each other.

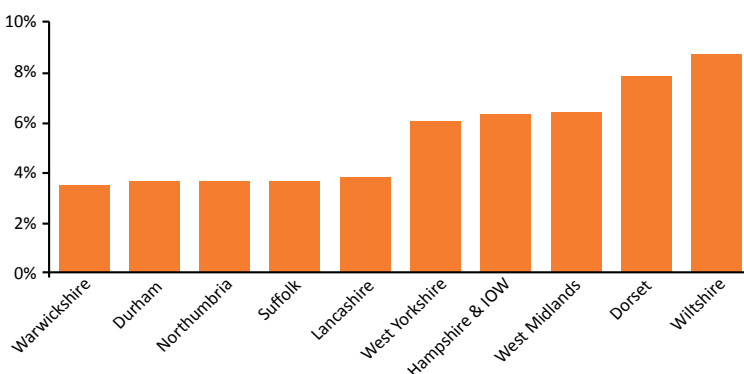
Prosecutions can be dropped on evidential grounds after a charge is laid, although this is done with far less frequency.

**Figure 3.11: Rate of dropped prosecutions on evidential grounds by group, 2011/12<sup>92</sup>**



Source: Crown Prosecution Service

**Figure 3.12: Rate of dropped prosecutions on evidential grounds by area, 2011/12**



Source: Crown Prosecution Service

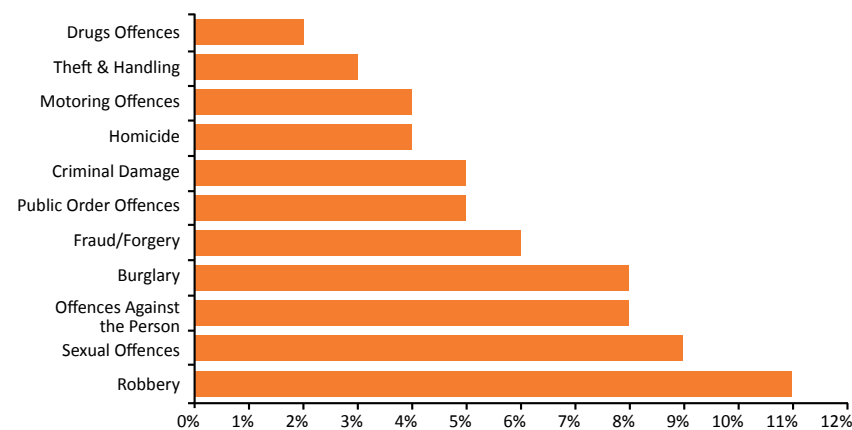
<sup>92</sup> These rates are the percentage of cases dropped on evidential grounds out of all completed prosecutions. These rates do not take into account pre-charge decisions or on-going prosecutions.

In 2011/12, CPS Wessex group had the highest rate of dropping prosecutions on evidential grounds post charge (6.9%, or 2,900 offences). CPS North East had the lowest rate of dropped prosecutions on evidential grounds after charge (3.9%). It is worth noting that CPS North East is also on the low end of dropping prosecutions on evidential grounds pre-charge. It could be that police forces in the North East submit better quality charging information, or perhaps prosecutors here are less vigorous in weeding out cases. Mersey-Cheshire is also on the low end of dropped prosecutions post-charge on evidential grounds, which may be the result of the high rate at which they drop prosecutions for insufficient evidence at the pre-charge stage.

Among the areas, Wiltshire had the highest rate of dropped prosecutions on evidential grounds, at 8.7% (543 offences), while Warwickshire had the lowest rate, 3.5% (224 offences). Dropping 1 in 11 cases on evidential grounds after a charge has been authorised, as is done in Wiltshire, represents a significant waste of police and prosecutor resources. Areas like Wiltshire and Dorset, with high rates of prosecutions dropped post-charge, may be laying charges too freely. Alternatively, they may have a very poor relationship with the local police, meaning that once a charge is laid, they do not receive sufficient investigative support to continue the prosecution.

Figure 3.13 and Table 3.8 illustrate the rate at which prosecutions for various offence types are dropped on evidential grounds. Only 2.4% of prosecutions for drug offences were dropped on evidential grounds (1,613 offences). By contrast, over 1 in 10 prosecutions for robbery were dropped on evidential grounds (1,436 offences).

**Figure 3.13: Prosecutions dropped on evidential grounds by offence category, 2011/12<sup>93</sup>**



Source: Crown Prosecution Service

93 Post-charge only.

**Table 3.8: Prosecutions dropped on evidential grounds in England & Wales, 2011/12**

Offence type	Total offences dropped
Homicide	34
Offences Against the Person	11,726
Sexual Offences	1,030
Burglaries	2,288
Robberies	1,436
Thefts	4,967
Frauds and Forgeries	795
Offences of Criminal Damage	2,156
Drugs Offences	1,613
Public Order Offences	4,038
Motoring Offences	9,622
Other Offences	3,161
<b>TOTAL</b>	<b>42,866</b>

Source: Crown Prosecution Service

Table 3.9 highlights the ten highest rates of dropped prosecutions on evidential grounds by area and offence type.

**Table 3.9: Highest rates of prosecutions dropped on evidential grounds by area and offence<sup>94</sup>**

1. Suffolk - Robbery	32.3% (21 offences)
2. Dyfed Powys – Robbery	20.8% (5 offences)
3. Gloucestershire – Robbery	15.0% (6 offences)
4. Warwickshire – Robbery	15.0% (6 offences)
5. South Wales – Robbery	14.4% (29 offences)
6. Cleveland – Robbery	14.4% (18 offences)
7. Hampshire & IOW – Robbery	14.3% (34 offences)
8. Wiltshire – Public Order Offences	14.0% (68 offences)
9. Thames Valley – Robbery	13.9% (62 offences)
10. Hertfordshire - Burglary	13.1% (54 offences)

Source: Crown Prosecution Service

Suffolk stands out for dropping a third of all robbery prosecutions for insufficient evidence. Outliers like that should give rise to an inquiry as to whose weaknesses lead to such poor performance. Whether Suffolk Police's robbery investigations are unsatisfactory or Suffolk prosecutors are too reluctant to pursue robbery prosecutions, the public is entitled to better performance from its criminal justice agencies. Only close public scrutiny of dropped prosecutions can highlight problem areas like this one.

Given the large number of cases that are rejected on evidential grounds, the evidential test should be reviewed along with the public interest test. In the DPP's

<sup>94</sup> Excluding motoring offences and homicide.

July 2012 request for comments on the Code for Crown Prosecutors, respondents are asked if the evidential test is explained clearly enough. The DPP and Attorney General should also consider whether the bar is placed at the appropriate level, or whether it is too high, preventing viable cases from being resolved by a trial.

### Visibility of the CPS

As the CPS is a public prosecution service, they must be visible to the public. The public has an expectation to know what its legal representatives are doing

on its behalf. Unfortunately, there is a significant lack of understanding about the CPS, which may in large part be due to what the public hears about the CPS. Too often, press coverage of the prosecution in England & Wales occurs only when charges have been dropped or there is an unsuccessful outcome in a

“The CPS still has a long way to go before its identity is sufficiently visible to the public and its role commonly understood”

high profile case.

A June 2012 poll by Policy Exchange found that around a third of respondents (30%) could not identify the CPS as the agency responsible for securing convictions in a criminal trial. That poll result demonstrates that even after a quarter of a century, the CPS still has a long way to go before its identity is sufficiently visible to the public and its role commonly understood.

**Table 3.10: Public perceptions of the role of the CPS**

**Question: From what you know about the way the justice system currently works, which of the following do you think has the main responsibility for securing criminal convictions in a court trial?**

	Percent of Respondents
The Crown Prosecution Service	70%
The Police	10%
The Courts Service	6%
The Probation Service	1%
Someone else	1%
Don't know	12%

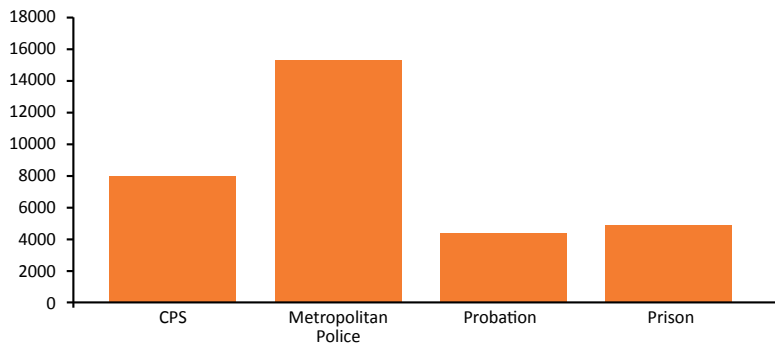
Source: June 2012 YouGov Poll for Policy Exchange

Many Chief Crown Prosecutors recognise that the public is not sufficiently informed about the work of the CPS. A couple of CCPs felt that the level of public understanding of the CPS was high in their area, and many noted that understanding of the CPS has improved significantly. However, they still observed that “We are not yet where we want to be,” “much understanding only arises from contact with the CJS,” and “knowledge is patchy and there is still confusion about the roles of the police, CPS and the courts.”<sup>95</sup>

The CPS only receives about half of the media attention that the police receive. Figure 3.14 shows the number of mentions each criminal justice agency received in UK newspapers (national and local) from June 2011 through June 2012:

95 Responses to a Policy Exchange questionnaire of Chief Crown Prosecutors.

**Figure 3.14: Media mentions of criminal justice agencies, June 2011–June 2012**

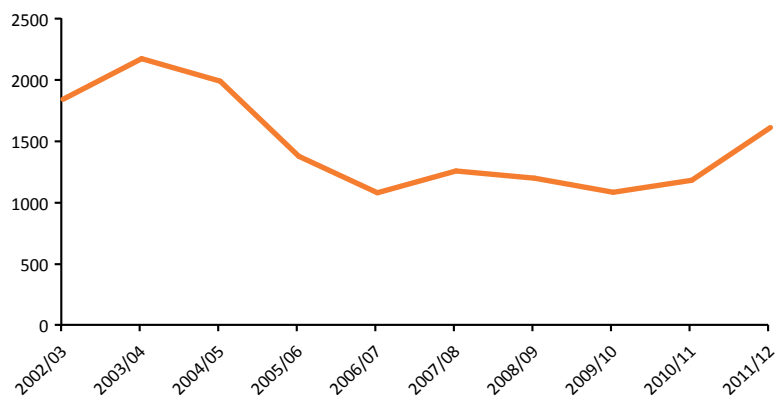


Source: LexisNexis

The prosecution's presence in the media still lags far behind the police presence, and the real difference is likely to be much higher, as there will be additional coverage of local police forces not reflected in the figures above. One Chief Crown Prosecutor noted, "[The CPS] remains overshadowed by the police, who have a far greater budget for dealing with the media."

Figure 3.15 below shows the CPS's presence in the media over the ten years from June 2002 through June 2012. The number of "major mentions" of the CPS in UK newspapers has increased since 2009/10, possibly helped by the aftermath of the August 2011 riots. However, CPS presence in UK newspapers has fallen well below what it was in the three years June 2002 to June 2005. It is possible that this is due to a reduction in negative press coverage, as not all press is good press. Nonetheless, it appears that the organisation has become less visible in the last decade rather than more.

**Figure 3.15: Annual media coverage ("Major Mentions" only) of the CPS, June 2002–June 2012**



Source: LexisNexis

## Public Profile

A significant share of the CPS's presence in the media is in relation to dropped prosecutions. Although there are concerns with the practice of dropping prosecutions, much of the time these decisions will be appropriate. It is therefore necessary that the CPS properly explain these decisions to the public. To do so, the organisation should take better advantage of the media coverage of these unpopular decisions.

The Director of Public Prosecutions has stated that he believes transparency and accountability come from letting the public know how decisions will be made, following that process, and then letting the public know how that process was followed. The Code for Crown Prosecutors explains the decision-making process in detail. It is in explaining individual decisions that the CPS often falls short.

When a prosecution is dropped, victims always receive a letter of explanation, and in more serious cases, they will have the opportunity to meet with a senior member of CPS staff to discuss the decision in person. When the press covers these decisions, the CPS is usually asked for a comment or explanation. However, these statements from the CPS are often formulaic and uninformative. They make minimal reference to the case at hand and show little sensitivity to the people or the community that may feel let down by the decision. In short, the CPS often fumbles media opportunities, making unpopular decisions or results even more damaging to its reputation.

For example, in a March 2012 case, a Crown Court judge criticised the CPS for an incorrect charge resulting in a suspect evading justice in a kidnap and torture case. In its response to the media, the CPS feebly asserted, "We accept that prosecution decisions meant we could not proceed against [the suspect]. We will be looking into what happened to ensure lessons are learnt."<sup>96</sup> A proper explanation should have detailed why the incorrect charge was laid and what specific steps would prevent recurrence. The public deserves more than vague assurances that "lessons will be learnt" from failed prosecutions for extremely violent crimes.

