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PUBLIC PROSECUTORS AND THE NIO CRIMINAL JUSTICE REVIEW IMPLEMENTATION PLAN

The Northern Ireland Office has published proposals for wide-ranging reform of the criminal justice system of Northern Ireland. They include proposals in relation to the prosecution of offences and the establishment of a Public Prosecution Service for Northern Ireland.

This Research Paper examines the role of the public prosecutor. It considers prosecution in Northern Ireland and in England and Wales. It examines the relationship between prosecutors and the police, and considers the issues of accountability and independence in relation to public prosecutors.

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SUMMARY OF KEY POINTS

1. The Northern Ireland Office published on 12 November 2001 its proposals for wide-ranging reform of the criminal justice system of Northern Ireland. The proposals are contained in a substantial Implementation Plan and a draft Justice (Northern Ireland) Bill.
2. The Implementation Plan includes proposals in relation to the prosecution of offences and the establishment of a Public Prosecution Service for Northern Ireland.
3. The power to launch prosecutions or charge a person with an offence is a formidable one. It has been said that *'the independence of the prosecution function stands at the heart of the rule of law... it is critical therefore that the prosecuting authority is independent from the executive.'* Prosecutors are expected to behave impartially.
4. Prosecution in Northern Ireland is performed by both the Director of Public Prosecutions and the Police Service of Northern Ireland. The Director of Public Prosecutions prosecutes the more serious cases, which amount to around 25% of all prosecutions.
5. The Director of Public Prosecutions has no investigative function: that is reserved to the Police Service. He may, however, require the Police Service to conduct further investigations in respect of an alleged offence, and does so frequently. Equally, the Police Service may seek the advice of the Director of Public Prosecutions during investigations.
6. In other jurisdictions, the public prosecutor has an investigative function as well as a prosecutorial one. In some jurisdictions, judges have an investigatory function.
7. The Director of Public Prosecutions operates under the superintendence and direction of the Attorney General. The Attorney General could direct the Director of Public Prosecutions to prosecute, or not to prosecute, in a particular case. The Director of Public Prosecutions has stated, however, that *'there has been no political interference in the exercise of his functions by the Attorney General.'*
8. The NIO proposes to establish a single Public Prosecution Service which will be responsible for all prosecutions, and a local Attorney General to which it will be accountable.
9. In England and Wales, the Crown Prosecution Service is responsible for all prosecutions, regardless of seriousness. A recent report highlighted defects in its organisation and operation. These represent lessons which the NIO should be expected to take into consideration in establishing a Public Prosecution Service for Northern Ireland.
10. This Research Paper should be read in conjunction with Northern Ireland Assembly Research and Library Services Research Paper 36/01, [The NIO Criminal Justice Review Implementation Plan](#).

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PUBLIC PROSECUTORS AND THE NIO CRIMINAL JUSTICE REVIEW IMPLEMENTATION PLAN

1. INTRODUCTION

1.1 The Northern Ireland Office ('the NIO') published on 12 November 2001 its proposals for wide-ranging reform of the criminal justice system of Northern Ireland. The proposals are contained in a substantial Implementation Plan. A draft Justice (Northern Ireland) Bill, which will give legislative effect to a large number of the proposals, has also been published. The NIO is consulting on the proposals until 12 December 2001.

1.2 The Implementation Plan includes proposals in relation to the prosecution of offences and the establishment of a Public Prosecution Service for Northern Ireland.

1.3 This Research Paper, prepared by Research and Library Services at the request of the Ad Hoc Committee on Criminal Justice Reform, examines the role of the public prosecutor. It considers prosecution in Northern Ireland and examines the experience of the Crown Prosecution Service of England and Wales, from which lessons may be learnt in relation to establishing the Public Prosecution Service. It also examines the relationship between prosecutors and the prosecutorial function, and police and the investigative function. It also considers accountability and independence in relation to public prosecutors.

1.4 This Research Paper should be read in conjunction with NI Assembly Research and Library Services Research Paper 36/01, [The NIO Criminal Justice Review Implementation Plan](#).

