PART I
INTRODUCTION

1.1 In this consultation paper we examine one of the procedural mechanisms used to control the prosecution process, namely the requirement in respect of certain offences of the consent of the Law Officers (the Attorney-General or the Solicitor-General) or the Director of Public Prosecutions ("the DPP")[1] as a condition precedent to the institution of criminal proceedings. In preparing this paper, we have borne in mind the constitutional gravity of consent provisions – not only do they fetter the right of private prosecution, but also, by their nature, they impose an administrative burden on senior officials and cause an additional administrative delay within the criminal justice system.

THE NEED FOR REVIEW

1.2 Although the use of consent provisions is not a recent development, their proliferation is. As we shall see in Part IV,[2] although the first example is thought to date back to the early nineteenth century, it was not until the Second World War that consent provisions became widely used. We believe that the consents regime is a pressing and important subject for review. We hold this belief for a number of reasons.

1.3 First, the Royal Commission on Criminal Procedure ("the Philips Commission"), under the chairmanship of Sir Cyril Philips, noted that the wide-ranging list of Acts which included a consent provision suggested that "some of the restrictions ha[d] been arbitrarily imposed";[3] and in formulating proposals which eventually led to the Prosecution of Offences Act 1985, the Commission took the view that the creation of the Crown Prosecution Service ("the CPS") provided the apposite moment for reviewing the consents regime and, noting that the DPP had said in evidence to the Commission that "the time was ripe for some rationalisation of the restrictions",[4] recommended that rationalisation should not be delayed.[5]

1.4 Second, notable former Law Officers have criticised the consents system. The former Attorney-General, Sir Reginald Manningham-Buller, later Viscount Dilhorne LC, whose formulation in 1958 of the underlying principles of the consent regime[6] is regarded as "the classic exposition",[7] conceded that the regime

[1] A number of officers or bodies have been given consent functions under a variety of different statutes. We are concerned only with those of the Law Officers and the DPP: see para 1.14 below.

[2] See para 4.2 below.

[3] Philips Report, para 7.56.

[4] *Ibid.*

[5] *Ibid*, para 7.57.

[6] In a memorandum to the Select Committee on Obscene Publications, 1958, HC 123-1, App I, pp 23-4.

[7] J Ll J Edwards, *The Attorney General, Politics and the Public Interest* (1984) p 26.

was "full of anomalies and even absurdities".[8] And Lord Simon of Glaisdale, a former Solicitor-General and a Law Lord, in his speech during the Second Reading of the Prosecution of Offences Bill in 1984, criticised the use of consent provisions as an erosion of the fundamental right to bring a private prosecution and referred to the list of offences requiring prior consent as "an absolute hotch-potch".[9] There has also been criticism by academic commentators such as J Ll J Edwards, author of *The Law Officers of the Crown*[10] and *The Attorney General, Politics and the Public Interest*,[11] who commented in 1964 that the proliferation of consents had made "substantial inroads into the much-acclaimed principle of the ordinary individual's right to set the criminal law in motion. … It is difficult to escape the unpalatable conclusion that the fundamental principle as to private prosecutions has become so eroded by legislation that the vaunted image of this right as one of the corner stones of our constitution is no longer justified".[12]

1.5 Third, not only can the consents system be criticised on grounds of constitutional principle but also on the more practical ground that it may cause delay in criminal proceedings and imposes an administrative burden, both of which features are unacceptable if the consent requirement, in a particular case, is unjustified.

1.6 Finally, previous efforts to effect rationalisation – albeit partial – have failed. Following a report of a working party set up under the auspices of the Law Officers' Department and the DPP, in 1979 a Consents to Prosecution Bill was introduced into Parliament with the purpose of transferring functions from the Attorney-General to the DPP. The Bill failed to reach the statute book because a general election was called, and Parliament dissolved, before it had completed its passage through Parliament.

THE OBJECTIVE OF THIS PROJECT

1.7 Having examined the consents regime and, not surprisingly, concluded that the criticisms made of it were substantial, we undertook to consider how it should be reformed. In pursuing this undertaking, we are grateful for the encouragement we have received from the Law Officers and the Legal Secretariat to the Law Officers.

1.8 Our initial task when we began this project was to attempt to identify all those Acts containing a provision which requires either a Law Officer's or the DPP's consent to the institution of criminal proceedings. We set these out in Appendix A.[13] It became clear to us that those who regarded the consents regime as "an absolute hotch-potch"[14] were quite right.

8 Select Committee on Obscene Publications, 1958, HC 123-1, App I, p 23, para 2.

9 *Hansard* (HC) 29 November 1984, vol 457, col 1050.

10 Published in 1964.

11 Published in 1984.

12 *The Law Officers of the Crown* (1964) p 397.

13 We have tried to ensure that the list is complete but we acknowledge that there may be omissions.

14 See n 9 above.

1.9 We took the view, however, that, although the long-term aim of a project such as this should be the effective reform of the consents regime, our immediate task should be to identify, first, whether or not a requirement of the consent of the Law Officers or the DPP was *ever* justified, and second, if it was, the principles determining whether or not a consent provision should be included or retained in any particular legislation. For this reason, the objective of this project is to identify guiding principles rather than to offer schedules of offences in regard to which, for example, a consent provision should be dispensed with or the consent function should be transferred.

1.10 Once we have considered the responses of consultees, we shall publish a report in the usual way. Unusually, however, given the nature of our objective, it is not our present intention to publish a draft Bill to accompany the report. Whereas we regard the formulation of guiding principles as a proper task for this Commission, putting those principles into effect is, we believe, in this particular case, a matter for the relevant Government department.

1.11 We at the Commission are frequently required to consider whether a proposed new offence should include a consent provision,[15] and, like Parliament, we have hitherto considered the matter as and when it has arisen, without recourse to an established set of guidelines. In achieving our objective, therefore, we hope that both Parliament and the Commission will be assisted in taking a *principled* approach to the issue of consents, thereby bringing to an end the ad hoc and chaotic way in which consents tend to be dealt with at present.

OUR APPROACH TO ACHIEVING THIS OBJECTIVE

Setting the context

1.12 We begin our examination of the consents regime by setting it in context. In Part II, we briefly describe the prosecution process. We note that prosecutions are usually brought by the police and continued by the CPS but that they can, in some circumstances, be instituted by private individuals. We note also that, if the CPS is prosecuting, then the institution or continuation of proceedings is governed by the Code for Crown Prosecutors,[16] which requires the prosecutor to apply what are called the "evidential test" and the "public interest test".[17] Should a Crown Prosecutor make a decision on whether or not to prosecute which departs from the Code, judicial review provides a remedy.[18]

1.13 We go on to consider the range of mechanisms, in addition to consent provisions, by which the institution or continuation of prosecutions can be controlled. These mechanisms include the prerogative power of the Attorney-General to terminate proceedings by entering a *nolle prosequi* and the statutory power of the DPP to

[15] See, eg, Legislating the Criminal Code: Corruption (1997) Consultation Paper No 145, paras 10.2 – 10.15; Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, paras 8.63 – 8.66; and Legislating the Criminal Code: The Year and a Day Rule in Homicide (1995) Law Com No 230, paras 5.22 – 5.39.

[16] Set out in Appendix C.

[17] Described in greater detail at paras 2.16 – 2.17 below.

[18] See para 2.24 below.

intervene in a private prosecution and terminate it by formal discontinuance, offering no evidence or withdrawing the proceedings. Later, in Part V, we also refer to the *informal* controls on private prosecutions provided by the deterrent effect of the cost of bringing the prosecution, the private prosecutor's lack of investigative resources, and the risk of being found liable in the civil courts for malicious prosecution or false imprisonment.

Scope of the project

1.14 As we shall see in Part III, the range of designated authorities specified in consent provisions runs far and wide: although in many cases that officer is either one of the Law Officers or the DPP, in other cases the officer may be the Secretary of State or, for example, the Industrial Assurance Commissioner.[19] As we mentioned at the beginning of this Part, in this paper we are concerned only with those consent provisions requiring the consent of either one or other of the Law Officers or the DPP *and no other authority*. We have chosen to confine our examination in this way on the ground that consent provisions requiring the consent of any other officers tend to be included for a specific reason, such as the fact that a particular statute involves some technical element, or the offence is of concern only to the designated officer.[20] Covering the whole range of designated authorities would, therefore, involve a multiplicity of quite separate issues.

Method of working

1.15 In formulating a principled approach to consents, we start by adopting what we describe in Part VI as the "fundamental principle": that the right of private prosecution should be unrestricted unless some very good reason to the contrary exists. We consider, however, whether any harm might be caused by an unfettered right of private prosecution, thereby providing a reason for restricting that right, and we conclude that it might. We consider whether that harm is best avoided by way of a consent provision rather than any other method of controlling a private prosecution, and we conclude that it is. We then consider whether a reformed consents regime should be one in which, as at present, the consent attaches to a particular offence or whether some other criteria should be adopted, and we conclude in favour of retaining an offence-structured regime; and finally, we attempt to identify the sorts of offences the prosecution of which would be most likely to give rise to the harm identified and which would, therefore, most appropriately include a consent provision.

1.16 We have not, on this occasion, adopted our usual practice of formally reviewing the practices of other jurisdictions. We take the view that it is not appropriate in respect of this particular project since the context of consents, involving the particular structure and powers of the CPS and the particular functions of the Law Officers, will vary from country to country.

[19] Insurance Companies Act 1982, ss 93(a) and 94(2). See Appendix A.