### CPS letter explaining dropped prosecution

In February 2012, the Crown Prosecution Service declined to pursue a fox hunting charge that was based on covert surveillance by the International Fund for Animal Welfare (IFAW). The reason for dropping the investigation was that the surveillance video was of too low quality to identify individual offenders, and therefore there was insufficient evidence to support the prosecution.

A case that may otherwise have gone unnoticed made national news because the CPS's explanation letter to the IFAW was so deeply unsatisfactory. It stated, in part:

*"Any arrest ... would inevitably mean that the Cattistock Hunt will be represented by specialist solicitors ... funded by the Countryside Alliance.*

*"May I suggest that arrests and release without charge or, worse still, a failed prosecution, could, potentially, be a media disaster for your organisation? The Cattistock Hunt are very media savvy."<sup>97</sup>*

<sup>96</sup> 'CPS blunder sets free woman suspected of torturing Queen Mother's former equerry', Daily Mail, 17 March 2012.

<sup>97</sup> 'Fox hunt investigation abandoned amid row between campaigners and CPS', The Guardian, 21 February 2012.

When asked about the letter, the CPS defended its decision not to prosecute, but acknowledged that the letter was “*somewhat clumsily worded*”.

The CPS should have explained that the footage was not sufficiently clear to identify individual defendants, and that therefore a prosecution was not possible. Given the politically volatile issue at hand, the CPS might have considered meeting with the IFAW to explain the decision. Instead, the CPS attracted more negative media attention to itself by defending its prosecution decision on highly inappropriate grounds such as PR implications, the quality of the opposing lawyers, and the defendants’ deep pockets.

By contrast, in July 2012 the CPS had to explain a decision not to prosecute G4S employees for the death of a detainee while in their custody. Gaon Hart, the Senior Crown Advocate responsible for the decision, explained in detail why he could not prove any of gross negligence manslaughter, unlawful act manslaughter, misconduct in public office, or corporate manslaughter.<sup>98</sup> The lengthy explanation provided details of what would have to be proven in the case and what evidential conflicts in particular prevented him from proving his point. The decision still came under some criticism, but Hart’s thorough explanation was an excellent example of making the decision process publicly visible.

In addition to more thoroughly explaining the “bad” news, it is important that the CPS take full advantage of the media and make every effort to publically celebrate its successes. Recently, the CPS began publishing a collection of “Successes of the Month” on its website to celebrate the good work of CPS prosecutors. Successful outcomes of interest to a local community should be shared with local media whenever possible. CPS leadership understands the need to be at the forefront of media coverage of success stories, not unlike the American prosecutor on the steps of the courthouse. Indeed, several Chief Crown Prosecutors specifically mentioned “steps of court” interviews as part of their media activity. The CPS should take responsibility for its public relations and invest time and talent toward countering the natural preference of the media to report bad news only, or to defer to interviews with police officers after a trial.

### Cameras in court

One key place the CPS can increase its visibility is in the courtroom. Currently, when an important case goes to trial, the CPS is invisible. Having prepared the case behind closed doors, it is often presented to the public by a solicitor agent or self-employed barrister, who is not a member of the CPS. The need for CPS advocates in the courtroom is discussed in depth in Chapter 4.

There are additional ways to improve CPS visibility in the courtroom. One will be with the advent of filmed courtroom proceedings – currently only planned for limited use in appeal court settings. Keir Starmer supports the wider use of cameras in the courtroom in order to promote “the principle of open justice”.<sup>99</sup> Open justice will open up the CPS as well. Cameras in court will mean the public will have the opportunity to see the CPS at work, which can have the effect of either building public confidence in the work of the CPS or of heightening public demand for more effective prosecution, or, most likely, both.

98 CPS decision on death of Jimmy Mubenga, 17 July 2012 (<http://blog.cps.gov.uk/2012/07/cps-decision-on-death-of-jimmy-mubenga.html>).

99 ‘DPP Keir Starmer in favour of allowing cameras in court’, The Guardian, 1 June 2011.



In addition to benefitting the public, if England and Wales eventually moved to a system with far more cameras in court during high-profile criminal trials, then this would also benefit the prosecution system. Poor advocates would be less able to hide in rarely visited courtrooms. Solicitors would no longer be able to remain anonymous to court reporters, an impermissible but common practice that has recently received some media attention.<sup>100</sup> CPS lawyers struggling with incomplete files, or being reprimanded by a judge for poor charging or poor preparation would be all the more compelling if the public could witness it too. This heightened visibility would have the effect of creating a stronger imperative for improved CPS performance, and it is something the prosecution should support.

### Victims and Witnesses

Statistics for 2011 indicate that 16% of ineffective trials in Magistrates' Court are due to a prosecution witness not appearing, and this rises to 21% of ineffective trials in the Crown Court.<sup>101</sup> Over 6,000 cases had to be relisted because the CPS could not get its witnesses to attend court.<sup>102</sup>

The CPS has paid tremendous attention to the treatment of victims and witnesses in the prosecution process, and their performance is significantly better in this area than it was five years ago. However, the public has not been able to see this progress for themselves unless they have personal experience of the system. A victim or witness who has had a pleasant experience with prosecutors will not gain media attention; a victim who feels he or she has been poorly mistreated by the CPS is far more likely to feature in the media. By publishing the results of a standardised survey given to all victims and witnesses, for example, the CPS could promote its improved treatment of victims and witnesses. In addition to promoting exposure of the CPS's work in this realm, such information could also help dispel preconceived notions that may discourage witnesses or victims from attending court.

Witness Care Units, separately or jointly operated by the police and CPS, attempt to provide support for victims and witnesses during a prosecution. However, WCUs were originally intended to be a temporary patch to cover for the very poor skills of CPS lawyers in dealing with victims and witnesses. WCUs were not expected to be a permanent solution. For example, much support could be provided simply by increased continuity in a case. If a witness spoke with prosecutors early during the prosecutor's preparation and later sees that same prosecutor at trial, that familiarity can provide a sense of reassurance for the witness or victim.

The kinds of hardships faced by victims often don't require specialist skills to overcome. In June 2012, CPS CEO Peter Lewis lauded the use of technology in victim and witness care. He observed that prior to smarter use of technology, many victims would first learn about their case in the newspaper, rather than through contact with the CPS. Avoiding that situation is basic and requires neither advanced technology nor expensive Witness Care Units. Witness care should be part and parcel of the skills expected of a prosecutor, and victim and witness support will be a natural consequence of well-managed prosecutions and the internal staff training provided by the CPS.

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<sup>100</sup> 'Solicitors 'refuse to give journalists their names'', Law Society Gazette, 19 April 2012.

<sup>101</sup> Ministry of Justice, Judicial and court statistics 2011, 28 June 2012.

<sup>102</sup> *Ibid.*

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## Recommendations

- The DPP and Attorney General should together re-evaluate the purpose of the public interest test. The test should be more concerned with avoiding prosecutions that contradict the spirit of the law than with avoiding minor prosecutions.
- The police should have a greater say in determining the public interest with respect to decisions not to prosecute. Where the police cannot agree that a prosecution should be dropped, they should have the opportunity to present their opinion before a judge or panel of magistrates, who can instruct the CPS to reconsider the decision. This process should be less formal than traditional judicial review, and the bar to review of prosecutorial decisions in these cases should be low.
- The Director of Public Prosecutions should establish guidelines as to the overall use of the public interest test, in addition to the current guidelines for individual cases. This will prevent numerous “appropriate” decisions from collectively amounting to an inappropriate practice (e.g. never prosecuting a particular offence).
- The Director of Public Prosecutions should revisit the factors tending against prosecution in the public interest to shift the focus away from the likely outcome at trial or the comparative value of the prosecution.
- Charging decisions should be regularly evaluated before cases proceed to trial to ensure that undercharging is not permitted. The CPS should ensure open communication with police officers who feel a particular case has been undercharged.
- The CPS should reaffirm its commitment to the prosecution role rather than a desire to maintain impartial observer status. One way to affect this is to calculate the conviction rates of individual prosecutors and to use this as a key performance metric for staff appraisal.
- Local CPS and police leadership should seek to increase the opportunities for interaction between lower level staff in both agencies. Joint training sessions can achieve this while also allowing each service to explain their expectations and needs.
- CPS and police leadership should continue to explore the benefits of co-location and should identify geographic areas where this might be arranged.
- The CPS needs to provide public relations training for all leadership personnel. This training should cover how to handle unsuccessful outcomes or dropped prosecutions as well as how to promote the agency’s success.
- Chief Crown Prosecutors should be encouraged to maximize their public visibility through a range of community engagement activities, and their success should be reviewed by the DPP.
- The CPS should become an advocate for televising court proceedings, and they should guide CPS staff in tackling the challenges presented by increased media coverage of trials.

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# 4

## Professional Prosecution

### In-House Advocacy

*“Advocacy changes everything for us. It enables us to grow up. To become at last a body of prosecuting advocates. I rather doubt that the broader significance of this is yet fully understood.”<sup>103</sup>*

Lord Ken Macdonald QC, 2009

One of the most important functions of a fully operational, professional prosecution service is to be an advocate for the prosecution in court proceedings. However, in England & Wales, a large portion of in-court advocacy for the prosecution is handled by private sector barristers and solicitors who are hired to represent the Crown Prosecution Service.

Prior to the founding of the CPS, police forces hired private lawyers to present their cases in court because the police themselves were unlicensed to do so. Even after the creation of the CPS, many CPS attorneys were limited in their in-court activities because they were solicitors lacking the necessary rights of audience to present cases in Crown Court. However, the Courts and Legal Services Act 1990 granted solicitors rights of audience to the Crown Court.<sup>104</sup>

In addition to greater rights of audience for solicitors, the CPS now employs nearly 700 barristers, comprising approximately one quarter of its lawyer workforce. Therefore, it is no longer lack of standing that prevents the CPS from performing its own advocacy.

During the early and mid-2000s, then DPP Lord Macdonald led a significant push toward in-house advocacy. Lord Macdonald’s goal was to have 25% of all advocacy handled by CPS-employed prosecutors by 2011. This modest goal has been met and passed in most areas, and for that progress the CPS should be commended. However, an increasing proportion of in-house advocacy must continue to be pursued before the CPS can be considered a truly professional prosecution service.

#### Current Practice

Currently, the CPS instructs independent barristers and solicitors for both Crown Court and Magistrates’ Court cases. In 2011/12, a total of £1,665,670 was spent employing private barristers to try cases in Magistrates’ Court.<sup>105</sup> A further £3,027,232 was spent employing solicitor agents for Magistrates’ Court work.<sup>106</sup> In total, £4,692,902 was spent on hiring private lawyers to advocate in the Magistrates’ Court alone.<sup>107</sup> While some areas have made it their policy to end

<sup>103</sup> House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*, 6 August 2009 (pg. 28).

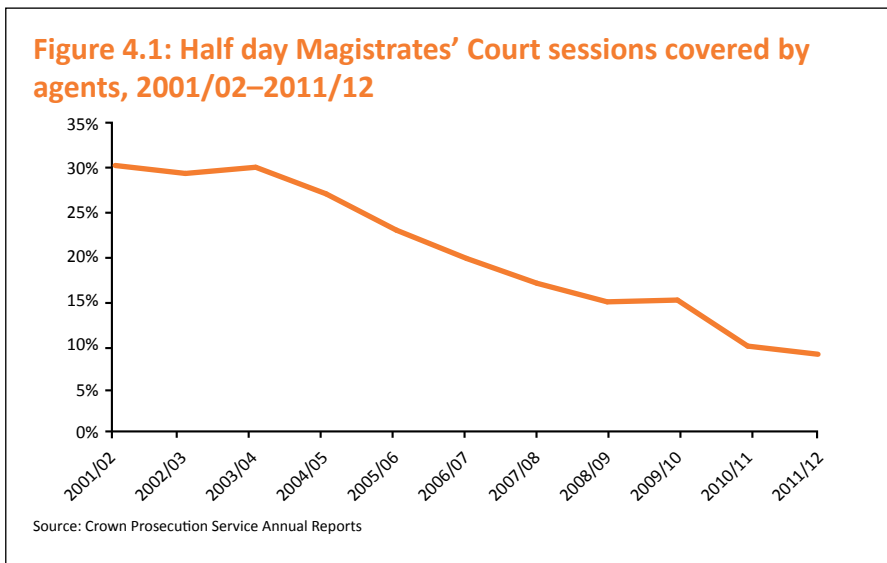
<sup>104</sup> Sec. 27, Courts and Legal Services Act 1990, subsequently superseded by the Legal Services Act 2007.

<sup>105</sup> Data obtained through a Freedom of Information request to the Crown Prosecution Service.

