



The Code for Crown Prosecutors - draft for public consultation

January 2009

THE CODE FOR CROWN PROSECUTORS

The Crown Prosecution Service is the principal public prosecuting authority for England and Wales and is headed by the Director of Public Prosecutions. The Attorney General is accountable to Parliament for the Service.

The Crown Prosecution Service is a national organisation consisting of 42 Areas and CPS Direct. Each Area is headed by a Chief Crown Prosecutor and corresponds to a single police force area, with one for London. It was set up in 1986 to prosecute cases investigated by the police. CPS Direct is a virtual Area which provides charging decisions and advice outside office hours.

Although the Crown Prosecution Service works closely with the police, it is independent of them. The independence of Crown Prosecutors is of fundamental constitutional importance. Casework decisions taken with fairness, impartiality and integrity help deliver justice for victims, witnesses, defendants and the public.

The Crown Prosecution Service co-operates with the investigating and prosecuting agencies of other jurisdictions.

The Director of Public Prosecutions is responsible for issuing a Code for Crown Prosecutors under section 10 of the Prosecution of Offences Act 1985, giving guidance on the general principles to be applied when making decisions about prosecutions. This is the sixth edition of the Code and replaces all earlier versions. For the purpose of this Code, a “Crown Prosecutor” includes a member of the Crown Prosecution Service who is designated by the Director of Public Prosecutions as an “Associate Prosecutor” under section 7A of the Act and who is exercising their powers in accordance with the current instructions issued by the Director under that section.

In accordance with section 36(2) of the Commissioners for Revenue and Customs Act 2005, prosecutors from the Revenue and Customs Prosecutions Office must have regard to the Code for Crown Prosecutors issued by the Director of Public Prosecutions.

1 INTRODUCTION

1.1 The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case a prosecution has serious implications for all involved — victims, witnesses and defendants. The Crown Prosecution Service applies the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions.

1.2 The Code helps the Crown Prosecution Service to play its part in making sure that justice is done. It contains information that is important to police

officers and others who work in the criminal justice system and to the general public. Police officers should apply the provisions of this Code whenever they are responsible for deciding whether to charge a person with an offence.

1.3 The Code is also designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. By applying the same principles, everyone involved in the system is helping to treat victims, witnesses and defendants fairly, while prosecuting cases effectively.

2 GENERAL PRINCIPLES

2.1 Each case is unique and must be considered on its own facts and merits. However, there are general principles that apply to the way in which Crown Prosecutors must approach every case.

2.2 Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, gender, religious beliefs, political views, the sexual orientation, or gender identity of the suspect, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source. The CPS Statement of Ethical Principles lays down the standards of conduct and practice that are expected of every prosecutor in the exercise of their professional duties, whether employed as a Crown Advocate, Crown Prosecutor or Associate Prosecutor.

2.3 It is the duty of Crown Prosecutors to make sure that the right person is prosecuted for the right offence. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.

2.4 Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures. Crown Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution.

2.5 It is the duty of Crown Prosecutors to review, advise on and prosecute cases, ensuring that the law is properly applied, that all relevant evidence is put before the court and that obligations of disclosure are complied with, in accordance with the principles set out in this Code.

2.6 The Crown Prosecution Service is a public authority for the purposes of the Human Rights Act 1998. Crown Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Act, at

each stage of a case. In doing so, Crown Prosecutors must be sure that decisions taken in a case are compatible with the principles of the Convention.

2.7 Crown Prosecutors must have due regard to any guidelines issued by the Attorney General.

3 THE DECISION TO PROSECUTE

3.1 Crown Prosecutors decide whether a person should be charged with a criminal offence, and, if so, what that offence should be, in all but the most minor and routine cases. Crown Prosecutors make these decisions in accordance with this Code and the Director's Guidance on Charging. The police apply these same principles in deciding whether to charge a person in those cases for which they are responsible.

3.2 Crown Prosecutors make charging decisions in accordance with the Full Code Test (see section 5 below), other than in those limited circumstances where the Threshold Test applies (see section 6 below).

3.3 The Threshold Test applies where the case is one in which it is proposed to keep the suspect in custody after charge, but the evidence required to apply the Full Code Test is not yet available.

3.4 Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the case must be reviewed in accordance with the Full Code Test as soon as reasonably practicable, taking into account the progress of the investigation.