2. THE ROLE OF THE PUBLIC PROSECUTOR

2.1 The role of the prosecutor varies from state to state. In common law jurisdictions, one of the prosecutor's central functions is to determine who should be prosecuted and who should not. The power to launch prosecutions or charge a person with an offence is a formidable one. It has been said by a judge of the US Supreme Court that the power to charge gives a prosecutor *'more control over life, liberty and reputation than any other person in America'*.¹ The same could be said in relation to this jurisdiction. Both the Criminal Justice Review Team (established, pursuant to the Belfast Agreement, to review the Northern Ireland criminal justice system²), and the DPP, believe that

*the independence of the prosecution function stands at the heart of the rule of law. In a common law environment the prosecutor stands between the state and the individual and it is critical therefore that the prosecuting authority is independent from the executive.*³

2.2 Prosecutors have been described, in their exercise of this function, as gatekeepers to the criminal justice process.⁴ It is important to remember that the prosecutor often has the discretion not to proceed with a prosecution, even where a conviction could be secured. In Northern Ireland, for example, the Director of Public Prosecutions may decide not to prosecute, where a prosecution would not be in the public interest.

2.3 Prosecutors are expected to behave impartially. Bryett and Osborne have encapsulated the role of the prosecutor nicely as being *'to serve justice rather than the State.'*⁵ The courts have stated that counsel for the prosecution

*throughout a case ought not to struggle for the verdict against the prisoner, but ... ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice.*⁶

2.4 It is interesting to remember that, in the UK, the notion of public prosecutors is a relatively new one, compared to the age of the criminal law. Prior to the Prosecution of Offences Act 1879, which established the first office of Director of Public Prosecutions, prosecutions were generally brought privately.

3. PROSECUTORS IN NORTHERN IRELAND: THE DPP AND THE POLICE

INTRODUCTION

3.1 Prosecution in Northern Ireland is performed by both the Director of Public Prosecutions and the Police Service of Northern Ireland. Both bodies may initiate and conduct proceedings.

3.2 The Office of the Director of Public Prosecutions ('the DPP') was created by the Prosecution of Offences (Northern Ireland) Order 1972. The DPP has a statutory power to control all prosecutions, whether commenced by his own office, the Police Service of Northern Ireland ('the PSNI'), or any other authority or person.⁷ The Director shall, where he thinks proper, initiate and conduct prosecution for:

- indictable offences (generally more serious, and tried in the Crown Court); and
- any summary offence (generally less serious, and tried in the magistrates' court) that he considers should be dealt with by him.⁸

3.3 In fact, the DPP conducts prosecutions only in a minority of cases. The majority – around 75% – are prosecuted by the PSNI. Private prosecutions are very rare.⁹

3.4 The DPP makes the decision to prosecute on the basis of whether:

- there is a reasonable prospect of conviction; and
- it is in the public interest to prosecute (there is a presumption that it is in the public interest to prosecute a breach of the criminal law).

NO INVESTIGATIVE FUNCTION IN DPP

3.5 The DPP has no investigative function: that is reserved to the PSNI. The PSNI investigates offences and prepares an 'investigation file' on each offence. The file is provided to the DPP, if he is taking responsibility for the prosecution. The DPP has provided the PSNI with detailed instructions on what that file should contain.¹⁰ On the basis of the file, and on consultation with the PSNI, victims and witnesses, the DPP decides whether or not to prosecute. He may decide not to prosecute, or to bring lesser charges.

3.6 The DPP may, however, require the PSNI to conduct further investigations in respect of an alleged offence.¹¹ He does so quite frequently – in about 30% of cases.¹² Bryett and Osborne report that

*regular formal liaison occurs between the two agencies to facilitate such directions. A model of prosecution can thus be discerned where the DPP can, in individual cases, exercise a power of direction over the police and where the mandatory reporting requirements result in the Director being supplied with information on all crime of any consequence within the jurisdiction.*¹³

3.7 The PSNI may also, at any time during their investigation, seek advice from the DPP. This can be especially useful in complex cases.¹⁴ The CJR reported that

*the RUC pointed out that, particularly in serious cases, they valued the opportunity to seek the advice of the DPP at an early stage and that sometimes they sought his input prior to charge.*¹⁵

3.8 Investigation need not necessarily be reserved to the police. In other jurisdictions (for example Scotland, the Netherlands, and the US), the prosecuting authority may have an investigative function. Similarly, judges can have an investigatory function (for example in France and Italy). It has been noted in relation to Northern Ireland that the

*police's continuing monopoly over the investigation of crimes will always, however, be a limiting factor on a prosecutor's autonomy.*¹⁶

3.9 The Criminal Justice Review ('the CJR') recommended that the investigative function should remain the responsibility of the police, and the NIO accepts that recommendation.¹⁷ However the CJR also recommended that *'that it be a clearly stated objective of the prosecution service to be available at the invitation of the police to provide advice on prosecutorial issues at any stage in the investigative process'*, and this recommendation has also been accepted. Accordingly, the draft Bill places an obligation on the DPP to provide such advice as appears to him appropriate on matters relating to the prosecution of offences.¹⁸