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

PROVISIONAL CONCLUSIONS

1.17 Our broad provisional conclusion is that a requirement of consent should be used to control prosecutions with respect to three categories of offences: those which directly affect freedom of expression, those which may involve national security or have some international element, and those in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution.

1.18 As for which officer should be the designated authority in respect of which offences, we provisionally conclude that a Law Officer should be the relevant officer as regards those offences which fall within the "international element" category and that the DPP should be the relevant officer as regards offences falling in the remaining categories. Further, as regards delegation of the DPP's power of consent, we provisionally conclude that the DPP consent decision should be made either by the DPP personally or by a senior Crown Prosecutor, namely one of the Chief Crown Prosecutors appointed to oversee the work of each of the proposed new CPS areas.

1.19 Given that, if our provisional conclusions were brought into effect, some transfers of consent powers between the Law Officers and the DPP would result, we provisionally propose that provision should be made to enable such transfers to be made by way of statutory instrument, rather than by primary legislation, subject to the affirmative procedure.

PART II
THE PROSECUTION PROCESS, PRIVATE PROSECUTIONS AND MECHANISMS FOR CONTROLLING THEM

1.1 In order to understand the significance of consents to prosecution, it is necessary to explain the prosecution process. We will examine the role of the principal prosecutor, the CPS, and consider the availability of judicial review as a way of challenging the decisions of the CPS. We shall then go on to consider private prosecutions and the relationship between the Law Officers, the DPP and the private prosecutor.

1.2 We begin, however, by looking briefly at how proceedings are commenced.

COMMENCING PROCEEDINGS

1.3 A prosecution may be commenced by the laying of an information before a magistrate or by an accused being charged at a police station. If the former, the magistrate will either issue a summons requiring the person named to attend court and answer to the information or issue a warrant for the arrest of the named person, requiring him or her to be brought before the magistrates' court.[21]

1.4 An information may be laid orally or in writing, by a prosecutor in person, a legal representative or some other authorised person.[22] It cannot be laid on behalf of an unincorporated association such as a police force:[23] "an information must be laid by a named, actual person and must disclose the identity of that person."[24] The decision to issue a summons is judicial rather than administrative,[25] and magistrates have a residual discretion to refuse a summons if the application appears to be frivolous or vexatious or to be an abuse of process.[26]

1.5 If proceedings commence by way of charge at a police station, then usually[27] the prosecutor is the police officer who signs the charge sheet.[28]

[21] Magistrates' Courts Act 1980, s 1(1).

[22] Magistrates' Courts Rules 1981 (SI 1981 No 552) r 4.

[23] *Rubin v DPP* [1990] 2 QB 80.

[24] *Blackstone*, para D4.2.

[25] *R v Gateshead JJ, ex p Tesco Stores Ltd*; *R v Birmingham JJ, ex p D W Parkin Construction Ltd* [1981] QB 470.

[26] *R v Bros* (1901) 85 LT 581; *R v West London Metropolitan Stipendiary Magistrate, ex p Klahn* [1979] 1 WLR 933. See also *Blackstone*, para D4.3, and para 2.32 below.

[27] In *R v Stafford JJ, ex p Customs and Excise Commissioners* [1991] 2 QB 339 it was held by the Divisional Court on an application for judicial review that, where a person such as a customs officer investigated an offence, arrested a person and took that person to a police station to be charged, that officer did not thereby surrender the prosecution of the proceedings. "Proceedings can only be said to have been instituted on behalf of a police

1.6 Although, in theory, proceedings are begun by a private individual – usually a police officer – exercising his or her rights as a member of the public,[29] most prosecutions are, in effect, brought by the police force for which the individual acts and, once instituted, they are taken over by the CPS. In addition to police prosecutions, however, are those proceedings instituted by other official prosecuting agencies, such as the Inland Revenue and Customs and Excise, and those instituted by private individuals who are not acting in any official capacity.

THE CROWN PROSECUTION SERVICE

1.7 Prior to the establishment of the CPS in 1986, most criminal prosecutions were brought by the police. The power of the police to prosecute was exercised locally, under the control of the local chief constable.[30] Most police forces had in-house prosecuting solicitors' departments;[31] a significant minority, however, used local firms of private solicitors.[32]

1.8 In 1978, the Philips Commission was set up to investigate pre-trial criminal procedure.[33] The report of the Commission was published in 1981. It said that the arrangements for the prosecution of criminal offences at that time were

> characterised by their variety, their haphazardness, their local nature and, at least so far as the police are concerned, by the unitary nature of the investigative and prosecutorial functions …[34]

As a consequence, the Commission recommended the establishment of a national prosecution service. The principal objectives behind this recommendation were "greater conformity of general prosecution policies, enhanced efficiency, and accountability for the efficient use of resources and for the execution of general prosecution policies."[35]

1.9 In 1985, the recommendation was put into effect by the Prosecution of Offences Act ("the POA 1985"). Section 1 established "a prosecution service for England and Wales", to be known as the Crown Prosecution Service and consisting of the

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force when it is the police who have investigated, arrested and brought the arrested person to the custody officer": *per* Watkins LJ, 666F-G.

28 *Blackstone*, para D2.29.

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

30 Philips Report, para 6.4.

31 Following a recommendation of the Royal Commission on the Police (1962) Cmnd 1728, the number of prosecuting solicitors' departments had increased. It was noted in the Philips Report, however, that the implementation of that recommendation had been "slow and inconsistent in its results": *ibid*, para 7.4.

32 *Ibid*, para 6.5.

33 *Ibid*, para 1.6.

34 *Ibid*, para 6.6.

35 *Ibid*, para 7.3.

DPP as head of the service, Chief Crown Prosecutors and other staff appointed by the DPP.[36] The DPP, in discharging his or her functions under the Act,[37] does so "under the superintendence of the Attorney General".[38]

1.10 Under section 3(2) of the POA 1985 the duties of the DPP include the duty

> (a) to take over the conduct of all criminal proceedings, other than specified proceedings,[39] instituted on behalf of a police force (whether by a member of that force or by any other person);
>
> (b) to institute and have the conduct of criminal proceedings in any case where it appears to him that –
>
> > (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or
> >
> > (ii) it is otherwise appropriate for proceedings to be instituted by him;
>
> (c) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person);
>
> (d) to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles); …

The CPS and the police

Under the present system

1.11 In describing its proposal in favour of a national prosecution service, the Philips Commission said: "It is a central feature of our proposals that there should be a division of functions between the police and prosecutor."[40] It was envisaged that the police would be left with "complete responsibility for investigating offences and for making the initial decision whether to bring the matter before a court … or to take no proceedings".[41] Once the case had reached the court, in the view of the Philips Commission, conduct of the case should be the responsibility of the prosecutor.

[36] POA 1985, s 1(1).

[37] Or any other enactment.

[38] POA 1985, s 3(1). The 1985 Act contrasts with its predecessor in that, whilst retaining the reference to the DPP being "under the superintendence of the Attorney General", it does not repeat the Attorney-General's power to direct the DPP to prosecute "in a special case" (see s 2 of the POA 1879). Whether this difference has any practical effect is doubted: see J Rozenberg, *The Case for the Crown* (1987) p 189, and ch 10 generally.

[39] "Specified proceedings" are those set out in the Prosecution of Offences Act (Specified Proceedings) Order, SI 1985 No 2010. They include a number of road traffic offences for which the accused is given an opportunity to plead guilty by post.

[40] Philips Report, para 7.6.

[41] *Ibid*, para 7.7.

1.12 Whether or not a case is available to be taken over by the CPS will depend on the initial decision of the investigating police force,[42] and that decision lies within the discretion of the chief officer[43] of the force in question. The discretion is unfettered save that the chief officer, being under a duty to enforce the law, is answerable to the law,[44] and the exercise of the discretion may be subject to judicial review should any decision amount to a dereliction of that duty.[45]

Recent proposals for change

1.13 Earlier this year, the Attorney-General[46] announced[47] a series of measures for reorganising the CPS into 42 areas, each with its own Chief Crown Prosecutor, each area to correspond to an existing police force area.[48] Whereas the creation of a national prosecution service was initially conceived as a way of dividing the prosecution process into investigators (the police) and prosecutors (the CPS) and eliminating regional variations in prosecution policy, the purpose of the latest reforms is said to be "to create a service much more locally based and therefore much better structured to cooperate with the police in ensuring an effective prosecution system".[49] It is planned that the DPP will formally vary the division of the CPS through a direction made under section 1(5) of the POA 1985 by April 1998.

The decision to prosecute and the role of the CPS

Generally

1.14 Under section 3(2)(a) of the POA 1985, the CPS is under a duty to take over almost all proceedings instituted on behalf of the police. Once in the hands of the CPS, the case is reviewed. The decision whether the prosecution should continue

[42] See A Ashworth, "The 'Public Interest' Element in Prosecutions" [1987] Crim LR 595: "The framework of the new system is such that the Crown Prosecutor formally receives only those cases in which the police have decided to bring a prosecution. The first set of filters are therefore police decisions".

[43] And those to whom he or she has delegated authority.

[44] *R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118, 136, *per* Lord Denning MR.

[45] *Blackstone*, para D1.60.

[46] The Rt Hon John Morris QC.

[47] See Written Answer, *Hansard* (HC) 21 May 1997, vol 294, cols 73–74.