4 REVIEW

4.1 Each case the Crown Prosecution Service receives from the police is reviewed to make sure that it is right to proceed with a prosecution. Crown Prosecutors must make sure that they do not allow a prosecution to start or continue where to do so would be likely to be seen by the courts as oppressive or as an abuse of process; or if it would otherwise be unfair to do so. Unless the Threshold Test applies, the Crown Prosecution Service will only start or continue with a prosecution when the case has passed both stages of the Full Code Test.

4.2 Review is a continuing process and Crown Prosecutors must take account of any change in circumstances. Wherever possible, they should talk to the police first if they are thinking about changing the charges or stopping the case. Crown Prosecutors should also tell the police if they believe that some additional evidence may strengthen the case. This gives the police the chance to provide more information that may affect the decision.

4.3 The Crown Prosecution Service and the police work closely together, but the final responsibility for deciding whether or not to charge a person, in all but the most minor and routine cases, rests with the Crown Prosecution Service. In all cases, the decision whether to continue the prosecution rests with the Crown Prosecution Service.

5 THE FULL CODE TEST

5.1 The Full Code Test has two stages: the evidential stage followed by the public interest stage. Subject to paragraphs 5.14-17, the evidential stage must be considered before the public interest stage. If the case does not pass the evidential stage it must not go ahead no matter how important or serious it may be. If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest. The evidential and public interest stages are explained below.

THE EVIDENTIAL STAGE

5.2 Crown Prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

5.3 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant's guilt.

5.4 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

Can the evidence be used in court?

- a** Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

Is the evidence reliable?

- b** Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant's age, intelligence or level of understanding?
- c** What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?
- d** If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?
- e** Is the witness's background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?
- f** Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?

5.5 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. In appropriate cases, Crown Prosecutors should consider conducting a pre-trial interview with the witness to assist in assessing their reliability.

THE PUBLIC INTEREST STAGE

5.6 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)

5.7 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution (see section 8 below).

5.8 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the

circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

Some common public interest factors in favour of prosecution:

5.9 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

- a** a conviction is likely to result in a significant sentence;
- b** a conviction is likely to result in a confiscation or any other order;
- c** a weapon was used or violence was threatened during the commission of the offence;
- d** the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
- e** the defendant was in a position of authority or trust;
- f** the evidence shows that the defendant was a ringleader or an organiser of the offence;
- g** there is evidence that the offence was premeditated;
- h** there is evidence that the offence was carried out by a group;
- i** the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- j** the offence was committed in the presence of, or in close proximity to, a child;
- k** the offence was motivated by any form of discrimination against the victim's ethnic or national origin, age, disability, gender, religion or belief, political views, sexual orientation, or gender identity or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- l** there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- m** the defendant's previous convictions or cautions are relevant to the present offence;

- n** the defendant is alleged to have committed the offence while under an order of the court;
- o** there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;
- p** the offence, although not serious in itself, is widespread in the area where it was committed; or
- q** a prosecution would have a significant positive impact on maintaining community confidence.

Some common public interest factors against prosecution

5.10 A prosecution is less likely to be needed if:

- a** the court is likely to impose a nominal penalty;
- b** the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order, unless the nature of the particular offence requires a prosecution or the defendant withdraws consent to have an offence taken into consideration during sentencing;
- c** the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- d** 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;
- e** there has been a long delay between the offence taking place and the date of the trial, unless:
 - the offence is serious;
 - the delay has been caused in part by the defendant;
 - the offence has only recently come to light; or
 - the complexity of the offence has meant that there has been a long investigation.
- f** a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
- g** the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a

defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;

- h** the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation); or
- i** details may be made public that could harm sources of information, international relations or national security.

5.11 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

The relationship between the victim and the public interest

5.12 The Crown Prosecution Service does not act for victims or the families of victims in the same way as solicitors act for their clients. Crown Prosecutors act on behalf of the public and not just in the interests of any particular individual. However, when considering the public interest, Crown Prosecutors should always take into account the consequences for the victim of whether or not to prosecute, and any views expressed by the victim or the victim's family.

5.13 It is important that a victim is told about a decision which makes a significant difference to the case in which they are involved. Crown Prosecutors should ensure that they follow any agreed procedures.

Applying the public interest stage when the evidence gathering is not finalised

5.14 Crown Prosecutors may be asked to advise during investigations. By definition, this will involve cases in which not all the evidence is available. In the vast majority of cases, the investigative process should continue until such time as all the evidence is available; at that moment, and subject to section 6 below, the test set out in this section should be applied, namely a consideration of the evidence followed by a consideration of the public interest.