<sup>106</sup> *Ibid.*

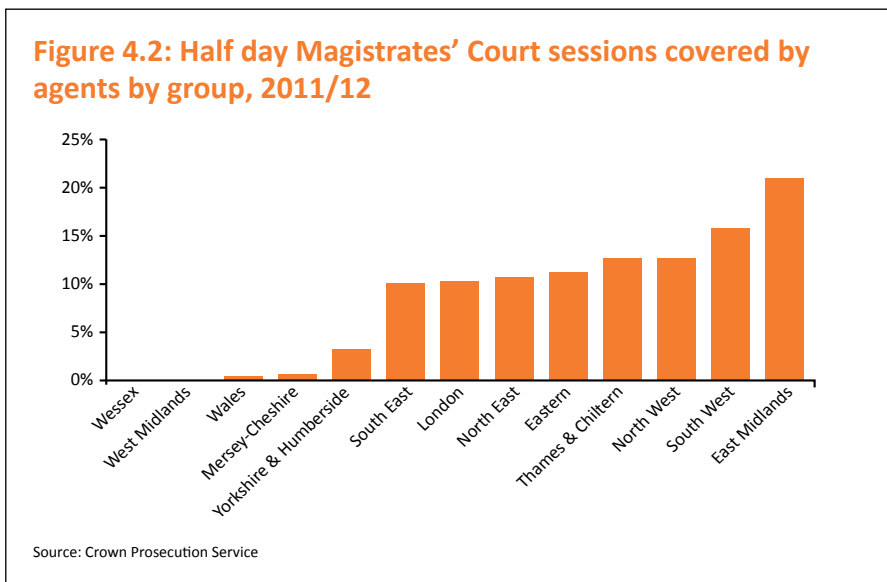
<sup>107</sup> *Ibid.*

the use of all agents in Magistrates’ Court, others continue to make frequent use of this expensive resource, on the grounds that they are necessary to cover for overly busy CPS staff.



In 2011/12, 8.8% of Magistrates’ Court sessions were covered by external agents acting for the Crown Prosecution Service. This is down from a decade high of 30.1% in 2001/02.

Advocacy policy and the priority given to the shift to in-house advocacy continues to be at the discretion of Chief Crown Prosecutors with the result that some groups have moved away completely from hiring external advocates for Magistrates’ Court work, while other groups still have a ways to go.



In 2011/12, seven CPS Areas did not use Agents at all for Magistrates’ Court sessions.<sup>108</sup> A further five Areas used Agents for fewer than 1% of their half day Magistrates’ Court sessions.<sup>109</sup> 10 of these 12 areas are in the Wales, Wessex, and West Midlands groups. CPS Wessex employed no Agents for Magistrates’ Court work in 2011/12.<sup>110</sup>

108 Cheshire, Dorset, Gloucestershire, Hampshire, Staffordshire, West Mercia and Wiltshire. Data obtained through a Freedom of Information request to the Crown Prosecution Service.

109 West Midlands, Gwent, North Wales, South Wales, Warwickshire. Data obtained through a Freedom of Information request to the Crown Prosecution Service.

110 Ibid.

At the other end of the scale, five CPS Areas employed Agents for more than 15% of their Magistrates’ Court sessions: Thames Valley (15.6%), Northamptonshire (20.7%), Devon & Cornwall (21.87%), Nottinghamshire (26.46%), and Derbyshire (31.35%).<sup>111</sup> Three of these five Areas belong to the same group: CPS East Midlands. CPS East Midlands employed Agents in over one-fifth (21.06%) of its Magistrates’ Court sessions.<sup>112</sup> Generally, Magistrates’ Court cases do not require the high level of advocacy that might necessitate hiring external advocates. Presenting these basic cases at court is the foundation for a professional prosecution service, and it should be achievable in the vast majority of cases.

“Presenting these basic cases at court is the foundation for a professional prosecution service, and it should be achievable in the vast majority of cases”

Much of the Magistrates’ Court advocacy that is completed in-house is done by Associate Prosecutors (APs). The AP role was expanded during the mid-2000s to permit CPS staff without legal qualifications to present low-level cases in the Magistrates’ Court. A recent CPS Inspectorate report found that Associate Prosecutors were very highly regarded by the Magistrates’ Courts;

better, even, than Crown Prosecutors.<sup>113</sup> The AP role is an opportunity for the CPS to grow its own advocates from the ground up. The role is a good example of efficient resource deployment, freeing up qualified lawyers to devote their time to more serious cases. As APs assume a greater share of the Magistrates’ Court workload, there is less reason for CPS lawyers not to assume the entirety of the remaining advocacy work without recourse to the independent Bar.

In the Crown Court, much wider use is made of outsourced advocates. According to CPS data, these are *always* barristers; solicitor agents are never hired to advocate cases in the Crown Court. Because Crown Court prosecutions are often handled by a mix of in-house and external advocates, the CPS is unable to report a breakdown of half-day sessions covered by in-house or external advocates. Instead, the extent of in-house advocacy in Crown Court can be measured by what percentage of Crown Court advocacy spend is spent on in-house advocates.<sup>114</sup>

111 Ibid.

112 Ibid.

113 HM Crown Prosecution Service Inspectorate, “Follow up report of the thematic review of the quality of prosecution advocacy and case presentation”, March 2012, page 18.

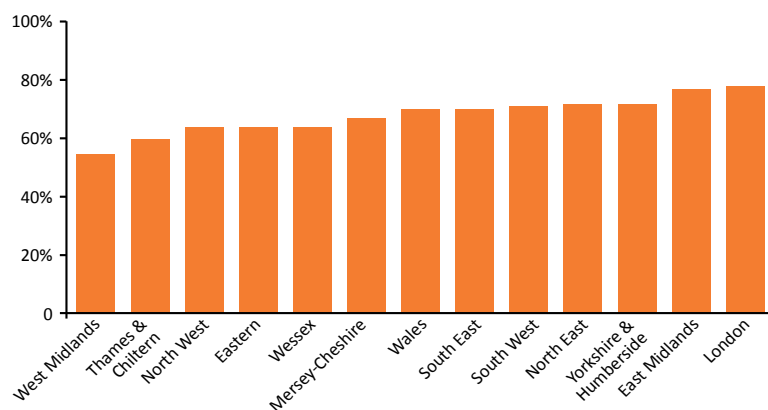
114 Excluding the small number of cases classified as Very High Cost Cases, whose costs do not come under the Graduated Fees Scheme.

**Table 4.1: Spend on Crown Court advocacy by advocate type, 2009/10-2011/12**

	2009/10	2010/11	2011/12
Payments to in-house advocates	24.5%	28%	31.1%
Payments to external advocates	75.5%	72%	68.9%

Source: Crown Prosecution Service

**Figure 4.3: Percent of Crown Court advocacy spend on external advocates, 2011/12**



Source: Crown Prosecution Service

The breakdown of advocacy payments shows that in 2009/10, approximately one quarter of Crown Court advocacy spend was on in-house advocates.<sup>115</sup> By 2011/12, nearly a third of Crown Court advocacy payments were for in-house advocates.<sup>116</sup> This progress is encouraging; the growth of the CPS's Crown Court advocacy capability must continue at an ever-increasing rate. In addition, some CPS groups need to catch up to the national average for percent of Crown Court advocacy spend going to in-house advocates. While West Midlands incurs nearly half of its Crown Court advocacy costs via in-house advocates, London lags behind, spending only 23% of its Crown Court advocacy spend on in-house advocates.<sup>117</sup>

In 2011, the CPS announced a move to Advocate Panels to govern its use of independent barristers. Any independent barristers wishing to be considered for future CPS work had to complete an application detailing the skills and experience qualifying them to try cases for the CPS. In addition, all barristers who were successful were sorted into levels that corresponded to the level of case they are qualified to present.

Of the roughly 4,500 barristers who could previously be instructed by the CPS, around 2,580 obtained places in the new Advocate Panels (94% of those who applied).<sup>118</sup> The new arrangement was promoted by the CPS as a mechanism for quality assurance; by employing a limited number of known advocates, the CPS would be more familiar with the quality of the barristers they employed, and the threat of removal from the panels would provide a check against poor performance. The Bar considers that the CPS has deprived itself of "a primary resource" at its disposal.

While this added mechanism of quality control is a positive step, it has come at a price to the CPS. As a consolation to the independent Bar, who were not in favour of the Advocate Panels, Keir Starmer agreed to limit the CPS to performing just 25% of all Crown Court advocacy.<sup>119</sup> In terms of fees, the limit will be between 20–40% of Crown Court advocacy fees going to in-house advocates; Figure 4.3 demonstrates that this could require a scaling back of in-house advocacy in some Areas.

An increasingly professional prosecution service should be setting targets – not limits – on its own performance.

<sup>115</sup> Data obtained through a Freedom of Information request to the Crown Prosecution Service.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Frances Gibb, "The CPS List: Prosecutors on Trial", *The Times*, 26 January 2012 (<http://www.thetimes.co.uk/tto/law/article3298292.ece>).

<sup>119</sup> Frances Gibb, "Thousands of lawyers 'no longer able to prosecute serious cases'", *The Times*, 19 January 2012 (<http://www.thetimes.co.uk/tto/law/article3291064.ece>). It should be noted that Starmer has denied that there will be a limit on CPS in-house advocacy, but other members of CPS leadership – as well as leaders of the independent Bar – have confirmed that such a limit was agreed to.

### Spending on Advocacy

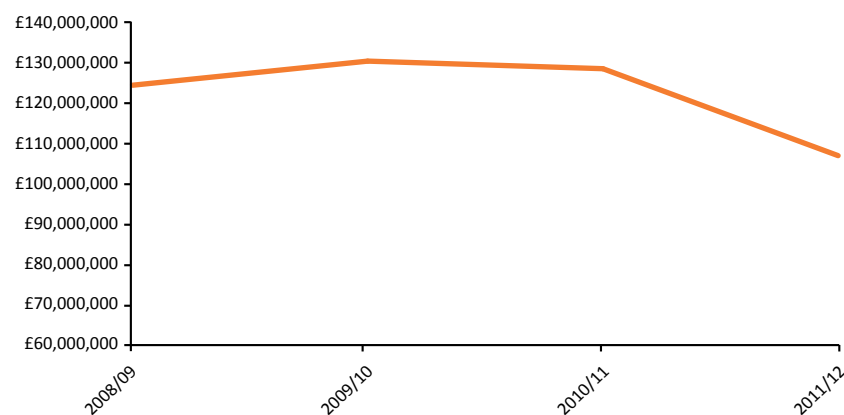
Until 2012, in most cases (Very High Cost Cases excepted) the CPS compensated advocates according to the Graduated Fees Scheme (GFS). This scheme calculated payment based on factors including hours worked, type of case, and numbers of pages of evidence turned over to the advocate. In 2010, the CPS Inspectorate observed that the complicated GFS resulted in the CPS overpaying for the services of private lawyers.<sup>120</sup> Late guilty pleas, overly thorough discovery (giving the advocate more evidence than necessary), and administrative errors can all lead to overly expensive fees under the GFS. In its report, the Inspectorate recommended reform of the GFS to simplify the process and to ensure that the CPS does not end up overpaying their instructed advocates.<sup>121</sup>

In March 2012 a new payment scheme was launched in an effort to simplify administration of advocacy payments. The new scheme, called Graduated Fee Scheme C, also revised the rates the CPS would pay to the independent barristers it instructed. Scheme C was a result of years of consultation between the CPS and the Bar.<sup>122</sup>

The fees paid by the CPS to the independent Bar under Scheme C remain very high.<sup>123</sup> A junior barrister working alone can earn up to £2,000 for a case resulting in a guilty plea. At trial, the junior can earn nearly £4,500 for a trial lasting just two days. If the CPS instructs a QC, that may cost the service over £6,500 for a guilty plea and over £15,000 for a two-day trial.

A Freedom of Information request revealed that in 2011/12, the CPS spent a total of £106,622,400 on outsourced advocacy work, £21,422,780 less than in 2010/11. This represents approximately 18% of the CPS’s net expenditure and 19% of all non-administrative cost. Every year from 2008/09 to 2011/12, outsourced advocacy costs have accounted for 20% of the CPS’s annual net expenditure. In 2011/12, the total spend on outsourced advocacy in the Crown Court was £101,929,427, a decrease of £21,571,659 over the previous year’s outsourced Crown Court advocacy costs. This figure rose for the preceding two years, from £116,755,412 in 2008/09 to £123,501,086 in 2010/11.

**Figure 4.4: CPS’s overall spend on outsourced advocacy, 2008/09–2011/12**



Source: Crown Prosecution Service

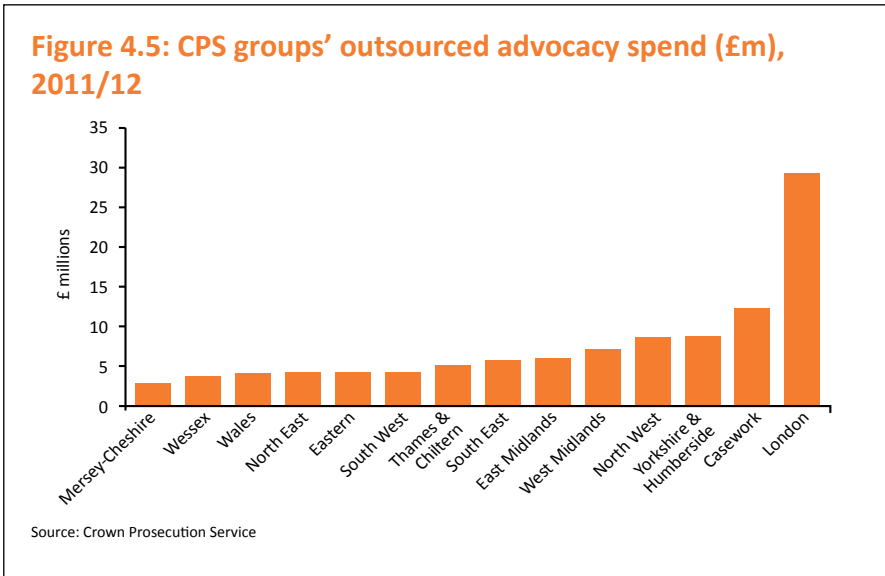
120 HM Crown Prosecution Service Inspectorate, “A value for money inspection of the application of the CPS graduated fees scheme”, May 2011.