ACCOUNTABILITY

3.10 The DPP is appointed by the Attorney General for Northern Ireland. The functions of the Attorney General for Northern Ireland are currently exercised by the Attorney General for England and Wales ('the Attorney General').* The Director may only be removed from office on grounds of inability or misbehaviour. Otherwise, he remains in office until resignation or the age of 65.¹⁹

3.11 The DPP operates under the *'superintendence'* and direction of the Attorney General in all matters.²⁰ Furthermore, he is responsible to the Attorney General for the due performance of his functions in relation to prosecution.²¹ Bryett and Osborne note that

*The nature of this relationship has been variously described as shadowy, a mystery, opaque, unclear and ambiguous. This relationship is key to the concept of accountability.*²²

* The NIO proposes that the Attorney General for Northern Ireland will be appointed by the First Minister and Deputy First Minister, on consultation with the Advocate General for Northern Ireland. He will be answerable to the Assembly, which is expected to provide in Standing Orders for him to participate in its business. See NIO 2001 [Criminal Justice Review Implementation Plan](#) response to Recommendations 42-4; and NI Assembly Research and Library Services Research Paper 36/01 [The NIO Criminal Justice Review Implementation Plan](#)

3.12 The Attorney General is, of course, a government minister and a political appointee. Members may therefore consider it appropriate to closely examine the extent and exercise of his powers of ‘*superintendence*’ and direction. Those powers could include a power to direct the DPP to prosecute, or not to prosecute, in a particular case. The DPP emphasised to the CJR that ‘*there has been no political interference in the exercise of his functions by the Attorney General.*’²³ However, he does consult with the Attorney General on particular cases, including ‘*difficult or sensitive cases, or cases which give rise to public interest considerations.*’²⁴

3.13 The Attorney General is answerable to Parliament for his actions, and decisions of the DPP may in some limited circumstances be subject to judicial review.

3.14 The CJR recommended that:

- the DPP should be accountable to an appropriate Assembly Committee for financial and administrative matters relating to the running of the Public Prosecution Service;
- there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters;²⁵
- legislation should confirm the independence of the prosecutor;
- legislation should make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it; and
- legislation should make provision for statutory consultation between the head of the prosecution service and the Attorney General, at the request of either.²⁶

3.15 The NIO states that it has accepted all of these recommendations.

3.16 There is an interesting relationship between accountability and independence. It has been argued that ‘*independence without accountability is an illusion. Independent power is entrusted only to those who give an account of its exercise.*’²⁷ In this context, it is interesting to note that the DPP is not required to make a public report of his activity, nor to give reasons for the decision to prosecute or not to prosecute. The CJR recommended that

*where information is sought by someone with a proper and legitimate interest in a case on why there was no prosecution, or on why a prosecution has been abandoned, the prosecutor should seek to give as full an explanation as is possible without prejudicing the interests of justice or the public interest ... the presumption should shift towards giving reasons where appropriate.*²⁸

3.17 The NIO states that it accepts this recommendation. However, its response indicates that it does not in fact propose to shift the presumption towards openness. Instead, It proposes that ‘*the propriety of applying the general practice to refrain from giving reasons other than in the most general terms must be examined and reviewed in every case where a request for the provision of detailed reasons is made.*’²⁹ No provision is made in the draft Bill.

3.18 It also appears that the NIO is referring only to the giving of reasons for a decision to prosecute, whereas the CJR recommendation also refers to decisions not to prosecute.

3.19 Members may wish to consider what level of accountability and independence will be provided to the DPP on the establishment of the Public Prosecution Service, and on the establishment of a new office of Attorney General for Northern Ireland. Members may wish to consider the political nature of the appointment of the Attorney General in this context.

4. THE PROSECUTOR IN ENGLAND AND WALES: THE CPS

INTRODUCTION

4.1 In England and Wales, the Crown Prosecution Service ('the CPS') is responsible for all prosecutions, regardless of seriousness. The police forces do not have a prosecutorial function, retaining the investigatory function. The CPS was established by the Prosecution of Offences Act 1985. It is independent of the police.³⁰

4.2 The CPS applies similar tests in deciding whether to prosecute: there must be sufficient evidence to provide a realistic prospect of conviction, and prosecution must be in the public interest.³¹

4.3 As in Northern Ireland, the police retain the investigative function and the decision to charge a person with an offence. The CPS then adopts responsibility for the prosecution, regardless of the seriousness of the offence. It can proceed, prefer lesser charges, or drop the charges. However, the police retention of responsibility for charging means that

*The CPS has little control over its workload. The case files arrive from the police who have already agreed the date of the first hearing with the court.*³²

ACCOUNTABILITY

4.4 The CPS is 'superintended' by the Attorney General, and answerable through that office to Parliament.³³ The CPS produces an annual report to the Attorney General.