[48] At the same time, the Attorney-General also announced that a review of the CPS was to be undertaken. Sir Iain Glidewell is to conduct the review. He is expected to report in December of this year. Against the background of the decision that the CPS is to be divided into police areas, the terms of reference of the review are, generally, to examine the organisation and structure of the CPS and, more particularly, to assess whether the CPS has contributed to the falling number of convictions, to consider the manner in which the CPS influences its relationship with the police and to consider the validity of the criticisms that the CPS has led to unjustified "downgradings" of charges. (News release issued by the Law Officers on 12 June 1997.)

[49] Press notice issued by the CPS on 21 May 1997.

with the original charges, or different charges, or whether it should be stopped, is governed by the principles set out in the Code for Crown Prosecutors:[50]

> Proceedings are usually started by the police … . Each case that the police send to the Crown Prosecution Service is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in this Code.[51]

1.15 The Code sets out a statement of general principles which includes the requirement that Crown Prosecutors should be "fair, independent and objective" and that they should not let their personal views of a defendant's, victim's or witness's "ethnic or national origin, sex, religious beliefs, political views or sexual preference" influence their decisions.[52] It sets out a two-part test which is applied to all cases under review. The test comprises the evidential test and the public interest test.[53]

1.16 The *evidential test* is an objective test which requires an assessment of whether "there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge".[54] By "realistic prospect of conviction", it is meant that "a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged".[55]

1.17 The *public interest test* is considered only if the evidential test is passed. It involves the prosecutor balancing factors for and against prosecution,[56] and the Code provides some guidance as to which factors should be considered.[57] It is assumed that "[t]he more serious the offence, the more likely it is that a prosecution will be needed in the public interest"[58] and, therefore, "[i]n cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour".[59]

1.18 Factors favouring prosecution include, for example,[60] the fact that a conviction is likely to result in a significant sentence; that a weapon was used or violence

[50] Issued under s 10 of the POA 1985. The most recent Code was issued in June 1994, replacing the previous version published in January 1992. It is set out in Appendix C below. The Code is more fully explained in an accompanying Explanatory Memorandum (June 1994). See also R K Daw, "The 'Public Interest' criterion in the decision to prosecute" (1989) 53 J Crim L 485; A Ashworth and J Fionda, "The New Code for Crown Prosecutors: (1) Prosecution, Accountability and the Public Interest" [1994] Crim LR 894; R K Daw, "(2) A Response" [1994] Crim LR 904.

[51] Code for Crown Prosecutors, para 3.1.

[52] *Ibid*, para 2.3.

[53] *Ibid*, paras 4.1 and 4.2.

[54] *Ibid*, para 5.1.

[55] *Ibid*, para 5.2.

[56] *Ibid*, para 6.2.

[57] *Ibid*, paras 6.4 - 6.9.

[58] *Ibid*, para 6.4.

[59] *Ibid*, para 6.2.

[60] *Ibid*, para 6.4.

threatened during the commission of the offence; that the evidence shows that the defendant was a ringleader or organiser of the offence; that the victim was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance; that the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference; that there are grounds for believing that the offence is likely to be continued or repeated (for example, a history of recurring conduct); or that the offence, although not serious in itself, is widespread in the area where it was committed.

1.19 Factors militating against prosecution include, for example,[61] the fact that the court is likely to impose a very small or nominal penalty; that the offence was committed as a result of a genuine mistake or misunderstanding;[62] that there has been a long delay between the offence taking place and the date of the trial;[63] that a prosecution is likely to have a very bad effect on the victim's physical or mental health; that the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health;[64] or that details may be made public that could harm sources of information, international relations or national security.

Cases involving allegations against police officers

1.20 At the end of July this year, it was agreed by the Attorney-General and the DPP that, in regard to cases involving deaths in police and prison custody and cases involving possible serious assault charges against the police, no prosecution decision would be taken without independent advice from Treasury Counsel. If the DPP disagrees with the advice, the Attorney-General and Solicitor-General are to be informed and consulted.

1.21 This special procedure was put in place following applications to the Divisional Court for judicial review of a decision by the CPS not to prosecute in two cases involving death in police custody[65] and a third case involving an allegation of assault against the police.[66] It will continue until the conclusion of an independent enquiry into those cases.[67]

[61] *Ibid*, para 6.5.

[62] "[T]hese factors must be balanced against the seriousness of the offence": *ibid*, para 6.5(b).

[63] 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: *ibid*, para 6.5(d).

[64] Unless the offence is serious or there is a real possibility that it may be repeated: *ibid*, para 6.5(f).

[65] Shiji Lapite and Richard O'Brien.

[66] Derek Treadaway.

[67] CPS statement dated 28 July 1997, and Law Officers' news release dated 31 July 1997. The enquiry will be conducted by His Honour Gerald Butler QC.

Judicial review of prosecutors' decisions

1.22 In this consultation paper, we are concerned with a particular restriction on the prosecution process – namely, a requirement of consent to prosecution – with, as we shall see, its particular impact on the private prosecutor. We shall later be considering other factors which inhibit private prosecution, such as the costs constraint and potential liability in tort. Given that private prosecution will tend to be a course of last resort, we believe it will be helpful at this stage to set out the ways in which a decision of the CPS not to prosecute, or to prosecute for a lesser charge, can be challenged by way of judicial review.

A decision not to prosecute

1.23 In the (pre-CPS) case of *R v Commissioner of the Police of the Metropolis, ex p Blackburn*,[68] in which the applicant, a private citizen, sought the reversal of a policy decision by the respondent not to enforce a provision of the Betting, Gaming and Lotteries Act 1963, it was held that the respondent was under a duty to enforce the law.[69] The Divisional Court appeared, therefore, prepared to intervene in matters of policy, although Lord Denning MR took the view that it was for the chief constable "to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought."[70]

1.24 In the recent case of *R v Director of Public Prosecutions, ex p C*,[71] in which the applicant sought judicial review of the decision of the DPP not to prosecute her husband for non-consensual buggery, Kennedy LJ said that it had been "common ground" that a decision by the DPP not to prosecute was reviewable, although the power was one "sparingly exercised".[72] Having considered the authorities, he identified three circumstances in which an application for judicial review of a decision not to prosecute would be effective:[73]

(1) if the decision was the result of some unlawful policy;

(2) if it was made because the DPP had failed to act in accordance with the Code issued pursuant to section 10 of the POA 1985;[74]

(3) if the decision was perverse.

[68] [1968] 2 QB 118.

[69] *Ibid*, at p 136A, *per* Lord Denning MR.

[70] *Ibid*, at p 136D-E, *per* Lord Denning MR.

[71] [1995] 1 Cr App R 136.

[72] *Ibid*, at pp 139G-140A.

[73] *Ibid*, at p 141B-E. See also *R v CPS, ex p Waterworth* [1996] JPIL 261.

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

A decision to prosecute for a lesser offence

1.25 It appears that a decision to prosecute an accused for an offence in circumstances in which an alternative and more serious offence could have been charged is amenable to judicial review.[75] In the case of *R v General Council of the Bar, ex p Percival,*[76] where judicial review was sought of a decision by the Professional Conduct Committee of the General Council of the Bar to charge a lesser offence, it was held that that decision was judicially reviewable.

OTHER PUBLIC BODIES

1.26 Although the great majority of prosecutions are conducted by the CPS, other public bodies have prosecutorial powers (usually in relation to offences within a specialist sphere of competence). *Blackstone* refers to these bodies as "governmental or quasi-governmental organisations such as local authorities, the Inland Revenue, Customs and Excise or the Department of Social Security".[77] To this list may be added others such as the Department of Trade and Industry, the Health and Safety Executive, the Ministry of Agriculture, Fisheries and Food, the Post Office, the National Television Licence Records Office, and the Department of the Environment (driver and vehicle licensing).

1.27 Whereas the purpose of the CPS is to act as the national prosecution service,[78] for these other prosecuting authorities, their power to prosecute tends to be secondary to a wider-ranging regulatory function.[79]

PRIVATE PROSECUTIONS

Right of private prosecution and the POA 1985

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

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

1.29 The Divisional Court considered the relationship between sections 3 and 6 of the POA 1985 in the case of *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd.*[80] The Marchioness, a pleasure boat, was run down on the River

[75] As for the circumstances in which a private prosecutor attempts to start a private prosecution for the greater offence, rather than attempting to make the CPS upgrade the charges, see para 2.33 below and the case of *R v Tower Bridge Magistrate, ex p Chaudhry* [1994] QB 340.

[76] [1991] 1 QB 212.

[77] At para D2.29.

[78] See the CPS Annual Report 1996-1997 (HC 68) at p 6: The CPS "is a national prosecution service dealing with cases in its Branches throughout England and Wales."

[79] K W Lidstone, R Hogg and F Sutcliffe (in collaboration with A E Bottoms and M A Walker), *Prosecutions by Private Individuals and Non-Police Agencies*, Research Study Number 10 of the Philips Commission, pp 34–35.

[80] (1993) 96 Cr App R 405.

Thames by a dredger, causing the death of 51 people. The husband, G, of one of the victims brought a private prosecution for manslaughter against the applicants and four of their employees. The applicants sought judicial review of a decision of the stipendiary magistrate not to stay proceedings. It was argued, inter alia, that G did not have locus standi to bring the prosecution. The court held, refusing the application, that section 6(1) precluded private prosecutions only in those proceedings (set out in section 3(2)(a), (c) and (d))[81] which the DPP was under a duty to *take over*; it did not preclude private prosecutions in those proceedings (under section 3(2)(b)) where the DPP was under a duty to *institute* proceedings.