121 *Id.*, page 1.

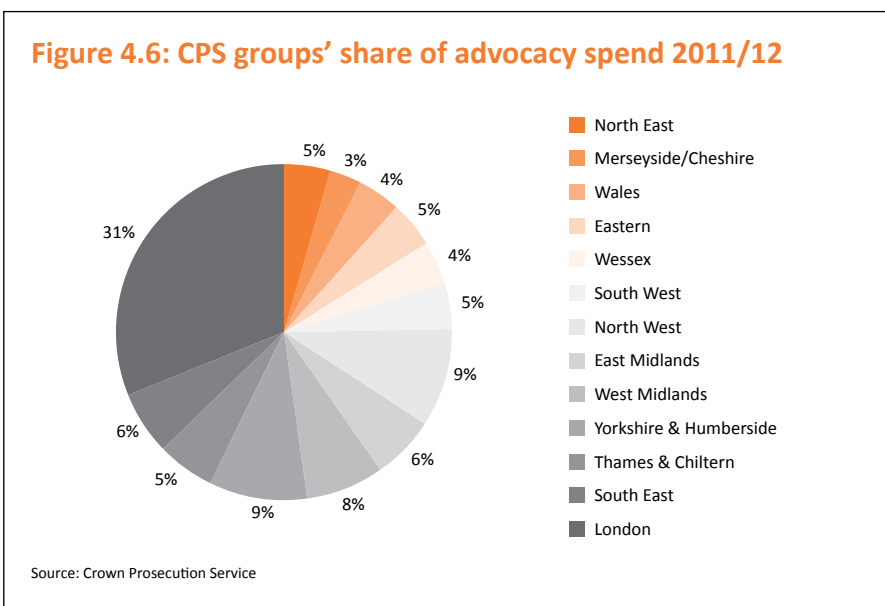
122 See, e.g., The Bar Council, “Crown Prosecution Service Fees”, 23 November 2011 ([http://www.barcouncil.org.uk/media/126381/bar\\_council\\_briefing\\_note\\_23\\_nov\\_2011\\_on\\_cps\\_gfs\\_proposals.pdf](http://www.barcouncil.org.uk/media/126381/bar_council_briefing_note_23_nov_2011_on_cps_gfs_proposals.pdf)).

123 Crown Prosecution Service, “Graduated Fee Scheme C Manual of Guidance” ([http://www.cps.gov.uk/publications/docs/gfs\\_scheme\\_c\\_manual\\_of\\_guidance.pdf](http://www.cps.gov.uk/publications/docs/gfs_scheme_c_manual_of_guidance.pdf)).

In the Magistrates' Court, the CPS spent £4,692,902 on outsourced advocacy: £1,655,670 to the independent Bar and £3,027,232 to solicitor agents acting for the CPS. This total has increased slightly (£148,808) over 2010/11, but has dropped significantly since just two years ago in 2009/10, when the CPS spent £7,443,074 on outsourced advocacy in the Magistrates' Court.



In 2011/12, London's spend on private advocates was a towering £29.3 million. Excluding the specialist casework groups, the next highest private advocate spend was in the Yorkshire & Humberside group, where outsourced advocacy totalled £8.8 million. These comparative outsourced advocacy spends largely reflect the size of these groups' caseloads. Groups like London and CPS North West, who have the highest caseloads in the country, can be expected to spend the most money on advocacy. The chart below illustrates each group's share of the total CPS spend on outsourced advocacy:





CPS London accounts for nearly a third of CPS spend on private advocates, while its caseload comprises only 18% of CPS caseload. All other groups' spend on outsourced advocacy closely reflects their share of the CPS caseload. This suggests that CPS London is greatly overspending on private advocates.

### The Case for In-House Advocacy

Many of the CPS's more pressing problems can in some way be addressed with a move toward in-house advocacy.

#### 1. Improved Advocacy Quality

When CPS lawyers do try cases, the calibre of their advocacy is often criticised, and this perceived weakness is frequently used to support the continued reliance on private barristers for important advocacy. Max Hill QC, Chairman of the Criminal Bar Association, recently stated that in important cases, "You want to be sure the best lawyer is on the job." This was why, he argued, the CPS needs to continue to rely on the Bar. In his view, "the best lawyer" will inevitably be from the independent Bar.

Assessments such as these of CPS advocacy are often tainted by special interests. Usually, the people who have the most experience with CPS advocates are members of the independent Bar; defence barristers and the judiciary, who nearly always arrive at the bench after a career as a barrister. The independent Bar, particularly those members employed in scarce criminal law work, are eager to protect their profession, especially the work they receive from the CPS. Without CPS work, there is the risk that the Criminal Bar will, in the words of one barrister, "wither on the vine". Thus, it is in their interests to claim superiority and denounce the quality of in-house CPS advocacy.

Slowly, however, there has been some improvement in the opinion of CPS advocacy quality from the bench.<sup>124</sup> Some District Judges in Magistrates' Court have observed that CPS advocates are more familiar with the case before them, and therefore are more comfortable and more thorough when presenting it before the court. Recently, individual judges around the country expressed the view that, while the quality of CPS in-house advocates varies, they are no worse overall than instructed advocates, whose quality also varies.

In March 2012, Her Majesty's Crown Prosecution Service Inspectorate released a follow-up report to its 2009 assessment of CPS Advocacy.<sup>125</sup> The 2012 follow-up identified areas of both improvement and decline in the quality of CPS advocates. The report noted that inadequate advocacy experience was largely to blame for the advocates' shortcomings, reinforcing the view that if advocacy were a more common experience, the quality of that advocacy would rise.<sup>126</sup> The high incidence of cracked trials means that the average Crown Advocate advocates fewer than four effective trials each year.<sup>127</sup>

The barristers to whom in-house advocates are compared will be in court far more frequently, they will have received more advocacy training, and they are more likely to have been promising advocates when they were called to the Bar.

This imbalance can be changed by a service-wide shift in focus to advocacy. To achieve this, the CPS will need to prioritise advocacy skill in its recruitment evaluations and put more resources toward advocacy training. There have already been discussions about the Bar providing training for CPS lawyers. Before pursuing this undoubtedly costly route, the CPS should first consider using its

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124 HM Crown Prosecution Service Inspectorate, "Follow up report of the thematic review of the quality of prosecution advocacy and case presentation", March 2012 (pg 1).

125 HM Crown Prosecution Service Inspectorate, "Follow up report of the thematic review of the quality of prosecution advocacy and case presentation", March 2012.

126 *Id.* at pg. 13.

127 *Ibid.*

own barristers to provide advocacy training. With 680 barristers employed by the CPS nationally – an average of over 52 per group and 16 per Area – a wholly internal advocacy training programme should be achievable.

As CPS lawyers appear more regularly in court, they will become more comfortable with the practice; there is no inherent reason that the CPS could not rival the private Bar as advocacy “experts”. This would in turn make the CPS a more attractive career choice for promising young advocates, ensuring the continued strengthening of the CPS’s advocacy capabilities.

The CPS Inspectorate identified the over-abundance of Crown Advocates as another obstacle for CPS advocacy quality. Initially, anyone who wanted to move from a Crown Prosecutor role to a Crown Advocate role – thereby receiving the larger salary of a CA – was permitted to do so, with little regard for their suitability to the requirements of that job. Many Crown Advocates lack the advocacy skills necessary to successfully execute the role; indeed, 71% of Crown Advocates fail the CPS’s own internal advocacy training course.<sup>128</sup> Civil service employment terms make it difficult for the CPS to shed unqualified staff, and this will continue to hold the service back as it professionalizes. Steps must be taken to ensure that only those who can fully perform the role are permitted to remain Crown Advocates.

## 2. Case Ownership

Lack of case ownership is a problem that manifests itself throughout the CPS. Higher level prosecutors tend to have greater ownership of their cases, as serious offences are prepared by one or two dedicated lawyers. However, these important cases are then handed off to a third party – the instructed advocate – at the moment that the CPS’s work is to be presented to the public through a court hearing. If these cases were routinely tried at court by the prosecutors who prepared them, the benefits would be manifold. First, prosecutors, knowing that they will be before a judge and jury, will prepare cases more thoroughly, lest any holes in the preparation reveal themselves in court. Knowing that they will be required to protect their witnesses from damaging cross examination, that they will have to provide the grounds for all information sought to be admitted into evidence, and that they will be the face representing the Crown and the public interest will assuredly result in more rigorously prepared cases.

Relatedly, an advocate who prepared the case he or she presents will be more knowledgeable about the facts and key players, and therefore will be a much more adept advocate for the case, basic advocacy skills being equal. If the same person prepares and presents a case, the choppy exchange of information between these two parties ceases to be a problem. Overall, maintaining responsibility for a case through preparation and advocacy will promote greater investment by the prosecutor in the quality of the prosecution. Lord Macdonald observed:

*“[In-house advocacy] makes us better at charging cases, at building cases, increases our accountability – if you have to justify yourself, the way you prepared it, in court, you’re going to prepare a lot more carefully than if farming out to a barrister to take the flak.”*<sup>129</sup>

<sup>128</sup> Id., pg 47.

<sup>129</sup> House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*, 6 August 2009 (pg. 27).

Currently, the CPS plans to promote in-house advocacy by setting aside a dedicated team of Crown Advocates and Senior Crown Advocates in each CPS area to operate as that area's "chambers", instructed by Crown Prosecutors.<sup>130</sup> This plan is intended to allow advocates to focus on advocacy, thereby gaining more practice in this skill. While that is an important goal, continuing to separate the advocacy role from the case preparation role ignores the benefits of case ownership and instead perpetuates the problems that arise from this division of tasks. If this separated "chambers" arrangement is an easy way to promote the move to in-house advocacy, then it should be pursued, but only as a temporary arrangement. The ultimate goal should always be for the preparing lawyer to also be the advocate. For the reasons stated above, these roles should not be separated.

A lack of case ownership is at the root of many of the weaknesses in the CPS, and it is not resolved only by a move to in-house advocacy. Under the Optimum Business Model, Magistrates' Court cases – and increasingly Crown Court cases – are handled in a pod system, where several Crown Prosecutors have shared responsibility for a bank of cases, such that no one prosecutor is responsible for any given case. The reasoning behind this system is that it would enable increased efficiency and consistency in case progression. However, this style of work can be tremendously damaging to the quality of the cases. If no one is fully responsible for the success or failure of a given case, then there will be a decreased sense of ownership, a less thorough understanding of the case by the lawyer who finally does present it in court, and there will be less communication between the prosecutor and the investigator and witnesses.

Prosecutors often show up in Magistrates' Court with a case they've only received moments before and have to be guided through the legal issues by the defence counsel, clerk, or, if applicable, the District Judge. Unprepared prosecutors are not only an embarrassment to the CPS, they can also result in wasted resources for the entire criminal justice system as cases must be relisted when the prosecution is not ready to proceed. In the worst cases, it can result in guilty defendants being acquitted.

The police and the Bar both disfavour pod working, as they are unable to get the information they need from a dedicated prosecutor who knows the case. Many prosecutors also lament the chaos of the pod working system.<sup>131</sup> It is troubling that the CPS noted in 2010 that it was seeking to introduce the pod system into Crown Court workload as well. A July 2012 CPS Inspectorate report found that "OBM has not yet delivered the consistent level of effective case progression required to gain the confidence of users and stakeholders."<sup>132</sup> The CPS should reconsider this model of case development before further expanding its use.

### 3. Victim and Witness Support

Lord Macdonald articulated a third benefit of the CPS handling its own advocacy: providing a better service to witnesses. While this may not seem readily apparent, much of the criticism surrounding victim and witness treatment could be resolved by having a dedicated prosecutor who prepares and presents a case. The lack of continuity in case preparation and advocacy means that victims are sometimes left uninformed and do not have anyone to speak to about the progress of their case. Witnesses do not know what to expect and are often inconvenienced with multiple calls to court before the trial actually proceeds.

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130 Frances Gibb, "Crown Prosecution Service sets itself a Bar standard", *The Times*, 27 September 2012 (<http://www.thetimes.co.uk/tto/law/article3550284.ece>).