5.15 However, there will be cases where it is clear, prior to the collection and consideration of all the likely evidence that the public interest does not require a prosecution. In these rare instances, Crown Prosecutors may decide that the case should not proceed further.

5.16 Crown Prosecutors should only take such a decision when they have all the information available regarding the relevant public interest factors.

5.17 If there is any doubt, the investigation must proceed and a decision taken in accordance with the Full Code Test set out earlier in this section.

6 THE THRESHOLD TEST

6.1 Crown Prosecutors will apply the Full Code Test wherever possible. However, there will be cases where the suspect presents a substantial bail risk if released and not all the evidence is available at the time a decision regarding charge has to be made.

6.2 In such circumstances, it may be necessary to detain a suspect in custody when the investigation is incomplete and the Full Code Test cannot be applied. In such cases, Crown Prosecutors may apply the Threshold Test.

6.3 The Threshold Test may only be applied where the Crown Prosecutor is satisfied that all the following four conditions are met:

- a** there is insufficient evidence currently available to apply the evidential stage of the Full Code Test; **and**
- b** there are reasonable grounds for believing that further evidence will become available within a reasonable period; **and**
- c** the seriousness or the circumstances of the case justifies the making of an immediate charging decision; **and**
- d** there are continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and in all the circumstances of the case an application to withhold bail may properly be made.

6.4 Where any of the above pre-conditions is not met, the Threshold Test cannot be applied and the suspect cannot be charged. Such cases must be referred back to the custody officer who will determine whether the person may continue to be detained or released on bail, with or without conditions.

6.5 There are two parts to the evidential consideration of the Threshold Test:

6.6 First the Crown Prosecutor must be satisfied that there is at least a reasonable suspicion that the person to be charged has committed the offence.

6.7 In determining whether reasonable suspicion exists, the Crown Prosecutor must consider the evidence which is currently available. This may take the form of witness statements, material or other information, provided the Crown Prosecutor is satisfied that:

- a** it is relevant; and
- b** it is capable of being put into an admissible format for presentation in court; and
- c** it would be used in the case.

6.8 If this part of the Threshold Test is satisfied, the Crown Prosecutor will proceed to the second part of the Threshold Test, namely that the Crown Prosecutor must be satisfied that there are reasonable grounds for believing that the continuing investigation by the police will provide further evidence capable of establishing a realistic prospect of conviction in accordance with the Full Code Test, within a reasonable period of time.

6.9 The further evidence must be identifiable and not merely speculative.

6.10 In reaching a decision under this second part of the Threshold Test, the Crown Prosecutor must consider:

- a** the nature, extent and admissibility of any likely further evidence and the impact it will have on the case;
- b** the charges that all the evidence will support;
- c** the reasons why the evidence is not already available;
- d** the time required to obtain the further evidence and whether it is reasonable in all the circumstances.

6.11 If both parts of the Threshold Test are satisfied, Crown Prosecutors must go on to consider the public interest stage of the Full Code Test based on the information available at that time.

6.12 A decision to charge under the Threshold Test must be kept under review. The evidence gathered must be regularly assessed to ensure that the charge is still appropriate and that continued objection to the grant of bail is justified. The Full Code Test must be applied as soon as reasonably practicable and in any event before the expiry of a custody time limit or extended custody time limit applicable to the case.

7 SELECTION OF CHARGES

7.1 Crown Prosecutors should select charges which:

- a** reflect the seriousness and extent of the offending;
- b** give the court adequate powers to sentence and impose appropriate post-conviction orders; and
- c** enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always choose or continue with the most serious charge where there is a choice.

7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

7.3 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

8 DIVERSION FROM PROSECUTION

ADULTS

8.1 When deciding whether a case should be prosecuted in the courts, Crown Prosecutors should consider the alternatives to prosecution. Where appropriate, the availability of suitable rehabilitative, reparative or restorative justice processes can be considered.

8.2 Alternatives to prosecution for adult suspects include a simple caution and a conditional caution.

Simple caution

8.3 A simple caution should only be given if the public interest justifies it and in accordance with Home Office guidelines. Where it is felt that such a caution is appropriate, Crown Prosecutors must inform the police so they can caution the suspect. If the caution is not administered, because the suspect refuses to accept it, a Crown Prosecutor may review the case again.