PROCEDURAL CONSTRAINTS ON PRIVATE PROSECUTIONS

1.30 Despite the widely-accepted principle that every individual should have a right of private prosecution unless there is very good reason to the contrary,[82] that right is subject to a number of procedural[83] limitations:

(1) a magistrate may refuse to issue a summons;

(2) the Attorney-General may terminate proceedings by entering a *nolle prosequi*;

(3) the Attorney-General may prevent criminal proceedings by vexatious litigants by applying to the High Court for a criminal or all proceedings order;

(4) the DPP may take over private prosecutions and terminate them, whether by discontinuance, withdrawal or offering no evidence; and

(5) the Law Officers, the DPP or some other designated officer or body may, with regard to those offences where consent is a condition precedent to the institution of criminal proceedings, refuse that consent.

1.31 Our concern in this consultation paper is the last of these limitations, the operation of consent provisions. For the moment, however, we shall set out briefly the other procedural constraints on private prosecutions.

The discretion of the magistrates to refuse to issue a summons

1.32 In the 1979 case of *R v West London Metropolitan Stipendiary Magistrate, ex p Klahn*,[84] Lord Widgery CJ stated that, in deciding whether to issue a summons, a magistrates' court should ascertain at minimum: (1) whether the offence alleged is known to law and whether the essential ingredients of the offence are prima facie present, (2) whether time-limits have been complied with, (3) whether the court has jurisdiction and (4) whether any consent to prosecute, if required, has been

[81] The text of all these paragraphs is set out in Appendix A and in para 2.10 above.

[82] Memorandum of the Attorney-General to the Select Committee on Obscene Publications. See the report of the Select Committee, HC 123–1, App 1, p 23 para 3. At para 6.4 we state our support for this principle.

[83] In Part V we consider other, practical, constraints on private prosecutions.

[84] [1979] 1 WLR 933, 935H.

obtained. In addition, the magistrate should consider whether the application is vexatious, which would in turn require examination of "the whole of the relevant circumstances".[85]

1.33 *Ex p Klahn* was considered in a recent case, *R v Tower Bridge Metropolitan Stipendiary Magistrate, ex p Chaudhry*,[86] in which an application was made for judicial review of a magistrate's decision not to issue a private prosecutor's summons in respect of a person who was already defendant in proceedings brought by the CPS involving the same incident but charging a lesser offence than that alleged by the private prosecutor. The Divisional Court rejected the submission that, if vexatiousness was not an issue, a magistrate should confine his or her consideration to what appeared on the information, and, as regards circumstances in which a private prosecution was sought in addition to a Crown prosecution, a magistrate should be cautious in issuing a summons:

> If a summons for a more serious charge is issued on the application of a private prosecutor, the discretion of the Crown prosecutor is overridden in a way which may well appear to the defendant and to those who represent him to be oppressive, and so, whilst I would not go so far as to suggest that a magistrate should never at the behest of a private prosecutor issue a summons against a defendant who, in respect of the same matter, already has to answer one or more informations laid by the Crown, it seems to me that unless there are special circumstances, such as apparent bad faith on the part of the public prosecutor, the magistrate should be very slow to take that step.[87]

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

1.34 On any indictable matter before the Crown Court, the Attorney-General may stay proceedings by entering a *nolle prosequi*.[88] Although only the Attorney-General can enter a *nolle prosequi*,[89] the prosecution or defence are able to make representations to the Attorney-General that a *nolle prosequi* is appropriate in a particular case.

1.35 The majority of cases in which a *nolle prosequi* is entered concern defendants who cannot plead or otherwise stand trial due to some mental or physical incapacity.[90]

[85] [1979] 1 WLR 933, 936A.

[86] [1994] QB 340. The case was taken to the House of Lords, the Divisional Court having certified a point of law of general public importance under s 1(2) of the Administration of Justice Act 1960, but leave to appeal was refused on 2 March 1994.

[87] *Ibid*, p 347 F–H, *per* Kennedy LJ.

[88] This can be done at any time after the bill of indictment is signed and before judgment: *Dunn* (1843) 1 Car & K 730; 174 ER 1009.

[89] Section 1(1) of the Law Officers Act 1944 is limited to the statutory functions of the Attorney-General and therefore does not apply to the power to enter a *nolle prosequi*, which is a prerogative power. The Law Officers Act 1997, however, which is to come into force shortly (see para 3.13 below), is not similarly limited and allows any function of the Attorney-General to be exercised by the Solicitor-General (see s 1(5) of the 1997 Act).

[90] Writing in 1969, the then Attorney-General (Sir Elwyn Jones, later the Rt Hon the Lord Elwyn Jones LC) said: "In practice, since I have been Attorney-General, almost every *nolle*

A *nolle prosequi* stays the proceedings but it does not operate as a bar or discharge or acquittal on the merits.[91] The defendant remains liable to be re-indicted if, for example, the state of mental or physical incapacity ends.[92]

The power of the Attorney-General to apply to the High Court for a criminal or all proceedings order

1.36 Under section 42 of the Supreme Court Act 1981[93] and on the application of the Attorney-General, the High Court may make a "criminal proceedings order" against a person if it is satisfied that he or she has "habitually and persistently and without reasonable ground … instituted vexatious prosecutions (whether against the same person or different persons)".[94] By section 42(1A) of the 1981 Act, a criminal proceedings order means that

> (a) no information shall be laid before a justice of the peace by the person against whom the order is made without leave of the High Court; and
>
> (b) no application for leave to prefer a bill of indictment shall be made by him without leave of the High Court … .

1.37 If the court is satisfied that the person is a vexatious litigant in both civil and criminal proceedings, it may make an "all proceedings order" as a result of which that person would be prevented from bringing both criminal and civil proceedings without leave of the High Court.[95] By analogy with vexatious civil proceedings,[96] the court will have to consider the whole history of the matter, and criminal proceedings may be held to be vexatious notwithstanding that each individual case taken in isolation discloses a cause of action.

The power of the DPP to take over proceedings

1.38 Section 6(2) of the POA 1985 provides:

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

1.39 Once proceedings have been taken over, the DPP may

(1) proceed with them;

(2) discontinue the prosecution under section 23(3) of the POA 1985;

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prosequi which I have entered has been because a defendant has been too ill to attend court." "The Office of Attorney-General" [1969] CLJ 43, 49.

91 *Goddard v Smith* (1704) 3 Salk 245; 91 ER 803.

92 *Ridpath* (1713) 10 Mod 152; 88 ER 670.

93 As amended by s 24 of the POA 1985.

94 Supreme Court Act 1981, s 42(1)(c).

95 Supreme Court Act 1981, s 42(1).

96 See *Re Vernazza* [1959] 1 WLR 622.

(3) decline to offer evidence;[97] or

(4) withdraw the case.[98]

Take over and proceed

1.40 Section 7(4) of the POA 1985 provides:

> It shall be the duty of every justices' clerk to send to the Director, in accordance with the regulations, a copy of the information and of any depositions and other documents relating to any case in which –
>
> (a) a prosecution for an offence before the magistrates' court to which he is clerk is withdrawn or is not proceeded with within a reasonable time;
>
> (b) the Director does not have the conduct of the proceedings; and
>
> (c) there is some ground for suspecting that there is no satisfactory reason for the withdrawal or failure to proceed.

If the CPS considers that such a case merits prosecution,[99] it will intervene and take over the case.

Take over and discontinue

1.41 Having taken over a private prosecution under section 6(2) of the POA 1985, the DPP may decide to discontinue the prosecution. Section 23(3) of the POA 1985 provides:

> Where, at any time, during the preliminary stages[100] of the proceedings, the Director gives notice under this section to the clerk of the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice …

1.42 The decision to discontinue is subject to a defendant's right to give notice (within a prescribed time)[101] that he or she wishes the proceedings to continue. If the defendant exercises that right, proceedings continue as if the DPP had given no

[97] *Turner v DPP* (1979) 68 Cr App R 70; see paras 2.43 – 2.45 below.

[98] *Cooke v DPP and Brent JJ* (1992) 156 JP 497; see para 2.46 below.

[99] In that it satisfies the Code tests.

[100] Negatively defined by s 23(2) of the POA 1985 as not including

(a) in the case of a summary offence, any stage of the proceedings after the court has begun to hear evidence for the prosecution at the trial;

(b) in the case of an indictable offence, any stage of the proceedings after –

(i) the accused has been committed for trial; or

(ii) the court has begun to hear evidence for the prosecution at a summary trial of the offence.

[101] At present 35 days from the date of discontinuance: POA 1985, s 23(7) and Magistrates' Courts (Discontinuance of Proceedings) Rules 1986 (SI 1986 No 367).

notice to the contrary.[102] A notice of discontinuance does not preclude the institution of fresh proceedings on a later occasion.[103]

Take over and offer no evidence

1.43 The power of the CPS to take over a case and offer no evidence is now beyond doubt. In *Turner v DPP*,[104] the High Court held that the DPP had properly exercised his discretion in taking over a private prosecution brought by a convicted robber against his accomplice, when the accomplice had given evidence in the robber's trial on the basis of an undertaking from the DPP that he would not be prosecuted for his part in the robbery. The DPP was held to have been acting in the public interest.