4.5 The Crown Prosecution Service Inspectorate is a statutory body which inspects the work of the CPS and reports to the Attorney General.³⁴ The Attorney General must lay such reports before Parliament.³⁵

COOPERATION WITH THE POLICE

4.6 The CPS and the police co-operate in order to ensure that cases are efficiently prepared. The CPS reports that their relevant joint initiatives include the following:

Pilot schemes were established in January 1996 in 11 police force areas for lawyers to work in police stations and administrative support units. They give early advice on cases, helping ensure the right charge for the right offence at the outset.

Joint Performance Management enables the police and CPS to identify weaknesses in local practices and agree targets for improving future performance. Recently published Home Office research has endorsed the scope of JPM for significant improvement in case handling.

An abbreviated files scheme will help to reduce administrative burdens on the police. The CPS played a major role in developing this initiative, which it is estimated will save about 6 million sheets of paper a year and free up time spent on administrative tasks for operational activities.³⁶

REVIEW OF THE CPS: THE GLIDEWELL REPORT

4.7 A recent review of the management of the CPS published its report ('the Glidewell report')³⁷ in 1998. It found that, in relation to whether the CPS had contributed to the falling number of convictions for recorded crime,

In various respects there has not been the improvement in the effectiveness and efficiency of the prosecution process which was expected to result from the setting up of the CPS in 1986 ... We do not place responsibility for this situation wholly on the CPS; in large part it stems from the failure of the police, the CPS and the courts to set overall objectives and agree the role and responsibility of each in achieving those objectives.³⁸

4.8 The Glidewell report highlighted defects in the organisation and operation of the CPS. These represent lessons which the NIO should be expected to take into consideration in establishing a Public Prosecution Service for Northern Ireland. The Glidewell report found that:

- the CPS was too centralised and bureaucratic, despite the fact that prosecution is an essentially local process;³⁹
- the volume of lower-level work was highly demanding on CPS resources⁴⁰ – for example, In 1998-99, the CPS dealt with approximately 1.4 million cases in the magistrates' courts and 125,000 in the Crown Courts;⁴¹
- the CPS was, at least initially, 'grossly under-staffed';⁴²
- many of its staff were inadequately trained;⁴³
- both the quality and the timeliness of production of some files received from the police were a cause of concern to the CPS;⁴⁴
- in the relationship between the police and the CPS there was a tendency for one to blame the other for weaknesses in performance;⁴⁵
- the most senior lawyers were expected to devote the majority of their time to management – the top 400 lawyers spent less than a third of their time on casework and advocacy.⁴⁶

4.9 The Glidewell report identified three key areas in which the CPS required change:

- greater priority should be given to more serious cases;
- a new organisation, structure and style of management should be established; and
- its proper role in the criminal justice process should be established.⁴⁷

4.10 Its specific recommendations included:

- setting up a decentralised national service through the genuine devolution of as much responsibility and accountability as possible;
- ensuring that all but the most senior lawyers in the CPS spend much more of their time prosecuting;
- reducing bureaucracy.

4.11 The Government's response included a certain amount of decentralisation, and a '*greater emphasis on serious cases and on local independence*'.⁴⁸ In April 1999 the CPS was reorganised from 14 areas into 42, generally corresponding to Police Force boundaries.⁴⁹ Each Area has its own offices and is headed by a Branch Crown Prosecutor.

4.12 The CJR recommended that '*those who are considering the resource implications and the organizational issues arising from our proposals in respect of the prosecution function should examine the Glidewell Report, with a view to seeing whether there are lessons to be learnt*'. The NIO stated that it accepts this recommendation, but has not provided any detail of the resources or preparation that will be required. Its Implementation Plan states only that '*resources will be provided to enable the DPP (NI) to manage the transition to the new prosecution service.*'⁵⁰

4.13 Members may wish to consider whether the establishment of the Public Prosecution Service will be properly supported and resourced. In this context it is interesting to note that the present Office of the Director of Public Prosecutions suffers such pressure of work that, despite its legal staff having rights of audience in the magistrates' courts and Crown Court, it frequently instructs independent counsel to conduct cases those courts.⁵¹