131 See, e.g., The Anonymous Prosecutor, "The 'OBM'" [blog post], 23 July 2009, <http://theanonymousprosecutor.blogspot.co.uk/2009/07/obm.html>.

132 HM CPS Inspectorate, "CPS Optimum Business Model: A thematic review of the CPS Optimum Business Model for case progression", July 2012, pg 6.

As long as the CPS outsources the advocacy role, witnesses will quite likely have never spoken to or even seen the lawyer examining him or her in court. Victims will feel removed from the process, as though they don't have a representative at court. With one prosecutor on a case from preparation through trial, witnesses and victims can have a name and a face to associate with the prosecution role. The prosecutor's case will benefit from being more familiar with the parties involved, and in return he or she can explain the process to victims and witnesses so they know what to expect in their case. This covers much of the support currently provided by third party providers and by costly Witness Care Units. The prosecutor should be the victim's point of contact during prosecution.

#### 4. Cost Savings?

The CPS has acknowledged that financial benefit "is not the main reason behind the [in-house] advocacy strategy."<sup>133</sup> The CPS Inspectorate found that increased in-house advocacy saved £26 million (net) over five years (2007–2011).<sup>134</sup> In a budget of £600m, annual savings of just over £5m is minimal. However, as long as the shift to in-house advocacy does not present significant increased costs, then the benefits already described represent increased value for money, whether or not they also result in immediate cost savings.

#### Challenges in Shifting to More In-House Advocacy

Handling an ever-increasing share of advocacy in-house will not come without difficulty. The most significant challenge to this move comes from the independent Criminal Bar. The Criminal Bar depends on CPS work for its livelihood, thus they have a vested interest in preventing the CPS from taking on more of its own advocacy work. Many members of the Bar believe that the CPS can never match the talent found at the Bar. A senior legal figure and member of the Bar described the CPS's "inevitable dependence" on the Bar. In 2012, the Bar Standards Board published a report of its findings comparing advocacy quality between the CPS and the Bar. Unsurprisingly, the Bar Council found that the Bar provided better advocacy. The plainly self-serving report prompted criticism from many fronts, including the Guardian, who called it "crass and deeply flawed".<sup>135</sup>

During his time as DPP, Ken Macdonald gained a reputation for chipping away at the CPS's relationship with the Bar due to his commitment to bringing advocacy in-house. Although Macdonald is a member of the Bar, his view was that the DPP's priority was professionalising the CPS, even if that came at the price of relations with the Bar. Some consider that Keir Starmer has been much more delicate in his dealings with the Bar. This has resulted in decisions like capping the CPS's share of advocacy, a decision which serves no benefit to the CPS. The Director of Public Prosecutions should be expected to be a vigorous proponent of the advancement of a strong prosecution service.

It is probably correct to say that the Bar has more advocacy talent than the CPS has. It is also possible that a rapid increase in in-house advocacy would result in an initial dip in performance, as the CPS grows to accommodate the new responsibility. A shift to 100% in-house advocacy cannot happen overnight. However, as the CPS steadily increases emphasis on the advocacy role, the benefits described above will slowly accrue, allowing them to attract and retain a higher

133 Crown Prosecution Service, "Cost Considerations Governing the Deployment of Crown Advocates", 25 June 2009, [http://www.cps.gov.uk/news/assets/uploads/files/higher\\_court\\_advocacy\\_costs\\_final.doc](http://www.cps.gov.uk/news/assets/uploads/files/higher_court_advocacy_costs_final.doc).

134 HM Crown Prosecution Service Inspectorate, "Follow up report of the thematic review of the quality of prosecution advocacy and case presentation", March 2012, pg 4.

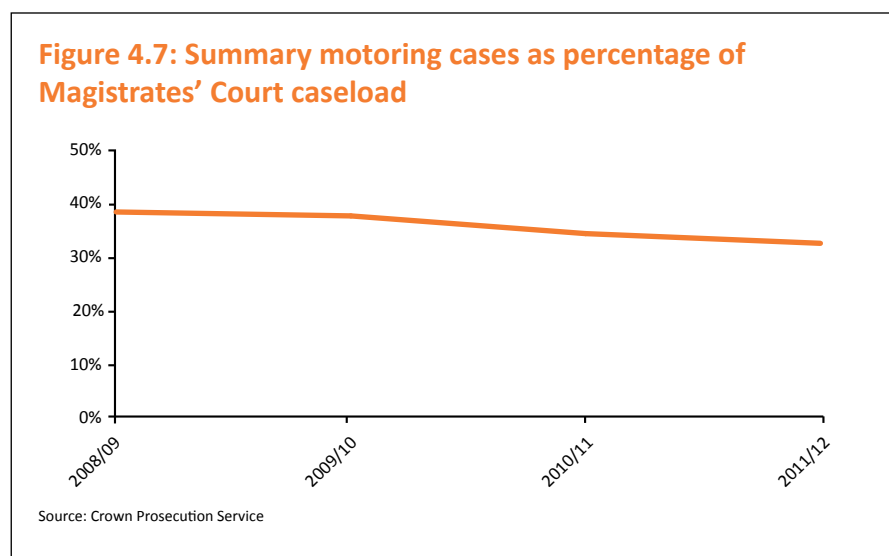
135 Richard Moorhead, "Bar Standards Boards 'research' is crass and deeply flawed", The Guardian, 23 April 2012.

calibre of advocate. Any initial drop in quality will quickly be reversed, with CPS performance eventually improving on its current position.

### Scope of the CPS

A professional prosecution service brings considerable talent to bear on each case it prosecutes. This level of expertise is not necessary for every criminal offense. To more efficiently deploy resources and to ensure that staff have sufficient time to devote to their caseload, it is right to review the scope of the CPS and consider where responsibility for some prosecutions might be passed to the police.

Low-level motoring offences absorb a significant portion of CPS resources. In 2011/12, the CPS prosecuted 255,367 summary motoring offences.<sup>136</sup> Of the 787,547 cases prosecuted by the CPS at Magistrates' Court, nearly one-third (32.4%) were summary motoring offences. Over the last four years, this percentage has steadily decreased, but has remained between 30% and 40%.<sup>137</sup>



In May 2012, the Home Office announced plans to return prosecution powers to police for low-level motoring offences in cases where no plea is entered or where the defendant does not attend court.<sup>138</sup> Previously, the police could prosecute these low-level motoring offences, but if the defendant did not appear in court, the case had to be handed over to the CPS, who had to repeat the case preparation, creating waste and delay. Furthermore, not all police forces were making full use of their powers to prosecute low-level motoring offences. This change now means the CPS can better conserve its own resources, and local areas should encourage police forces to assume responsibility for these offences.

In October 2012, police prosecution powers were further extended to include criminal damage of under £5,000, some alcohol offences, and some public order offences.<sup>139</sup>

The Home Office is right to reduce redundancy by expanding the police prosecution powers to cover low-level motoring offences, as deploying the CPS in such straight-forward, low-value cases is highly inefficient and unnecessary. However, the pursuit of cost-efficiency must not come at the price of returning incrementally to the problematic police prosecution system that existed prior to 1986.

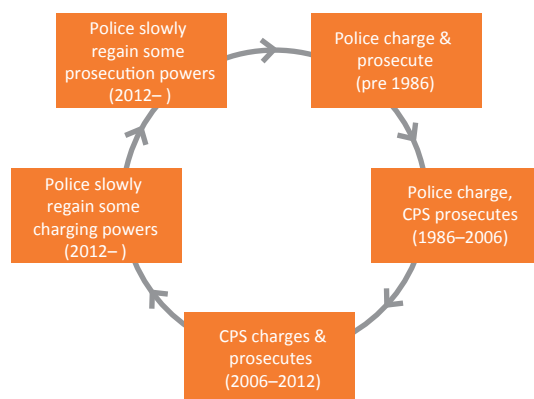
136 Data obtained through a Freedom of Information request to the Crown Prosecution Service.

137 Ibid.

138 Home Office, "Police prosecution powers to be extended", 16 May 2012, <http://www.homeoffice.gov.uk/media-centre/press-releases/police-powers>.

139 Home Office, "Greater police prosecution powers to cut costs and deliver swifter justice", 23 October 2012, <http://www.homeoffice.gov.uk/media-centre/news/police-prosecution-powers>.

**Figure 4.8: Separating and rejoining prosecution and police powers?**



Source: Crown Prosecution Service

## CPS Workforce and Recruitment

The CPS workforce is composed of a combination of solicitors, barristers, and non-legal support and administrative staff. All CPS employees are employed under the terms and conditions of Civil Service employment. Unlike at the self-employed Bar, CPS lawyers are all salaried, according to graded pay scales. In 2011/12, the CPS employed 7,394 Civil Service full-time equivalents, a 7% drop on staff numbers in 2010/11. These numbers included 1,978 solicitors and 680 barristers.<sup>140</sup>

The CPS recruits trainees who have trained either as prospective solicitors or as prospective barristers. These trainees complete their pupillage or training contracts with the CPS and then and then join the service as Crown Prosecutors. From 2009 until summer 2012, the CPS trainee scheme was frozen, permitting no new legal trainees to join. In the spring of 2012, applications were solicited for 15 spots on the CPS's trainee scheme. The organisation received over 1,000 applicants for those 15 spots, or over 66 applicants for each available slot. This was also the first time that applicants had to have a 2:1 university degree in order to be considered for a position; previously, the CPS would consider applicants with a 2:2 degree qualification.

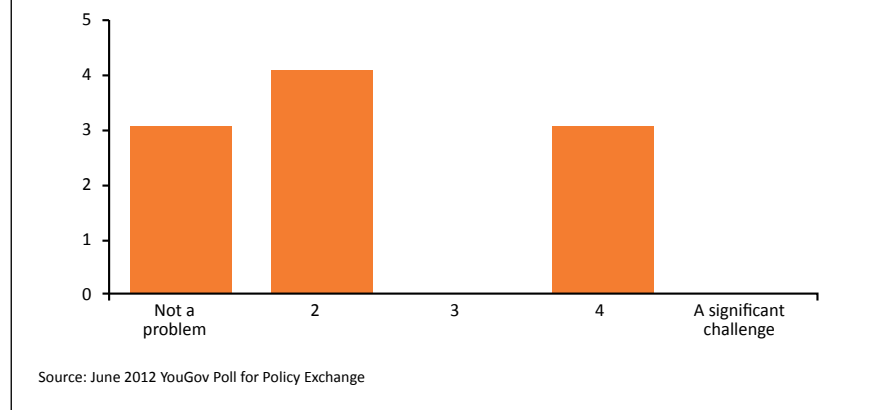
There has been a tradition of considering the CPS a career choice only for those who were unsuccessful entering private practice or the self-employed Bar. Traditionally, the Bar has been a much more prestigious and competitive field to enter. However, some legal analysts have observed that the job security and steady salary offered by the CPS has become more appealing to young lawyers than a meagrely-paid career at the self-employed Bar. Thus, with higher application requirements and an overly large applicant pool, the CPS should now have a better pick of top quality young lawyers.

Nonetheless, there remains concern within CPS leadership that its applicant pool remains below par. Rather than being concerned with how to whittle down 1,000 to the 15 best, a senior figure in CPS Headquarters placed more emphasis on the fact that they still might not be able to find 15 qualified applicants, and so would extend offers to even fewer than 15 candidates.

<sup>140</sup> Staff numbers as of 30 June 2012

Some Chief Crown Prosecutors are also concerned about the quality of applicants to the CPS, although most are not. When asked to rate the calibre of the applicant pool on a scale of 1 (not a problem) through 5 (a significant problem), three of ten Chief Crown Prosecutors answered '4'.

**Figure 4.9: Chief Crown Prosecutors poll on quality of the candidate pool**



In addition to newly qualified lawyers, the CPS aims to attract experienced legal talent from private practice and the self-employed Bar. CPS leadership is particularly keen on attracting senior barristers to join them in-house as Principal Crown Advocates, advocating the most serious prosecutions and appellate work. To encourage a greater number of barristers to join the CPS, the CPS and the Bar could consider establishing a formal secondment system, whereby members of the independent Bar move in-house for the CPS for a fixed period of time. A system akin to this operates in Scotland, where the most serious cases are advocated by Advocates Depute, private lawyers who are appointed to work exclusively for the Crown Office and Procurator Fiscals Service for a fixed number of years.

A formal secondment arrangement could be beneficial to the Bar, who would enjoy the opportunity for regular hours, work, and pay, as well as specialist prosecution experience, and the CPS, who could exert greater quality control over its external advocates (while it continues to use external advocates) and could seek to benefit broadly from the experience and talent of the barristers during their years in-house. In addition, secondments may have the added benefit of encouraging more barristers to move to the CPS permanently.

Another significant challenge to up-skilling the CPS workforce and promoting more in-house advocacy is the quality of existing staff and the inability of the CPS to remove unqualified staff from their posts. Many CPS lawyers will have joined at a time when advocacy was not expected of them, and they may wish to continue doing case preparation or charging decisions only. Short of offering voluntary early release to staff who cannot meet the advocacy expectations, the CPS cannot fully make the shift toward an outfit of advocates until the time that all non-advocating staff have left and have been replaced with a new workforce hired under advocacy-oriented criteria.