1.44 The reasoning in *Turner* was confirmed by the Court of Appeal in *Raymond v Attorney-General*:[105]

> The Director will … intervene in a private prosecution where the issues in the public interest are so grave that the expertise and the resources of the Director's office should be brought to bear in order to ensure that the proceedings are properly conducted from the point of view of the prosecution.
>
> On the other hand there may be what appear to the Director substantial reasons in the public interest for not pursuing a prosecution privately commenced.[106]

1.45 Nevertheless, it appears that the power to take over a private prosecution and offer no evidence will be exercised only rarely. The High Court in *Turner* considered that it would be an improper exercise of the power to take over a prosecution to do so with a view to offering no evidence unless the circumstances were exceptional, like those in *Turner.*

Take over and withdraw

1.46 In addition to discontinuance, the CPS has the power to take over and withdraw the proceedings. The existence of such a power was challenged in *Cooke v DPP and Brent JJ,*[107] in which it was argued that the discontinuance power under section 23 was the only way in which the CPS could terminate a case. The question for the court was whether the 1985 Act supplemented or replaced the pre-1985 powers of a prosecutor to terminate proceedings. The court held that the CPS's common law and statutory powers existed side by side.

[102] POA 1985, s 23(7).

[103] POA 1985, s 23(9).

[104] (1979) 68 Cr App R 70.

[105] [1982] QB 839.

[106] *Ibid*, at p 847A-C, *per* Sir Sebag Shaw.

[107] (1992) 156 JP 497.

CONCLUSION

1.47 In this Part we have examined the prosecution process, with particular emphasis on the relationship between Crown and private prosecutions. Having set the context, we now consider one element of that relationship, namely the consents regime.

PART III
THE AUTHORITIES WHOSE CONSENT IS REQUIRED, AND OTHER PROCEDURAL MATTERS

1.1 In this Part we consider which officers have authority to grant or refuse consent to prosecution, and we set out the constitutional functions of the Law Officers and the DPP. We describe the practical operation of consent provisions – the principles applied in exercising the power of consent, the form consent should take and the time when consent must be given. Finally, we examine whether the decision to grant or refuse consent is amenable to judicial review.

WHOSE CONSENT?

1.2 A variety of offences require the consent of a designated officer or body[108] before proceedings can be instituted. As we said in Part I, in many cases that officer is either one of the Law Officers (the Attorney-General or the Solicitor-General) or the DPP; in other cases, the officer may be the Secretary of State or, for example, the Industrial Assurance Commissioner[109] or the Commissioners of Customs and Excise.[110] In this paper we confine our examination to those consent provisions requiring the consent of either one or other of the Law Officers or the DPP.

The Law Officers

1.3 The Law Officers consist of the Attorney-General and the Solicitor-General. Unlike the office of the DPP, which was created by statute,[111] the offices held by the Law Officers arose by royal decree.[112]

Historical background

1.4 The origin of the office of Attorney-General can be traced back to the thirteenth century when, as King's Attorney or King's Serjeant, the office holder was responsible for maintaining the interests of the sovereign in the royal courts.[113] The modern office of Solicitor-General originated in 1461.[114] Although since the early part of the seventeenth century both the Attorney-General and the Solicitor-General were entitled to sit in the House of Commons, "until well into the nineteenth century the generally accepted interpretation of a Law Officer's

[108] Eg Housing Associations Act 1985, s 27(4) and s 30(6), which specifies the consent of the Housing Corporation.

[109] Insurance Companies Act 1982, ss 93(a) and 94(2).

[110] Criminal Justice (International Co-operation) Act 1990, s 21(2)(a).

[111] POA 1879.

[112] J Ll J Edwards, *The Law Officers of the Crown* (1964) p 2.

[113] *Ibid*, p 3.

[114] Sir John Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (1987) p 59.

responsibilities was primarily that of leading counsel, whose professional services could be called upon at any time by the government to look after litigation affecting the Crown".[115] As a result of the increase in the official workload of the Law Officers caused by the increase in the volume and complexity of legislation, in 1893 the Law Officers Department was set up.[116]

Present day functions of the Law Officers

1.5 Since about the turn of the century, the emphasis of the work of the Law Officers has been on their ministerial duties (rather than private practice) so that today their primary function is as "legal adviser of the Government as a whole, and of the various government departments".[117] Whereas, as members of the legislature and members of the Government, the Law Officers are politically active, in their capacity as legal advisers or when discharging their duties as participants in legal proceedings, they are required to act impartially.[118] Writing in 1969, the Attorney-General, Sir Elwyn Jones, later Lord Elwyn Jones LC, wrote:

> [T]he Attorney-General, when he is acting in political matters, is a highly political animal entitled to engage in contentious politics … But the basic requirement of our constitution is that however much of a political animal he may be when he is dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act in an impartial and even quasi-judicial way.[119]

1.6 More recently, in June of this year, the present Solicitor-General, Lord Falconer of Thoroton, in moving that the Law Officers Bill be read a second time, said:

> The two Law Officers for England and Wales … are politicians, and members of the Government. They are the chief legal advisers for the Executive, and their prime advocates. They also perform a wide range of duties in the public interest in which they are independent of government and to which the doctrine of collective responsibility does not apply.[120]

"GUARDIAN OF THE PUBLIC INTEREST"[121]

1.7 The Attorney-General's role as guardian of the public interest is demonstrated by the function of that office both in relation to criminal and civil proceedings.

[115] J Ll J Edwards, *The Law Officers of the Crown* (1964) p 4.

[116] *Ibid*, pp 4-5.

[117] Sir Elwyn Jones, "The Office of Attorney-General" [1969] CLJ 43, 46.

[118] For this reason, it is considered inappropriate for a Law Officer to be a member of the Cabinet: *ibid*, p 47.

[119] *Ibid*, p 50.

[120] *Hansard* (HL) 16 June 1997, vol 580, col 1075.

[121] See J Ll J Edwards, *The Law Officers of the Crown* (1964) ch 14 generally.

Criminal proceedings

1.8 In addition to the power to grant or refuse consent to certain prosecutions, the main functions of the Attorney-General, in regard to criminal proceedings, include instituting and conducting prosecutions of exceptional gravity or complexity (and occasionally appearing in court for the prosecution in such cases), terminating a prosecution by entering a *nolle prosequi*, issuing guidelines on prosecution practice, and appointing[122] and acting as superintendent[123] of the DPP.[124]

Civil relator actions

1.9 It is in the interest of the Crown, as *parens patriae*, to uphold the law for the general public benefit, and the relator action is a device by which the Crown's procedural privileges have been made available to private plaintiffs. A relator action may be brought against a public authority that is acting, or threatening to act, ultra vires; and equally it may be brought against any private individual or body committing a public nuisance or otherwise violating public law.

1.10 Although a private individual will have standing to restrain a breach of public law where the interference with the public right involves some interference with private rights (or, perhaps, where that individual is threatened with special damage over and above that which the wrong inflicts on the rest of the public),[125] in all other cases only the Attorney-General can institute proceedings to vindicate public rights. The Attorney-General can act independently, but in practice he usually acts at the relation (that is, at the instance) of a private individual. A court can always hear cases brought at the instance of the Attorney-General, because the Crown will always have standing for this purpose, whereas a private plaintiff might be refused relief on the ground that he or she had no more interest in the matter than any other member of the public.[126]

1.11 Before the Attorney-General will accept the relator action, the relator must certify that the statement of claim is proper for the Attorney-General's acceptance and that the relator will be responsible for costs. Once the Attorney-General has accepted, the actual conduct of the proceedings is then in the hands of the relator.[127] The decision as to whether or not to lend his name to an action is entirely within the discretion of the Attorney-General.[128]

[122] POA 1985, s 2.

[123] POA 1985, s 3(1).

[124] *Blackstone*, para D2.36.

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

[126] "By lending his name for this purpose the Attorney-General enabled the injunction and declaration, which were basically remedies for the protection of private rights, to be converted into remedies of public law for the protection of the public interest. They thus acquired a hybrid character even before the reforms of 1977": Wade and Forsyth, *Administrative Law* (7th ed 1994) p 601.

[127] Eg, it is up to the relator to instruct solicitor and counsel.

[128] *London County Council v A-G* [1902] AC 165, 169.

Relationship between the Attorney-General and Solicitor-General

1.12 Under the present law the Solicitor-General has a general power to discharge the statutory functions of the Attorney-General in certain circumstances only.[129] These are: if (a) the office of Attorney-General is vacant; or (b) the Attorney-General is unable to act owing to absence or illness; or (c) the Attorney-General authorises the Solicitor-General to act in any particular case.

1.13 Very shortly, however, the Law Officers Act will come into force,[130] section 1(1) of which provides that "[a]ny function of the AttorneyGeneral may be exercised by the Solicitor General" and section 1(2) of which provides that "[a]nything done by or in relation to the Solicitor General in the exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General".

Provisions requiring the consent of the Law Officers

1.14 Although, as we shall see, many take the view that there is no unifying principle to account for the variety of offences for which the Attorney-General's consent is required, *Blackstone* suggests that, broadly, "the Attorney's consent is required where issues of public policy, national security or relations with other countries may affect the decision whether to prosecute".[131] Edwards, writing in 1984, noticed that the DPP was increasingly being designated as the consent authority rather than the Attorney-General and, warning against looking for "any insidious motive behind this evolving Parliamentary practice", suggested that this was a demonstration of

> a policy of restricting the Attorney-General's involvement to those rare situations where … it can be said that the widest interests of the State make it preferable that the senior Law Officer, as the responsible minister, exercise his best informed judgment before authorising proceedings to commence.[132]

1.15 Examples of the sorts of offences which raise the issues identified by *Blackstone* include those created under the following Acts:

(1) Public policy

(a) offences of bribery under the Public Bodies Corrupt Practices Act 1889[133] and the Prevention of Corruption Act 1906;[134]

(b) offences involving stirring up racial hatred contrary to Part III of the Public Order Act 1986.[135]

[129] Law Officers Act 1944, s 1(1).