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- ¹ Supreme Court Justice Robert Jackson: see Samaha, J. 1999 Criminal Procedure (4th ed) Belmont CA USA: Wadsworth Publishing, at p. 507. Robert Jackson was also Chief United States Prosecutor at the International War Crimes Tribunal in Nuremberg, Germany: see http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/justices/query=*/doc/{t174}?
- ² See NI Assembly Research and Library Services Research Paper 36/01, The NIO Criminal Justice Review Implementation Plan
- ³ Criminal Justice Review Team 2000 Report of the Criminal Justice Review in Northern Ireland TSO: Belfast para 4.4
- ⁴ Report of the Criminal Justice Review in Northern Ireland page 16
- ⁵ Bryett, K, and Osborne, P 2000 Criminal Prosecution Procedure and Practice: International Perspectives Research Report 16 of the Review of the Criminal Justice System in Northern Ireland
- ⁶ Per Avory J in R v Banks [1916] 2 KB 621
- ⁷ Prosecution of Offences (Northern Ireland) Order 1972 Article 5
- ⁸ Prosecution of Offences (Northern Ireland) Order 1972 Article 5(1)(c)
- ⁹ Dickson, B 2001 The Legal System of Northern Ireland Belfast: SLS page 42
- ¹⁰ Report of the Criminal Justice Review in Northern Ireland para 4.37
- ¹¹ Prosecution of Offences (Northern Ireland) Order 1972 Article 5(1)(b)
- ¹² Report of the Criminal Justice Review in Northern Ireland para 4.38
- ¹³ Criminal Prosecution Procedure and Practice: International Perspectives page 20. The 'mandatory reporting requirements' referred to are those imposed on the Chief Constable of the Police Service for Northern Ireland by virtue of Article 6
- ¹⁴ Report of the Criminal Justice Review in Northern Ireland para 4.36
- ¹⁵ Report of the Criminal Justice Review in Northern Ireland para 4.60
- ¹⁶ The Legal System of Northern Ireland page 42
- ¹⁷ NIO 2001 Criminal Justice Review Implementation Plan response to Recommendation 18
- ¹⁸ Draft Justice (Northern Ireland) Bill Clause 29 (5)
- ¹⁹ Prosecution of Offences (Northern Ireland) Order 1972 Art 4
- ²⁰ Prosecution of Offences (Northern Ireland) Order 1972 Art 3 (2)
- ²¹ Prosecution of Offences (Northern Ireland) Order 1972 Art 5 (2)
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- ²³ Report of the Criminal Justice Review in Northern Ireland para 4.45
- ²⁴ Report of the Criminal Justice Review in Northern Ireland para 4.46
- ²⁵ Report of the Criminal Justice Review in Northern Ireland para 4.162
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- ³⁴ The Crown Prosecution Service Inspectorate Act 2000 c 10 s 1
- ³⁵ The Crown Prosecution Service Inspectorate Act 2000 s 2
- ³⁶ <http://www.cps.gov.uk/>
- ³⁷ Review of the Crown Prosecution Service 1998 Report Cm 3960
- ³⁸ The Review of the Crown Prosecution Service Summary para 21
- ³⁹ The Review of the Crown Prosecution Service Summary para 4. It is interesting to note that in the 1983 White Paper proposing the establishment of a fully independent Office of the DPP, 'the Government favoured a national service with strong local features and with the majority of cases being handled in local offices to prevent delays in decision making': see CPS Our background and history at <http://www.cps.gov.uk/>
- ⁴⁰ The Review of the Crown Prosecution Service Summary para 12
- ⁴¹ Director of Public Prosecutions 1999 Crown Prosecution Service Annual Report for the period April 1998 – March 1999 London: TSO Chapter 1
- ⁴² The Review of the Crown Prosecution Service Summary para 3

- ⁴³ [The Review of the Crown Prosecution Service Summary](#) paras 3 and 6
- ⁴⁴ [The Review of the Crown Prosecution Service Summary](#) para 8
- ⁴⁵ [The Review of the Crown Prosecution Service Summary](#) para 8
- ⁴⁶ [The Review of the Crown Prosecution Service Summary](#) para 12
- ⁴⁷ [The Review of the Crown Prosecution Service Summary](#) paras 29 and 65
- ⁴⁸ [Criminal Prosecution Procedure and Practice: International Perspectives](#) page 24
- ⁴⁹ CPS London Area covers the areas served by the forces of the City of London Police and the Metropolitan Police
- ⁵⁰ [Criminal Justice Review Implementation Plan](#) response to Recommendation 66
- ⁵¹ [Report of the Criminal Justice Review in Northern Ireland](#) para 4.30