This necessitates a wholesale reform of terms and conditions of CPS staff, to ensure that outdated civil service terms do not retard the upskilling of the CPS in

future. In common with the police, there is a strong case for a thorough review of CPS staff terms and conditions to make it easier to attract skilled applicants and reward strong performance, to link pay to performance rather than time served, and to remove underperforming staff.<sup>141</sup>

## Recommendations

- **The Director of Public Prosecutions should recommit to a push toward increased in-house advocacy, even if this must be done at the expense of the CPS's relationship with the Bar. The CPS should establish new goals of 100% of Magistrates' Court advocacy to be performed by in-house advocates within 5 years and 50% of Crown Court advocacy to be performed by in-house advocates within 10 years.**
- **Recruitment procedures should ensure that all new hires are talented advocates, able to succeed in court against the self-employed Bar. The CPS should promote its advocacy plans in recruitment materials so that talented new advocates will consider applying for a position at the CPS. In addition, all Crown Advocates should be given the opportunity to voluntarily move to a Crown Prosecutor role in light of the increased expectations of Crown Advocates.**
- **The Attorney General should instigate an independent review of the remuneration and terms and conditions of CPS staff to see what changes may be needed to support a professionalisation agenda. All lawyer employees should be given the opportunity to take Voluntary Early Leave options over the course of the next five years in light of increased advocacy expectations.**
- **All Crown Advocates should undergo an annual Advocacy Assessment. Those receiving the lowest score should be prohibited from advocating cases in any court until their performance improves.**
- **Summary motoring offences should routinely be taken to court by police forces. Only in exceptional cases should the CPS be responsible for a summary motoring prosecution.**
- **The CPS should allow police to prosecute the majority of cases for which the police have prosecutorial powers. Only in special circumstances should the CPS be responsible for these cases.**

“The CPS should promote its advocacy plans in recruitment materials so that talented new advocates will consider applying for a position at the CPS”

141. A similar review of police terms and conditions of service and remuneration was conducted by Tom Winsor in 2011-12 that has led to new conditions for police officers and staff that are more in tune with the modern world and the needs of a professional service.



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# 5

## Accountability of the CPS

The Crown Prosecution Service is a key player in the criminal justice system, and it must at all times retain its independence from political influence and uphold complete impartiality in the conduct of its work. However, the CPS is also a major public service that costs hundreds of millions of pounds each year. It cannot, therefore, be immune from democratic oversight, and it must be held accountable for its performance. Although the majority of citizens do not interact directly with the CPS, everyone relies on a high-performing prosecution system to support the rule of law and a fair and effective justice system. Achieving this requires a strong degree of accountability and formal oversight that ensures that the CPS serves the public well.

Democratic legitimacy demands that all elements of the criminal justice system are answerable for their decisions to a governing authority, but unlike District Attorneys in the United States, none of the Crown Prosecution Service leadership is directly elected. Instead, the formal accountability of the primary prosecution agency in England and Wales has traditionally been less clear and much more centralised, with no local line of accountability to communities. CPS staff are held to account internally by the bureaucratic oversight of their local Chief Crown Prosecutor and ultimately the DPP, and CPS leadership is subject to the indirect ministerial accountability provided by the ‘superintendence’ of the Attorney General.

To command public support, it is critical that the CPS considers and satisfies the needs of the public they represent. Stronger accountability of the CPS must be achieved both in the form of increased public accountability through community involvement, local media visibility, and formalised relations with Police & Crime Commissioners, and increased internal accountability to the Director of Public Prosecutions, the Attorney General, and ultimately to Parliament.

### Oversight of the DPP and CPS

The Attorney General for England and Wales is responsible for all criminal prosecutions undertaken by the State as well as for providing legal guidance to the government. Among the many roles assigned to this office, the Attorney General has direct oversight of the operation of the Crown Prosecution Service, in what one occupant of that office described as a “superintendent role”. The Attorney General appoints the Director of Public Prosecutions to run the CPS. Subsequently, democratic accountability for the prosecution service is only at the level of the Attorney General; the DPP is an appointed role with no established Parliamentary oversight of that process and no fixed term limit. In addition, he or she can only be removed from post by the Attorney General.

Although the Attorney General retains the power to remove the DPP, the DPP role is largely independent of the Attorney General. Decisions to prosecute are almost exclusively the domain of the DPP, with only a few exceptional cases requiring the consent of the Attorney General. The Attorney General is uninvolved in the vast majority of prosecutions. Only where a prosecution is of unusually high relevance to the public interest will the Attorney General engage with the DPP about a case.

According to the Protocol between the Attorney General and the Prosecuting Departments, the Attorney General advises the DPP on the “strategic direction” of the Crown Prosecution Service, consults with the DPP on proposed revisions to the Code for Crown Prosecutors, and receives periodic reports from the DPP on the CPS’s functions.<sup>142</sup> The DPP must prepare an annual report to the Attorney General, who will then lay the report before Parliament. There is no formal requirement for the DPP to attend Parliament to give evidence before MPs, though in recent years this has become more common.

## The Chief Crown Prosecutor

After considerable struggles in the past with its leadership, the CPS’s current cadre of Chief Crown Prosecutors (CCPs) and headquarters leadership is one of the service’s best assets. Many CCPs have been with the service since its inception in 1986, and a number of them have prosecution experience that pre-dates the CPS. Some also have significant experience in the private sector. As most of the 13 CCPs were chosen from the larger group of 42 CCPs extant prior to April 2011, they represent the highest calibre of leaders working in the CPS. Therefore, it is to the CPS’s benefit that they be the public face of prosecution locally.

### Chief Crown Prosecutors, October 2012

- **Nazir Afzal OBE**, CPS North West: Joined CPS in 1991 as a solicitor from private practice.
- **Jim Brisbane**, CPS Wales: Joined CPS as a CCP in 2008 from the Procurator Fiscal’s Office in Scotland, where he served as an Area Fiscal and as Deputy Crown Agent for Scotland.
- **Roger Coe-Salazar**, CPS South East: Barrister, worked as a corporate legal advisor before joining the CPS in 1999.
- **Martin Goldman**, CPS Yorkshire & Humberside: Joined the CPS in 1989 as a trainee solicitor. Became a CCP in 2004.
- **Nick Hawkins**, CPS Wessex: Joined the CPS as a CCP in 1999. Served previously in the Royal Navy and was head of the Naval Prosecuting Authority.
- **Barry Hughes**, CPS South West: Joined the CPS in 1986 as a solicitor.
- **Harry Ireland**, CPS West Midlands: Joined the CPS in 1986 after a career as a solicitor in private practice and then in a County Prosecuting Solicitors Department.
- **Grace Ononiwu**, CPS Eastern: Joined the CPS in 1990 as a Chief Crown Prosecutor. Previously worked as a private solicitor practising criminal law.
- **Alison Saunders**, CPS London: Barrister, joined the CPS in 1986 after working as a corporate legal advisor.
- **Baljit Ubhey**, CPS Thames & Chiltern: Joined the CPS in 1992 as a trainee solicitor.

<sup>142</sup> “Protocol Between the Attorney General and Prosecuting Departments”, July 2009 (<http://www.attorneygeneral.gov.uk/Publications/Documents/Protocol%20between%20the%20Attorney%20General%20and%20the%20Prosecuting%20Departments.pdf>).

- **Judith Walker OBE**, CPS East Midlands: Prior to joining the CPS in 1986, worked first as a defence solicitor before joining the Chief Prosecuting Solicitors Office.
- **Paul Whittaker**, CPS Mersey-Cheshire: Joined the CPS in 1986 following a career at the Bar and subsequently at the North Wales Police Prosecuting Solicitors Office.
- **Wendy Williams**, CPS North East: Joined the CPS in 2003 after working at Her Majesty's CPS Inspectorate and in private practice as a solicitor.

Half of all CCPs joined the CPS in the first four years of its existence, and nine CCPs have been with the CPS for 20 years or more. Because the CPS has improved so significantly since those difficult early years, those who have been in the CPS since then are worthy of credit for their part in that turnaround. Because of their long service, current CCPs are sometimes inclined to compare the CPS's current performance with how it used to be. Viewed from that angle, the CPS has improved a great deal. But it is too easy for anyone using 1986 as the benchmark against which progress is measured to fail to see that the CPS still has a long way to go.

### Appointment of Chief Crown Prosecutors

Chief Crown Prosecutors are appointed by the DPP, with input from the CEO and Chief Operating Officer. The positions are advertised internally as well as externally in national media, although one CCP observed that it is difficult for non-CPS lawyers to demonstrate the required management experience. The selection process involves multiple rounds of interviews, an assessment centre that includes a media skills interview, and a presentation before the DPP, CEO, Chief Operating Officer, and a non-executive director.

CCPs are accountable to the Chief Executive and DPP for the functioning of their local areas. Currently, this accountability is achieved primarily through quarterly Area performance reviews and biannual reviews of individual CCP performance. The DPP hosts combined meetings with all 13 CCPs, and he also hosts individual meetings with CCPs either at Headquarters or locally. The DPP meets with each CCP approximately 4–6 times each year. Indeed, one of the supports given for reducing the number of CCPs from 42 to 13 was that it increased the scrutiny with which the DPP is able to monitor each one.

Significant occurrences in an Area are also addressed outside these regular reviews. One way this happens is the Director's monthly honours for "Successes of the Month" from across the service. Failures, too, may attract particular attention from the DPP. For example, following a particularly damaging custody time limit violation by prosecutors in one CPS Area, the DPP sent a letter to the CCP of that area fervently detailing the reasons why the violation was so troubling and expressing a clear expectation that the local practice be improved.

Surveillance and written reprimands only provide limited accountability, however. There must be incentives for strong performance and consequences for CCPs who do not meet expectations and cannot deliver improvements to their local service.

Compensation for Chief Crown Prosecutors includes a performance-based bonus structure, whereby a bonus of 5–6% of gross salary is awarded to the top 25% of performers. This bonus is awarded based on an internal evaluation of Area performance, witness satisfaction, staff surveys, and the CCP's personal corporate contribution. One CCP suggested that responsibility for this evaluation process should be given instead to a panel of local CPS staff and local representatives from the wider criminal justice system, in order to more accurately determine the public's satisfaction with their CCP, thereby increasing local accountability.

The contract for CCPs covers expectations regarding poor Area performance. However, when asked how often CCPs are removed from the post, CPS leadership responded that it was quite rare, stating that they are most often moved around within the organisation or else leave of their own accord. Indeed, a Freedom of Information request from Policy Exchange discovered that not a single Chief Crown Prosecutor has been formally dismissed in the CPS's 26 year history.<sup>143</sup>

## The Director of Public Prosecutions and Parliamentary Scrutiny

The chief role of the Director of Public Prosecutions is to protect the public interest in the prosecution of offenders. This aim is achieved primarily through ensuring that the CPS runs efficiently and effectively, but also through ensuring that decisions whether to prosecute are taken properly. Like CCPs, the DPP is also an appointed role, vetted and selected by the Attorney General. The DPP is accountable to the Attorney General, primarily through the Annual Report, which the Attorney General then presents to Parliament. It is the Attorney General, not the DPP, who is answerable before Parliament on all questions regarding the CPS.

The relationship between the DPP and the Attorney General is one of broad oversight and limited interference. The Attorney General has the power to review the DPP's legal decisions and also has oversight of the Director's policy decisions, such as the content of the Code for Crown Prosecutors. The Protocol between the Attorney General and Prosecuting Departments establishes that,

*“Other than in the exceptional cases [for which the Attorney General's consent is required to prosecute], decisions to prosecute or not to prosecute are taken entirely by the prosecutors. The Attorney General will not seek to give a direction in an individual case save very exceptionally where necessary to safeguard national security.”<sup>144</sup>*

The Justice Select Committee, in its 2007 report, 'A Consultation on the Role of the Attorney General', summed up the Attorney General's role with respect to the CPS as follows:

*answering for the prosecuting authorities in Parliament; responsibility for the overall policies of those authorities, including prosecution policy in general; responsibility for the overall “effective and efficient administration” of those authorities, including matters of resources; a right for the Attorney General to be consulted and informed about difficult, sensitive and high-profile cases; but not responsibility for every individual prosecution decision, or for the day-to-day running of the organisation.<sup>145</sup>*

143 The CPS response stated, “No one with the grade of CCP is recorded with a leaving reason of Dismissal in the time periods stated.” The time periods stated included “since 1986”.

144 “Protocol Between the Attorney General and Prosecuting Departments”, July 2009 (<http://www.attorneygeneral.gov.uk/Publications/Documents/Protocol%20between%20the%20Attorney%20General%20and%20the%20Prosecuting%20Departments.pdf>).

145 Justice Select Committee, “The Governance of Britain: A Consultation on the Role of the Attorney General”, 2007.

Thus, limited scope exists for the Attorney General to control the operation of the Crown Prosecution Service. Consequently, the CPS's accountability to Parliament and the public is tenuous at best, and the DPP, one of the most powerful governing officials in public life, is one of the least accountable. To promote increased Parliamentary oversight of the CPS, the DPP should be required to appear before Parliament on some scheduled basis – whether quarterly, semi-annually, or even simply annually – to ensure the public has oversight of the decisions made in their name and to address any concerns over the use of the public interest test.