[130] The Law Officers Act 1997 received Royal Assent on 31 July 1997, coming into force two months after that date: s 3(3).

[131] *Blackstone*, para D1.83.

[132] *The Attorney General, Politics and the Public Interest* (1984) p 19.

[133] Section 4 (Attorney-General or Solicitor-General).

[134] Section 2 (Attorney-General or Solicitor-General).

(2) National security

(a) offences prosecuted in the United Kingdom as a result of the extension of jurisdiction under the Suppression of Terrorism Act 1978[136] with respect to terrorist offences committed in countries belonging to the European Convention on the Suppression of Terrorism;

(b) offences contrary to the Official Secrets Act 1911.[137]

(3) Relations with other countries

(a) an offence contrary to the Taking of Hostages Act 1982;[138]

(b) proceedings brought under the War Crimes Act 1991.[139]

The Director of Public Prosecutions

Historical background

1.16 The office of the DPP was created by the POA 1879. Originally, it was intended to supplement the existing system by which important government prosecutions were instituted and conducted by the Treasury Solicitor. In 1884,[140] the offices of the Treasury Solicitor and the DPP were merged, only to be again divided in 1908,[141] the DPP's office this time taking on all the functions previously performed by the Treasury Solicitor in respect of criminal proceedings.[142]

Present day function of the DPP

1.17 The office of the DPP is at present governed by the POA 1985 which, as we have seen,[143] continues "the well-established relationship"[144] between the Attorney-General and the DPP in which the DPP acts "under the superintendence" of the Attorney-General.[145] Whereas, however, prior to the 1985 Act, the DPP was

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[135] Section 27 (Attorney-General only).

[136] Section 4 (Attorney-General only).

[137] Section 8 (Attorney-General only).

[138] Section 2 (Attorney-General only).

[139] Section 1(3) (Attorney-General only).

[140] POA 1884.

[141] POA 1908.

[142] See J Ll J Edwards, *The Law Officers of the Crown* (1964) ch 17 generally, and G Williams, "The Power to Prosecute" [1955] Crim LR 596, 602.

[143] See para 2.9 above.

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

[145] POA 1985, s 3(1).

appointed by the Home Secretary,[146] section 2(1) of the POA 1985 transferred the power of appointment to the Attorney-General.

1.18 Before the establishment of the CPS, the DPP was concerned only with those criminal cases sufficiently difficult to warrant the intervention of the DPP; with the passing of the Act, however, the DPP's primary function is now to take over conduct of almost all[147] criminal proceedings instituted by the police.[148] The DPP is also under a duty to advise police forces on all matters relating to criminal offences.[149]

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

1.19 The DPP is head of the CPS[150] and statutorily required to issue guidance to Crown Prosecutors on, for example, when to institute or continue proceedings and which charges should be preferred.[151] Section 1(7) of the POA 1985 provides that any consent to prosecution given by a Crown Prosecutor shall be treated as having been given by the DPP:

> Where any enactment (whenever passed) –
>
> (a) prevents any step from being taken without the consent of the Director or without his consent or the consent of another; or
>
> (b) requires any step to be taken by or in relation to the Director;
>
> any consent given by or, as the case may be, step taken by or in relation to, a Crown Prosecutor shall be treated, for the purposes of that enactment, as given by or, as the case may be, taken by or in relation to the Director.

1.20 Prior to the 1985 POA, the consent functions of the DPP were also delegable. Under the POA 1979, the Secretary of State was empowered not only to appoint the DPP,[152] but also such number of Assistant Directors of Public Prosecutions as the Minister for the Civil Service would sanction,[153] each Assistant being able to do any act or thing which the DPP was required or authorised to do under any Act.[154] Joshua Rozenberg, writing in 1987, remarked on the expansion of the range of

[146] POA 1979, s 1(1). "That the theoretical possibility of confusion continues to exist is regrettably once more made manifest by the retention, under the Prosecution of Offences Act 1979, of the Home Secretary's statutory power of appointing each new incumbent to the office of Director of Public Prosecutions": Edwards, *op cit* (1984) p 7.

[147] Save for specified proceedings: POA 1985, s 3(2)(a). See para 2.10 above.

[148] POA 1985, s 3(2)(a).

[149] POA 1985, s 3(2)(e).

[150] POA 1985, s 1(1).

[151] POA 1985, s 10.

[152] POA 1979, s 1(1).

[153] POA 1979, s 1(2).

[154] POA 1979, s 1(4).

delegation brought about by the 1985 Act. Explaining the structure of the (then) recently created CPS, he said of Crown Prosecutors: "despite being the lowest grade of legally qualified staff [they] have all the powers which until 1986 could only be exercised by the Director of Public Prosecutions and his Assistant Directors".[155]

The relationship between the DPP and the Law Officers

1.21 Since the DPP acts "under the superintendence" of the Attorney-General, the Attorney-General is answerable to Parliament for the actions of the DPP. In a Home Office memorandum written in 1972[156] it was suggested that there was substantial consultation between the Attorney-General and the DPP when either is required to consider whether to consent to criminal proceedings:

> It is the Director's practice to consult the Attorney-General on cases of special importance or difficulty even where there is no legal requirement for the Attorney to be involved. Cases in which the Attorney-General's fiat for a prosecution is required are considered by the Director of Public Prosecutions, and the Attorney-General takes his decision only after he has received the Director's advice. In a proportion of cases where the Director's consent to prosecution is required he consults the Attorney-General before taking his decision. The practical difference between a control over prosecutions exercised by the Attorney-General and one exercised by the Director of Public Prosecutions is that, in the latter case, the Director decides straightforward cases himself without reference to the Attorney-General.[157]

1.22 Since the inception of the CPS and the consequent delegation of the DPP's power of consent to Crown Prosecutors, the practice has, we understand,[158] changed to a degree. Most applications for the Attorney-General's consent to prosecution are sent directly from CPS central casework to the Attorney-General without the intervention of the DPP. This shift away from the centre is likely to continue in that the recently proposed devolution of the CPS[159] may well see the lines of communication developing between the Law Officers and the CPS areas (rather than the central administration).

Examples of provisions requiring the consent of the DPP

1.23 *Blackstone* suggests that the principle underlying the various offences the prosecution of which requires the consent of the DPP "may be that, in each instance, although sometimes for different reasons, the weighing of the

[155] *The Case for the Crown* (1987) p 98. The author is the BBC's Legal Correspondent for News and Current Affairs.

[156] Further memorandum by the Home Office on the control of prosecutions by the Attorney-General and the Director of Public Prosecutions (April 1972) submitted to the Departmental Committee on s 2 of the Official Secrets Act 1911 ("the Home Office Memorandum to the Franks Commitee").

[157] *Ibid*, para 5.

[158] From correspondence with the Legal Secretariat to the Law Officers.

[159] See para 2.13 above.

discretionary factors relevant to the decision to prosecute is likely to be a particularly sensitive and difficult exercise, thus making it desirable for the police or the Crown Prosecution Service to obtain prior approval for prosecution."[160]

1.24 Examples of offences requiring the DPP's consent are:

(a) offences of theft or criminal damage under the Theft Act 1968 where the property stolen or damaged belonged to the accused's spouse;[161]

(b) complicity in the suicide of another contrary to the Suicide Act 1961;[162]

(c) homosexual offences where either party was under the age of 21;[163]

(d) unauthorised interception of communications contrary to the Interception of Communications Act 1985;[164]

(e) failure of a member of a local authority to disclose a pecuniary interest contrary to section 94 of the Local Government Act 1972.[165]

PRACTICAL OPERATION OF THE CONSENT REQUIREMENT

The decision to grant or refuse consent

The Law Officers

1.25 In a report[166] published in 1939, a Select Committee investigating the conduct of the Attorney-General[167] under the Official Secrets Act 1911 said of the Attorney-General's statutory discretion to consent to proceedings under that Act that it should be "exercised judicially": the decision to consent or not "must be arrived at upon principle and not on grounds of expediency." Edwards,[168] having regard to the variety of offences for which consent is required, suggests that

> the basic question to which the Attorney-General (or the Solicitor-General as the case may be) addresses himself, when considering an

[160] *Blackstone*, para D1.83. We note for completeness that, in contrast to the Attorney-General's consent provisions, the consent power of the DPP is often shared with other authorities. Such provisions are described as "diverse in range and esoteric in detail" (B M Dickens, "The Prosecuting Roles of the Attorney-General and the Director of Public Prosecutions" [1974] PL 50, 62) and, as we have indicated in Part I, are outside the scope of this paper.

[161] Theft Act 1968, s 30(4) (DPP only).

[162] Section 2(4) (DPP only).

[163] Sexual Offences Act 1967, s 8 (DPP only).

[164] Section 1(4) (DPP only).

[165] Section 94(3) (DPP only).

[166] Report of the Select Committee on the Official Secrets Act, 1939, HC Paper 101, p xiii, para 20.

[167] Sir Donald Somervell.

[168] J Ll J Edwards, *op cit* (1964) p 245.