Conditional caution

8.4 A conditional caution may be appropriate where a Crown Prosecutor considers that while the public interest justifies a prosecution, the interests of the suspect, victim and community may be better served by the suspect complying with suitable conditions aimed at rehabilitation or reparation. These may include restorative processes.

8.5 Crown Prosecutors must be satisfied that there is sufficient evidence for a realistic prospect of conviction and that the public interest would justify a prosecution should the offer of a conditional caution be refused or the offender fail to comply with the agreed conditions of the caution.

8.6 In reaching their decision, Crown Prosecutors should follow the Conditional Cautions Code of Practice and the Director's Guidance on Conditional Cautioning.

8.7 Where Crown Prosecutors consider a conditional caution to be appropriate, they must inform the police, or other authority responsible for

administering the conditional caution, as well as providing an indication of the appropriate conditions so that the conditional caution can be administered.

YOUTHS

8.8 Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. However Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the youth's past behaviour is very important.

8.9 Cases involving youths are usually only referred to the Crown Prosecution Service for prosecution if the youth has already received a reprimand and final warning, unless the offence is so serious that neither of these were appropriate or the youth does not admit committing the offence. Reprimands and final warnings are intended to prevent re-offending and the fact that a further offence has occurred indicates that attempts to divert the youth from the court system have not been effective. So the public interest will usually require a prosecution in such cases, unless there are clear public interest factors against prosecution.

9 VENUE

9.1 The Crown Prosecution Service applies the current guidelines for magistrates who have to decide whether cases should be tried in the Crown Court when the offence gives the option and the defendant does not indicate a guilty plea. Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.

9.2 Speed must never be the only reason for asking for a case to stay in the magistrates' courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.

10 ACCEPTING GUILTY PLEAS

10.1 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors must never accept a guilty plea just because it is convenient.

10.2 In considering whether the pleas offered are acceptable, Crown Prosecutors should ensure that the interests of the victim and, where possible, any views expressed by the victim or victim's family, are taken into account

when deciding whether it is in the public interest to accept the plea. However, the decision rests with the Crown Prosecutor.

10.3 It must be made clear to the court on what basis any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.

10.4 Where a defendant has previously indicated that he or she will ask the court to take an offence into consideration when sentencing, but then declines to admit that offence at court, Crown Prosecutors will consider whether a prosecution is required for that offence. Crown Prosecutors should explain to the defence advocate and the court that the prosecution of that offence may be subject to further review.

10.5 Particular care must be taken when considering pleas which would enable the defendant to avoid the imposition of a mandatory minimum sentence. When pleas are offered, Crown Prosecutors must bear in mind the fact that ancillary orders can be made with some offences but not with others.

11 PROSECUTORS' ROLE IN SENTENCING

11.1 Crown Prosecutors must offer assistance to the sentencing court by drawing the court's attention to the following factors:

- any aggravating or mitigating factors disclosed by the prosecution case;
- any victim personal statement;
- where appropriate, evidence of the impact of the offending on a community;
- any statutory provisions or sentencing guidelines which may assist;
- any relevant statutory provisions relating to ancillary orders (such as anti-social behaviour orders).

11.2 The Crown Prosecutor may also offer assistance to the court by making submissions, in the light of all the above factors, as to the sentencing range within which the current offence falls.

11.3 The Crown Prosecutor should challenge any assertion made by the defence in mitigation that is inaccurate, misleading or derogatory. If the defence persist in the assertion, and it appears relevant to the sentence, the court should be invited to hear evidence to determine the facts and sentence accordingly.

11.4 It is the duty of the Crown Prosecutor to apply for appropriate ancillary orders, such as anti-social behaviour orders and confiscation orders. When considering which ancillary orders to apply for, the Crown Prosecutor must

always have regard to the victim's needs, including the question of his or her future protection.

11.5 In all complex cases or where there is the potential for misunderstanding, the Crown Prosecutor must set out in writing the aggravating and mitigating factors that he or she will outline when informing the court of the case in the sentencing hearing. In all other cases, this approach should be considered and undertaken if it will be of benefit to the court.

12 RE-STARTING A PROSECUTION

12.1 People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.

12.2 These reasons include:

- a** rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;
- b** cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again; and
- c** cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

12.3 There may also be exceptional cases in which, following an acquittal of a serious offence, the Crown Prosecutor may, with the written consent of the Director of Public Prosecutions, apply to the Court of Appeal for an order quashing the acquittal and requiring the defendant to be retried, in accordance with Part 10 of the Criminal Justice Act 2003.