## Public Scrutiny

### Headquarters Leadership

Keir Starmer has been dedicated to making the role of Director of Public Prosecutions a very public one. He has said, “People are interested in decisions. Why shouldn't they see people who are making decisions and hear for themselves, directly, what the reasons are one way or another?”<sup>146</sup> He has actively created opportunities to appear in the media as the leader of the CPS. For example, on 3 February 2012, the public turned on their televisions to see Keir Starmer announce the CPS's decision to prosecute the former Cabinet Minister, Chris Huhne MP, for obstruction of justice. Such a decision would ordinarily be announced via press release, but Starmer turned it into an opportunity to make a widely-broadcast appearance as the face of the CPS. Similarly, the *News of the World* phone hacking charges were announced via a televised statement from CPS HQ.

As described above, Parliamentary control over the CPS and the DPP is minimal, due to the expectation that the CPS remain independent of political persuasions. However, this should not preclude Parliament having an informed view on the appointment of the DPP. In this way, the public's representatives could exert some scrutiny over who leads its prosecution service.

Currently, a very small selection committee composed of high-ranking civil servants and members of the judiciary recommends a candidate to the Attorney General, who makes the final selection. In 2003, then Solicitor General Harriet Harman described the appointment process to Parliament as follows:

*“Advertisements were placed in the national media and legal journals and, as part of the search process, a number of civil servants and members of the judiciary were approached in order to identify suitable candidates.*

*The selection panel was chaired by the independent First Civil Service Commissioner Baroness Prashar. The other members of the selection panel were Sir Hayden Phillips, Permanent Secretary at the Department for Constitutional Affairs, Sir David Omand, Permanent Secretary, Cabinet Office; and Sir Robin Auld, Lord Justice of Appeal. Ken Macdonald QC was recommended for appointment by the panel to the Attorney-General. No other Ministers, civil servants or members of the judiciary, apart from a referee nominated on a confidential basis by Mr. Macdonald, were consulted as part of this process.”<sup>147</sup>*

The fact that the appointment process had to be explained in Parliament, as well as the process itself, belies how little Parliament knows about the DPP

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146 Camilla Long, “Keir Starmer: No comment from Lawyer Transparent”, *The Sunday Times*, 1 April 2012 (<http://www.thesundaytimes.co.uk/sto/newsreview/features/article1006492.ece>).

147 Hansard HC Deb 17 Sep 2003, vol 410, col 781W.

prior to his or her appointment. If, prior to appointment, the Attorney General's preferred candidate was presented to, for example, the Justice Select Committee for approval, this would increase public understanding of the DPP role as well as public knowledge about the person fulfilling that role. Parliamentary approval would provide greater transparency and accountability in the appointment process. The Justice Committee could even invite the short-listed candidates for the DPP role to a pre-appointment hearing where MPs could discover more about their background, qualifications for the role, and prosecutorial philosophy.

### Local Leadership

Chief Crown Prosecutors are the local leadership of the CPS, and they should be as familiar to a local area as a Chief Constable. However, CCPs are often unseen aside from when responding to criticism or explaining unpopular decisions. CCPs must be encouraged and expected to integrate themselves as much as possible into the communities they serve and to embrace a much bigger public profile. It is ultimately their responsibility to ensure that the CPS meets the public's expectations in their area.

Media visibility is one method of promoting greater public scrutiny of Chief Crown Prosecutors. In February 2012, Alison Saunders, CCP for London, enjoyed several days of media attention for her lecture on misconceptions about rape. In addition, she gave several informal interviews about her work prosecuting cases stemming from the riots of August 2011. The interviews gave her a chance to promote the work done by CPS prosecutors in relation to the disorder, a subject likely to garner significant public support for the CPS given the swift prosecutions delivered in that instance. Opportunities like these to use the press to the CPS's advantage should be sought out by all CCPs on a regular basis.

“In February 2012, Alison Saunders, CCP for London, enjoyed several days of media attention for her lecture on misconceptions about rape”

East Midlands CCP Judith Walker received good media coverage for a lecture she gave about domestic abuse. This coverage led to a broader campaign regarding domestic violence, and both Walker and the CPS have continued to attract coverage on this issue. By putting herself and the organisation at the fore of a domestic violence campaign, Walker has opened her group's DV practices and performance to public scrutiny and helped to educate the public about the problem and the role of the CPS in tackling it.

Nazir Afzal, CCP for CPS North East, is frequently in local and national media, particularly for his work on honour killings and forced marriages. He is frequently quoted in relation to cases around the country on this subject, and he is consulted on the issue by special interest groups, various criminal justice organisations, and documentary teams. He has also travelled to conferences and events abroad to share his experiences and his approach on these sensitive issues. The result is that he is known and respected as an experienced and talented legal mind, on these specialist issues as well as generally. Afzal is unique in the CPS for enjoying this level of visibility, but it has come as the result of making public engagement a top priority for himself as a CCP, first in London and then in the North East. All CCPs should be encouraged to pursue the same opportunities.

## Accountability Under Elected Police and Crime Commissioners

On 15 November 2012, voters in England & Wales elected the first Police & Crime Commissioners (PCCs), a role designed to provide democratic accountability for policing. While this new role is primarily aimed at affecting local policing and crime reduction, Section 10(3) of the Police Reform & Social Responsibility Act 2011 requires all criminal justice bodies, including the CPS, to “make arrangements [...] for the exercise of functions so as to provide an efficient and effective criminal justice system for the police area.” Thus, the CPS must be prepared to collaborate with this newly elected police authority.

### Fostering Cooperation

PCCs will provide a new opportunity to improve collaboration between the CPS and local police forces. Although the PCC’s official remit is policing, the role is also tasked with reducing crime, a result that can only come about when all parts of the criminal justice system are working effectively. The public to whom the PCC is accountable will look to their PCC for answers when investigations are dropped or prosecutions fail – not least because the PCC will be highly visible and have a large personal mandate. Thus, the CPS should be prepared to work with PCCs to tackle these issues, and Chief Crown Prosecutors in particular should be prepared for the PCC to come seeking reassurance about the performance of the local CPS.

There is the possibility that the PCC role will lead to increased finger-pointing between the police and the CPS. An ineffective PCC could attempt to avoid responsibility for unsuccessful prosecutions by claiming that it was the CPS’s failure, and that the police – the organisation he or she oversees – fulfilled their role. However, the public is unlikely to respond well to continued blame-shifting and will instead expect their representative to bring the two organisations together with the goal of improving investigations and prosecutions. PCCs will be well-placed to serve as a mediator between the two sides; he or she will be unaffiliated with either and should be removed from the internal cultural frictions that still plague police-prosecutor relations in some areas. The PCC’s only personal allegiance should be to the local public, who will want to see successful prosecution outcomes, and as such, a talented PCC should be able to encourage both police and the CPS to focus on this shared goal.

The PCC can provide both sides with an opportunity to explain their frustrations and articulate the expectations they have of each other. Historical or cultural reasons aside, the day-to-day reasons that police and prosecutors struggle to cooperate are neither unreasonable nor overly complicated. In his or her aim to reduce crime overall and to promote effective policing, the elected PCC would be well-advised to foster opportunities to resolve these unsatisfactory practices. Such opportunities might include joint training sessions, better accountability for police after a charge is laid, and improved communication amongst the leadership of both operations. The CPS should welcome such initiatives without becoming defensive or seeing the interest of the elected PCC as a threat to their independence.

### Potential Conflicts

PCCs also come with the potential for conflict with CPS leadership. A senior minister observed, “the CPS cannot be brought within the PCC’s control.” The minister observed that, in the same way the Home Secretary must respect the DPP’s role, at the local level the PCC must respect the Chief Crown Prosecutor, and there ought to be no question of them having the power to “task” the CPS. For this reason an elected PCC does not have any statutory authority over the CPS, however all criminal justice bodies are expected to collaborate with the PCC in the interest of improving the effectiveness of the criminal justice system. Furthermore, the PCC’s responsibility to reduce crime does require him to exert some influence over the CPS. Indeed, as a public prosecution service, the CPS will be expected to cooperate with the public priorities expressed through the PCC, who will represent the only governing authority in the local criminal justice system who has a democratic mandate. And while CCPs and Deputy CCPs have many years of experience as managers, prosecutors, and lawyers, PCCs have the added authority of being a democratically elected representative of the public’s interest.

The PCC, having engaged in an election campaign, is likely to be a more widely-known figure in the local community; many PCC candidates are already well-known figures in the political and criminal justice spheres. In a conflict between these two sources of leadership, the CPS will be at a disadvantage with the public if it does not make visibility of its leadership a priority in the time leading up to and following the election of PCCs. CPS leadership should therefore develop a strategy for cooperating with PCCs so that they are not unprepared when the new authority begins to exert its influence. Such a strategy must take into account how to balance CPS leadership expertise with the democratic authority of the PCC and how CCPs can effectively collaborate with multiple PCCs, if the local CPS area structure is not restored (see below).

### Selection of new Chief Crown Prosecutors

Police & Crime Commissioners should contribute to the selection or removal of Chief Crown Prosecutors. Presently no such role is envisaged, but it would be beneficial to formalise a process for PCC input into CCP appointments so as to permit the PCC to have a stake in local prosecution strategy. While the DPP should remain responsible for appointing Chief Crown Prosecutors, the PCC should be included in selection interviews alongside the DPP and senior CPS staff. Involving the local PCC in these decisions will increase democratic accountability of the CPS and will provide a degree of local input over this choice, whilst leaving the CCP appointment in the hands of the DPP to whom the CCP will ultimately be answerable.

Where a CCP has shown unwillingness to cooperate with a PCC, this should be taken into consideration in promotion or demotion decisions. PCCs represent an unprecedented opportunity to unify the disparate threads of the criminal justice system. This opportunity cannot be lost to the vagaries of the personalities and agendas of individual Chief Crown Prosecutors.



### Problems Presented by Lack of Co-Terminosity

Local accountability of the CPS has been weakened – and the potential leadership tensions between elected PCCs and Chief Crown Prosecutors further complicated – by the fact that the CPS Groups no longer align with police force boundaries. While the old, 42-area boundaries are still in effect to some extent (for example, each smaller area has its own leadership, its own CPS office, and maintains its own performance metrics), the primary level of CPS authority is at the new, larger group or regional level. Thus, one Chief Crown Prosecutor may be collaborating with as many as five Police & Crime Commissioners.

Each area within a Group is liable to have very different crime priorities, and thus, PCCs may have dramatically different agendas. This problem of conflicting priorities and needs has already arisen under the new CPS structure, with some police forces feeling that their local CPS is now operating with a different

set of priorities than the local police force; priorities driven by a non-local CCP reacting to the needs of a broad geographic area. For example, the same CCP will be working with the PCC for Greater Manchester and the PCC for Cumbria. These two areas have vastly different crime rates and priorities, and

the CCP is likely to feel pulled in multiple directions, probably to the satisfaction of neither PCC. In this way, the move to regional groups has weakened the local accountability of the CPS at just the time when the public are gaining stronger democratic oversight of the police via the election of PCCs.

The 2011 reorganisation into 13 Groups runs counter to the values of local co-ordination and local administration which led to the 42-area organisation. Moving to a regional structure has also extracted local CPS teams from co-located offices where they worked alongside the police, or has even seen them withdraw prosecutors from their base in police stations in London and elsewhere.<sup>148</sup> This unilateral move by the CPS to a regional structure did not require primary legislation and was not subject to any Parliamentary scrutiny.

Many practitioners agree that co-terminosity between the two criminal justice agencies was beneficial to their working relationships. Although savings were urgently required, it should have been possible to streamline processes and strip out management overheads without centralising the CPS and breaking the co-terminosity that many agencies had previously strived for. Resurrecting the regional structure that plagued CPS-police relations in the mid-90s now risks undermining efficient working arrangements between the police and prosecutors and is unlikely to improve local links or foster better relationships among staff. The economies of scale argument which led to shifting power back towards the centre replaces an efficient delivery system with one designed solely for cost savings. The regional CPS structure was abolished for good reason and should not have been brought back because other cost-saving options were thought to be more difficult.

The shift to regionalisation also directly contradicts the declared policies of the Coalition Government to foster localism and the principle of “devolving

“Each area within a Group is liable to have very different crime priorities, and thus, PCCs may have dramatically different agendas”

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148 It was during the move to more co-terminous criminal justice areas that local agencies began to co-locate some of their staff – a trend that had been slow to take off in England and Wales, despite being common in other countries. Although they were still rare, co-located offices were a feature of a number of criminal justice areas in the last decade.

power as far as possible to those actually using the services at local level”.<sup>149</sup> The ‘Open Public Services’ white paper published in 2011 set out five guiding principles of public service modernisation under the Coalition Government, including: “Power should be decentralised to the lowest appropriate level.”<sup>150</sup> Reconstituting the CPS on a regional basis is not the most appropriate level; on the contrary, the move further centralises a key element of the criminal justice system that should have its roots in local communities. The Prime Minister, David Cameron, hails “a great wave of decentralisation”.<sup>151</sup>

In order to prevent the 13 group organisation from leading to centrally-dictated priorities and a return to the breakdown of police-prosecutor relations of the pre-Glidewell era, CPS leadership must capitalize on the existing lines of local leadership. Deputy Chief Crown Prosecutors should be given significant authority to establish local priorities to address the concerns of their smaller area and to work with their local police forces and Police & Crime Commissioners.