> application for his consent, is whether the particular case falls within the ambit of the mischief at which the Act is directed.[169]

1.26 Edwards also suggests, however, that even if it were decided that there was a prima facie case against the accused *and* the case fell within the mischief of the Act, the Law Officer's consent should not be given automatically; rather, expediency, by which is meant "the public interest at large", should also be put in the balance.[170] This accords with the evidence of the Attorney-General to the Select Committee on the Official Secrets Acts:

> [W]here Parliament provides that the fiat of the Attorney-General or the Lord Advocate is a condition precedent to a prosecution taking place, it is not their business to get a prosecution. It is their business to exercise their discretion to the best of their ability, it being clear from the fact of their consent being necessary that this is a case where Parliament thinks it particularly important that a discretion should be exercised and that prosecutions should not automatically go forward merely because the evidence appears to afford technical proof of an offence.[171]

And it also accords with comments by Lord Frazer of Tullybelton in *Gouriet v Union of Post Office Workers*:[172]

> It is well-established that [the Attorney-General] is not bound to prosecute in every case where there is sufficient evidence, but that when a question of public policy may be involved the Attorney-General has the duty of deciding whether prosecution would be in the public interest.

1.27 In a memorandum submitted by the Attorney-General to the Franks Committee, dated September 1971, it was suggested that, in deciding whether to grant or refuse consent to a prosecution under the Official Secrets Acts, an Attorney-General would consider the following factors:[173]

(1) the strength of the evidence;[174]

(2) the degree of culpability of the potential defendant;

[169] *Ibid*, p 245.

[170] *Ibid*, p 246.

[171] Report of the Select Committee on the Official Secrets Act, 1939, HC Paper 101, Minutes of Evidence, p 15, Q 69.

[172] [1978] AC 435, 523G.

[173] Memorandum submitted by the Attorney-General (September 1971) to the Franks Commitee, para 15.

[174] Evidential sufficiency, as a precondition of consent, is illustrated by the case of *R v Solicitor-General, ex p Taylor, The Times* 14 August 1995 (see para 3.31) in which the Solicitor-General decided against instituting proceedings under the Contempt of Court Act 1981 on the ground that "proceedings for contempt against the newspapers would be unlikely to succeed. He therefore decided that it was not an appropriate case for such proceedings": *per* Stuart-Smith LJ at p 12 of the transcript (case no: CO 2117-94).

(3) the damage to the public interest which has resulted from disclosure;

(4) the effect of the prosecution on the public interest.

1.28 The consent decision of the Law Officers, therefore, follows the dual test of evidential sufficiency and public interest.

The DPP

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

Availability of judicial review

The Law Officers: a "unique constitutional position"

1.30 The powers of the Law Officers either emanate from the common law or have been conferred by statute. An example of the former is the power of the Attorney-General to enter a *nolle prosequi*; an example of the latter is the power of the Attorney-General or the Solicitor-General to grant or refuse a consent to prosecution. Whereas, until recently, there has been no suggestion that prerogative powers could be reviewed,[175] Edwards notes that "[s]ince the source of the discretionary power [to grant consent] rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked".[176]

1.31 In the 1995 case of *R v Solicitor-General, ex p Taylor,*[177] however, the Divisional Court[178] took the view that there was no jurisdiction for judicial review of a decision of the Solicitor-General to withhold consent to a prosecution under the Contempt of Court Act 1981. In that case, the applicants sought judicial review of a decision by the Solicitor-General, taken on behalf of the Attorney-General by virtue of section 1 of the Law Officers Act 1944[179] and made pursuant to section 7 of the Contempt of Court Act 1981,[180] that it was not appropriate to take proceedings for contempt of court arising out of the newspaper coverage of the

[175] In the "GCHQ case", *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it was held that the source of power was immaterial. Lord Scarman, at p 407, expressing the majority view of the House of Lords, stated that "Today ... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter." See also para 2.34, n 72 above.

[176] *The Attorney-General, Politics and the Public Interest* (1984) p 29.

[177] *The Times* 14 August 1995, case no: CO 2117 -94.

[178] Stuart-Smith LJ and Butterfield J.

[179] As to which, see para 3.12 above.

[180] Section 7 provides:

> Proceedings for a contempt of court under the strict liability rule (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it.

trial of the applicants in July 1992. The decision had been made on the basis that any prosecution would, in the light of the evidence, have been unlikely to succeed. It was argued on behalf of the applicants that although the weight of authority was against judicial review of the Attorney-General's decisions, that authority did not apply to those decisions, such as the instant, in which the Attorney-General had refused consent on the ground of evidential insufficiency[181] rather than any political considerations (for which the Attorney-General was answerable to Parliament alone). The court's attention was also drawn to the authorities which demonstrated that other prosecuting authorities *were* susceptible to judicial review.[182] Lord Justice Stuart-Smith, giving judgment, did not accept the submissions:

> The authorities … which lay down the rules in relation to the Attorney-General, point to his unique constitutional position. … Parliament must be taken to know the law as stated in *Gouriet* and the previous authorities; and if it had intended the Attorney-General's discretion to be reviewable by this court in this instance, in my view it would have said so.[183]

The DPP and other prosecuting authorities

1.32 As we have seen,[184] and as counsel for the applicants in *Ex p Taylor* pointed out, unlike the decisions of the Law Officers, those of the DPP and other prosecuting authorities are susceptible to judicial review.

Other procedural matters

Form of consent

1.33 In the case of *Cain and Schollick*[185] the Attorney-General gave his consent to a prosecution under the Explosive Substances Act 1883 in general terms: "I hereby consent to the prosecution of [the accused] … for an offence or offences contrary to the provisions of the said Act."[186] On appeal on the ground, inter alia, that the consent was ineffective because it was insufficiently detailed, the Court of Appeal held that it was the Attorney-General's duty to consider the general circumstances of the case. He had to decide which, if any, of the provisions in the relevant statute could be pursued against the defendant, but there was no constitutional objection to the consent being in wide terms if the Attorney-General believed that the

[181] See n 67 above.

[182] *R v Commissioner of Police, ex p Blackburn (No 3)* [1973] QB 241 in relation to the police; *R v General Council of the Bar, ex p Percival* [1991] 1 QB 212 in relation to disciplinary proceedings by professional bodies; *R v Inland Revenue Commission, ex p Mead* [1993] 1 All ER 772 in relation to the Inland Revenue, and *R v Director of Public Prosecutions, ex p C* [1995] 1 All ER 385 in relation to the DPP.

[183] *R v Solicitor-General, ex p Taylor, The Times* 14 August 1995, case no: CO 2117-94, at pp 21-22 of the transcript.

[184] See para 2.22 – 2.25 below.

[185] [1976] QB 496.

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

prosecutor should be at liberty to pursue any charge under the Act justified by the evidence.[187]

1.34 Usually consent is given formally in writing,[188] although it need not be.[189] Indeed, in the recent case of *Jackson*,[190] although the practice of written consent was endorsed, the Court of Appeal took the view that, in cases involving the consent of the DPP, it was sufficient for a Crown Prosecutor to have turned his or her mind to the question without more. Jackson was convicted of various sexual offences committed against children. He appealed against his conviction for buggery and attempted buggery on the ground, inter alia, that the consent of the DPP had not been obtained in accordance with section 8 of the Sexual Offences Act 1967[191] and that, therefore, the subsequent proceedings were a nullity. At the appeal it was agreed by both parties that consent could be given by a Crown Prosecutor on behalf of the DPP by virtue of section 1(7) of the POA 1985, and also that the Crown Prosecutor need not be acting on the express direction of the DPP. The issue was, therefore, factual: whether the Crown Prosecutor, T, had in the instant case given consent. T swore an affidavit in which he stated that he was unable to establish that he had signed a formal written consent (which was the usual practice) but believed that the words "DDP's consent required" in the CPS Indictment Precedent Manual which he had used would have drawn his attention to the need for a consent and that, in the circumstances, he had given the necessary consent. The court, rejecting the defence submission that compliance with the Act required "something from which consent could be discerned and distinguished", held that consent had been given.

Proof of consent

1.35 There is a presumption that the clerk to the justices, on an application being made for the issue of a summons, ensures that any pre-condition such as a consent provision is satisfied. Consent, therefore, need only be proved at trial if an objection is raised by the defendant.[192]

1.36 Section 26 of the POA 1985 provides that any document purporting to be the consent of a Law Officer or the DPP, and signed by such, shall be admissible as prima facie evidence of consent.

[187] *Ibid*, pp 502–503, *per* Lord Widgery CJ.

[188] *Blackstone,* para D1.83.

[189] *Cain and Schollick* [1976] QB 496, 502C, *per* Lord Widgery CJ.

[190] [1997] Crim LR 293.

[191] Section 8 provides:

> No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of buggery with … another man … where either of those men was at the time of its commission under the age of twenty-one.

[192] *Waller* [1910] 1 KB 364; *Price v Humphries* [1958] 2 QB 353.

Absence of consent

1.37 If proceedings which require consent are instituted without consent, both the committal proceedings and the subsequent trial are a nullity.[193]

Time of consent

1.38 In *Whale and Lockton,*[194] concerning charges under the Explosive Substances Act 1833, it was held that proceedings were instituted for the purposes of the Attorney-General's consent provision contained in section 7(1) of that Act[195] when a person came to court "to answer the charge".[196] It was unnecessary, therefore, for the consent of the Attorney-General to be obtained until arraignment.

1.39 This case appeared to conflict with *Price v Humphreys,*[197] which held that proceedings were instituted when a summons was issued following the laying of an information.[198] In *Bull,*[199] however, it was explained that, in cases where the summons procedure had not been used, section 25(2) of the POA 1985[200] would

[193] *Angel* [1968] 1 WLR 669, a case involving s 8 of the Sexual Offences Act 1967, as to which see n 84 above.