## Recommendations

- **After the Attorney-General has nominated a candidate for Director of Public Prosecutions, that candidate should appear before the Justice Select Committee for approval before he or she is appointed. The Justice Select Committee should also be permitted to invite all short-listed candidates for the role of DPP to a public hearing.**
- **Chief Crown Prosecutors should have a very public-facing role in their communities. The DPP should monitor public engagement by CCPs, and failure to be sufficiently active in the community should be taken as a mark of poor performance.**
- **CCPs should be pointed towards opportunities for public engagement, and they should receive continued media and public relations training to ensure they perform this role effectively. CCPs who have successfully embraced their responsibilities as a public figure should be incentivized to share their knowledge and experience with other CCPs.**
- **All CPS leadership should be actively considering how to cooperate with Police and Crime Commissioners in order to improve collaboration with other criminal justice agencies.**
- **PCCs should be included in decisions to appoint or remove Chief Crown Prosecutors and invited to attend selection interviews for the role. Performance evaluations for Chief Crown Prosecutors should consider how well he or she has engaged with local PCCs.**
- **Resurrecting the old CPS regions may be a flawed strategy, and Chief Crown Prosecutors and the DPP should be extremely mindful of the value of permitting the smaller, 42 CPS Areas to set priorities and engage with law enforcement.**

149 HM Government, “Civil Service Reform Plan”, June 2012 (<http://resources.civilservice.gov.uk/wp-content/uploads/2012/06/Civil-Service-Reform-Plan-acc-final.pdf>).

150 HM Government, “Open Public Services White Paper”, July 2011 (<http://files.openpublicservices.cabinetoffice.gov.uk/OpenPublicServices-WhitePaper.pdf>) HM Government, “Civil Service Reform Plan”, June 2012 (<http://resources.civilservice.gov.uk/wp-content/uploads/2012/06/Civil-Service-Reform-Plan-acc-final.pdf>).

151 HM Government, “Civil Service Reform Plan”, June 2012 (<http://resources.civilservice.gov.uk/wp-content/uploads/2012/06/Civil-Service-Reform-Plan-acc-final.pdf>).

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# 6

## Conclusion

After more than a quarter of a century, and despite pockets of local resentment that persist amongst some long-service police officers and members of the Bar, the CPS has become an established and increasingly respected player in the criminal justice landscape. While tremendous strides have been and continue to be made toward a more public-facing, professional prosecution service, there is still a considerable way to go toward a robust prosecution service that excels in a clearly defined role and inspires public confidence.

Despite significant public funding increases and better leadership in the decade after 2001, the CPS remains an underperforming, low-profile and largely unaccountable agency. The Crown Prosecution Service at times seems to face a crisis of confidence. Other partners in the criminal justice system lack confidence in the CPS, the public lack confidence in the CPS, and indeed, the CPS often lacks confidence in itself.

Progress has been made in some areas. Since the early 2000s, overall conviction rates have risen in both Magistrates' Court and Crown Court, as have the rates of guilty pleas. The percent of ineffective trials has generally declined, and in the Magistrates' Court, far fewer ineffective trials are the fault of the prosecution. General opinion in the CPS seems to be that their presence in the media and in local communities has improved. Many CPS leaders value the importance of engaging with the public, and Keir Starmer has been particularly keen to promote this engagement. In addition, a greater proportion of advocacy is occurring in-house, and judges and magistrates appear to be less critical of CPS advocacy.

But there is now an urgent need for the CPS to become more professional, more accountable and more visible. Part of the answer is to endow the CPS with more responsibility – not less.

The CPS must be prepared to become much more publicly answerable for its decisions and more comfortable with the exposure that a professional prosecution agency naturally attracts. The CPS should take on a greater advocacy role, even if this comes at the expense of the criminal Bar, and it should aspire to attract and retain a higher calibre of legal talent over time.

Only by assuming more in-house advocacy and focusing on appropriate measures of performance, including success at trial, will the CPS mature to become the focused and professional prosecution agency the public rightly expects. Without major reforms along these lines, the CPS is destined to remain overlooked, misrepresented and misunderstood.

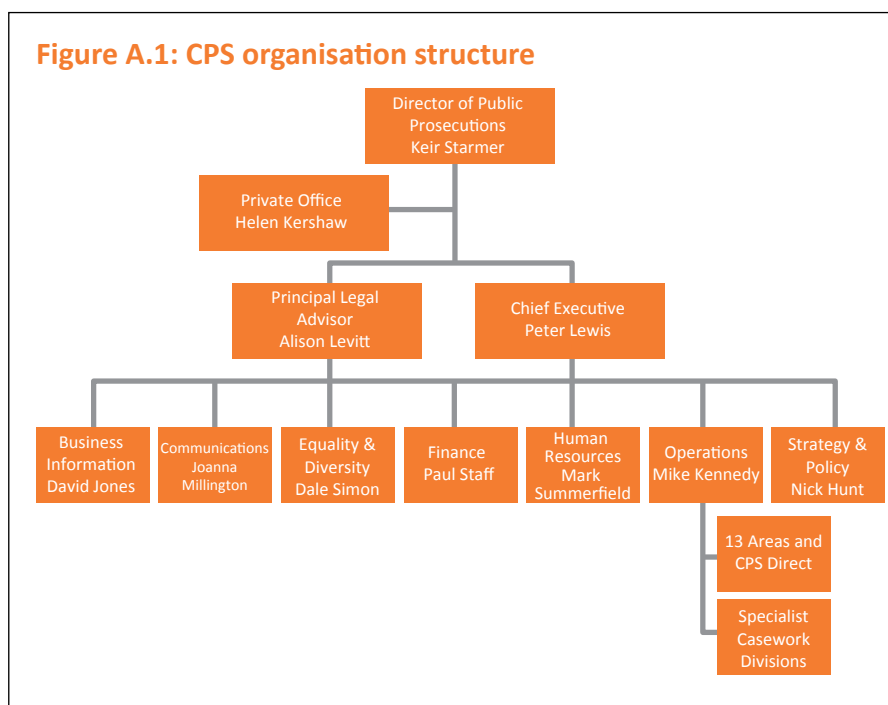
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# Annex A: CPS Structure, Staffing, and Funding

## CPS Structure, Staffing and Funding

### Structure

The CPS is organised around a central Headquarters with 13 local areas. At Headquarters, the Director of Public Prosecutions is the head of the entire organisation. He is assisted by a Principle Legal Advisor, responsible for legal policies and functions, and CPS's Chief Executive Officer, responsible for the business operations of the organisation. Also at Headquarters are a team of seven directors covering the following divisions: Business Information Systems, Communications, Equality and Diversity, Finance, Human Resources, Operations, and Strategy and Policy.



When the 2011 restructuring occurred, the Chief Crown Prosecutor for each new area was usually selected from among the Chief Crown Prosecutors of the small areas subsumed into the larger grouping. For CPS Wales, whose areas had come under heavy criticism by Her Majesty's Crown Prosecution Service Inspectorate, a new Chief Crown Prosecutor was brought in from the Procurator Fiscal Service in Scotland.

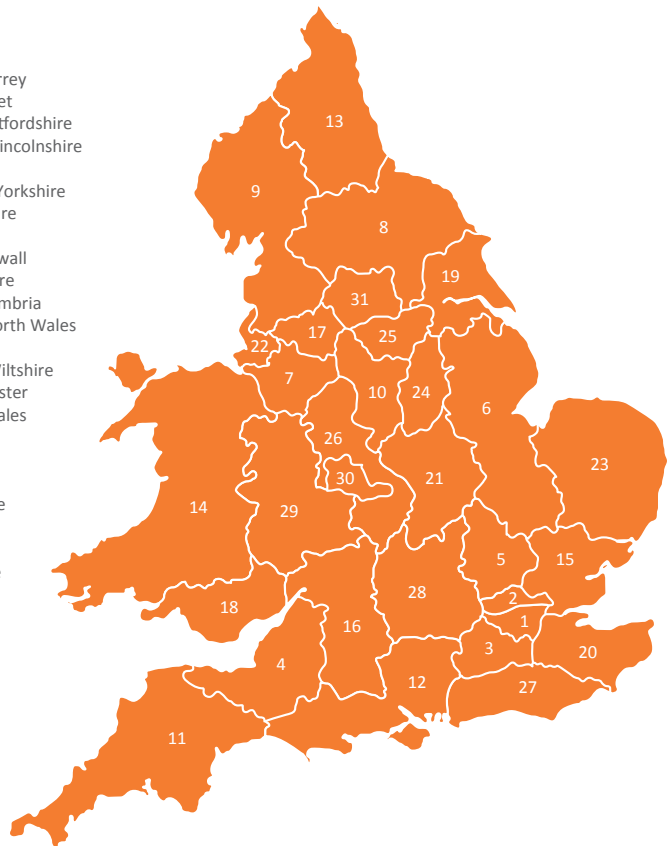
The Chief Crown Prosecutors not selected to become CCP of the new, larger groups became Deputy Chief Crown Prosecutors (DCCPs), still responsible for their smaller areas. Thus, each of CPS's 13 areas is led by a Chief Crown Prosecutor and a team of Deputy Chief Crown Prosecutors. Each area also has an Area Business Manager, whose role mirrors that of the Chief Executive Officer at Headquarters.

**Figure A.2: Hierarchy between the DPP and local leadership**



**Figure A.3: 1986 CPS organisation<sup>152</sup>**

1. Inner London
2. London North
3. London South/Surrey
4. Avon and Somerset
5. Bedfordshire/Hertfordshire
6. Cambridgeshire/Lincolnshire
7. Cheshire
8. Cleveland/North Yorkshire
9. Cumbria/Lancashire
10. Derbyshire
11. Devon and Cornwall
12. Dorset/Hampshire
13. Durham/Northumbria
14. Dyfed-Powes/North Wales
15. Essex
16. Gloucestershire/Wiltshire
17. Greater Manchester
18. Gwent/South Wales
19. Humberside
20. Kent
21. Leicestershire/Northamptonshire
22. Merseyside
23. Norfolk/Suffolk
24. Nottinghamshire
25. South Yorkshire
26. Staffordshire/Warwickshire
27. Sussex
28. Thames Valley
29. West Mercia
30. West Midlands
31. West Yorkshire



In addition to the 13 areas and CPS Direct, there are also Casework Groups based in London, whose specialised work is not contained within any geographic area. The

<sup>152</sup> Image from Crown Prosecution Service Annual Report, 1986-87

Serious Crime Casework Group is split into two teams: the Organised Crime team and the Special Crime and Counter-Terrorism team. The Serious Crime Casework Group is responsible for all prosecutions by the UK Border Agency and the Serious Organised Crime Agency, as well as additional prosecutions which fall under their remit. The second Casework Group is the Central Fraud Group, responsible for all prosecutions brought by HMRC as well as other complex fraud work.

In March 2012, CPS announced the formation of a new Casework Group, the CPS Welfare, Rural, and Health Prosecutions Division. This new Group will handle the work inherited by the CPS from the Department for Work and Pensions and the Department of Health.

### Staffing and Funding

In 2011/12 the CPS employed an average of 7,464 civil service full-time equivalent employees and 70 additional staff. Approximately 35% of these employees are fully licensed prosecutors: 1,978 solicitors and 680 barristers. Overall staff numbers were reduced by 7.8% from the previous year, continuing a five-year reduction in staff numbers. However, there are still 20% more staff (total FTE) in the CPS in 2011/12 than in 2001/02.

**Table A.1: CPS average staff numbers (full-time equivalents)**

2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
6,242	7,094	7,832	8,132	8,384	8,546	8,520	8,396	8,316	8,094	7,464

Source: Crown Prosecution Service Annual Reports

In 2011/12, the CPS's net operating cost totalled £589 million. This represents a 3.8% decrease from 2010/11 and a 12.3% decrease since 2009/10. The 2010 Comprehensive Spending Review requires CPS's budget to be reduced by 25% over five years, to be completed by 2014/15. To accommodate this expectation, CPS is planning a 6% decrease in spend over each of the four years.

**Table A.2: CPS net operating cost 2001/02–2011/12**

2001/02	£405,628,000
2002/03	£451,594,000
2003/04	£512,517,000
2004/05	£565,363,000
2005/06	£600,466,000
2006/07	£614,218,000
2007/08	£632,714,000
2008/09	£664,036,000
2009/10	£671,702,000
2010/11	£612,383,000
2011/12	£588,767,000

Source: Crown Prosecution Service Resource Accounts



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