[194] [1991] Crim LR 692.

[195] Section 7(1) (as substituted by the Administration of Justice Act 1982, s 63(1)) provides:

> Proceedings for a crime under this Act shall not be instituted except by or with the consent of the Attorney-General.

[196] The decision followed the decision in *Elliot* (1985) 81 Cr App R 115.

[197] [1958] 2 QB 353.

[198] *Per* Devlin J.

[199] (1994) 99 Cr App R 193.

[200] Paragraph (a) of this subsection provides that any enactment requiring the consent of the Law Officers or the DPP to the institution or carrying on of proceedings "shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence".

enable a person to be arrested and remanded in the absence of any required consent.

PART IV
JUSTIFICATIONS FOR A REQUIREMENT OF CONSENT

1.1 In Part III we examined the offices of the Law Officers and the DPP and considered the practicalities of consent provisions. We now turn to the *justification* for consent provisions. As we shall see, this has in the past tended to focus on the particular character of the offence to which the consent provision applies.

HISTORICAL NOTE

1.2 According to Edwards,[201] the first example of a consent provision was contained in the Roman Catholic Relief Act 1829. Subsequently, a number of statutes were enacted during the nineteenth century restricting the right of private prosecution by way of consent provision.[202] Efforts were also made to prevent abuses by private prosecutors, for example by imposing penalties on those who made unfounded complaints,[203] and by requiring a prosecutor, in respect of certain offences, to be bound by recognisance to prosecute or give evidence.[204] Nonetheless, it was not until the Second World War and the substantial amount of social welfare legislation that followed that consent provisions became widely used, acting as a counterbalance to the broad drafting of much of the legislation.[205]

JUSTIFICATION

General

1.3 Joshua Rozenberg[206] said that the aim of consent provisions was "to stop busybodies blundering in and prosecuting people in circumstances which would not be seen as appropriate".[207] A more detailed justification is set out in what

[201] J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 17.

[202] B M Dickens, "The Attorney-General's consent to prosecutions" (1972) 35 MLR 347, 354, lists the following (consent provision in brackets): the Sunday Observation Prosecutions Act 1871 (s 1), the Metalliferous Mines Regulation Act 1872 (s 35), the Public Health Act 1875 (s 253), the Territorial Waters Jurisdiction Act 1878 (s 3) and the Explosive Substances Act 1883 (s 7(1)).

[203] Eg the preamble to the Metropolitan Police Courts Act 1839 (c 71) stated:

> XXXII … informations are often laid for the mere sake of gain, or by parties not truly aggrieved, and the offences charged in such informations are not further prosecuted, or it appears upon prosecution that there was no sufficient ground for making the charge …

and made provision for magistrates, in such circumstances, to require the informer to recompense the party informed or complained against.

[204] Vexatious Indictments Act 1859 (c 17). This Act applied to the offences of perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house and indecent assault.

[205] B M Dickens, "The Attorney-General's consent to prosecutions" (1972) 35 MLR 347.

[206] See Part III n 48.

[207] J Rozenberg, *The Case for the Crown* (1987) p 169.

Edwards describes as the Attorney-General's "classic exposition of the relevant factors that should govern any resort to a consent formula in new statutory offences",[208] submitted to the Select Committee on Obscene Publications in 1958.

The Attorney-General and the Obscene Publications Bill 1959

1.4 In a memorandum to the Select Committee on Obscene Publications,[209] the Attorney-General[210] set out his views on the proposal that there should be a DPP's consent requirement in respect of all proceedings concerning obscene publications. He noted that a large proportion of offences requiring consent had been created during and immediately after the Second World War; he noted also that such offences were "generally in connection with the enforcement of controls which were of necessity drafted in wide terms and the object of the restriction was to ensure the proper enforcement of the policy underlying the imposition of the control".[211] He then went on to attempt to categorise offences requiring consent, and suggested the following three broad categories:[212]

(1) "offences which are both public rather than private in character (in the sense that they are directed at the community as a whole rather than at individual members of it) and of sufficient importance to affect the life of the community";[213]

(2) "offences which are in their nature liable to provoke vexatious legal proceedings, ie, proceedings instituted rather to gratify some whim of the prosecutor than to vindicate his rights or assist in the administration of justice";

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

    (a) "those administered by a Government Department or other public body which is given a right to prosecute";[214]

    (b) "those creating offences which are as a matter of drafting incapable of precise definition although there is no doubt about their substance".[215]

[208] J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 26.

[209] Report of the Select Committee on Obscene Publications, 1958, HC 123–1, App 1, pp 23-4.

[210] The holder of the office at that time was the Rt Hon Sir Reginald Manningham-Buller QC MP, later Viscount Dilhorne LC.

[211] *Ibid*, p 23, para 2.

[212] *Ibid*, p 23, para 4.

[213] Examples suggested are offences against the Official Secrets Act.

[214] An example suggested is s 12 of the Oil in Navigable Waters Act 1955 (repealed by s 33(1) Prevention of Oil Pollution Act 1971).

[215] An example suggested is s 2 of the Children and Young Persons (Harmful Publications) Act 1955.

The Attorney-General concluded that offences relating to obscene publications fell within none of the specified categories and their prosecution should not, therefore, be constrained by any consent requirement, whether that of the Attorney-General or the DPP.[216]

1.5 In a speech made at the Report stage of the Obscene Publications Bill in 1959,[217] the Attorney-General[218] argued against an amendment requiring the consent of the DPP to the institution of criminal proceedings under the provisions of that Bill. In the course of his speech, relying on his memorandum to the Select Committee, he set out three grounds in favour of departing from the "fundamental principle of English law that proceedings may be instituted by private individuals".[219] These grounds for an Attorney-General's consent provision, which in his speech he described as "bad grounds",[220] were

(1) "to secure uniformity in the administration of the law";[221]

(2) to prevent vexatious proceedings;[222] and

(3) to restrict prosecutions in circumstances where a law has, necessarily, been drafted in broad terms, thereby creating the risk that it would catch those who had not offended against the spirit of the legislation.[223]

The Home Office memorandum to the Franks Committee in 1972

1.6 Based on the Attorney-General's submission to the Select Committee on Obscene Publications, guidance as to the reasons for including a consent provision can also be found in a Home Office memorandum to the Departmental Committee on section 2 of the Official Secrets Act 1911[224] ("the Home Office memorandum to the Franks Committee"). According to that memorandum, "the basic reason for including in a statute a restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances".[225] Five overlapping reasons were given for considering the inclusion of a consent requirement:

[216] Report of the Select Committee on Obscene Publications, 1958, HC 123-1, App 1, p 24, paras 9 and 10.

[217] *Hansard* (HC) 24 April 1959, vol 504, cols 839-846.

[218] Sir Reginald Manningham-Buller.

[219] *Hansard* (HC) 24 April 1959, vol 504, col 840.

[220] *Ibid*, col 841.

[221] *Ibid*.

[222] *Ibid*, col 843.

[223] *Ibid*, cols 843-4.

[224] Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (1972) Cmnd 5104 ("the Franks Report"). A prosecution under s 2 of the 1911 Act also requires the consent of the Law Officers.

[225] Home Office memorandum to the Franks Committee, Franks Report, vol 2, p 125, para 7.

(a) to secure consistency of practice in bringing prosecutions, eg, where it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;

(b) to prevent abuse, or the bringing of the law into disrepute, eg, with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases;

(c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;

(d) to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship;

(e) to ensure that decisions on prosecutions take account of important considerations of public policy or of a political or international nature, such as may arise, for instance, in relation to official secrets or hijacking.[226]

1.7 Whereas the Attorney-General in 1958 had not drawn any distinction between the roles of the Attorney-General and the DPP,[227] the Home Office suggested apportioning tasks between the two officers. Of the five reasons provided, the Home Office submitted that a consent requirement introduced on ground (a), (b) or (c) "would normally be thought appropriate" to the DPP, whereas ground (e) would lie in the province of the Attorney-General. Where consent is required on ground (d), it would depend on the circumstances of the case whether the consent should be that of the Attorney-General or the DPP.[228]

The choice of designated authority

1.8 In 1972, the Home Office took the view that the consents which should be within the province of the Attorney-General (and not the DPP) were those which involved "important considerations of public policy or of a political or international nature".[229] The memorandum explained:

> Where important political or international considerations may be involved, the [Attorney-General], who is directly answerable in Parliament for his decisions and who is in a position to consult Ministerial colleagues direct if need be, is regarded as the proper person to carry the responsibility. … Similarly, with sensitive subjects like race relations Parliament may feel that that they would like to hold the Attorney directly answerable for a personal decision … .[230]

[226] *Ibid.*

[227] *Hansard* (HC) 24 April 1959, vol 504, col 840.

[228] Home Office memorandum to the Franks Committee, Franks Report, vol 2, p 126, para 7(e).

[229] *Ibid.*

[230] *Ibid,* para 8.

1.9 As we shall see when we consider the criticisms of the present regime below,[231] the Franks Committee, having regard to the Attorney-General's particular constitutional position, identified this as the source of the Attorney-General's particular contribution to the proper prosecution of offences under the consents regime.

Specific examples of consent provisions

1.10 We now consider some specific examples of consent provisions and the reasons why they were thought necessary.

War Crimes Act 1991

1.11 Following the report of the War Crimes Inquiry,[232] the War Crimes Act 1991 was passed. It provides that proceedings for murder, manslaughter and culpable homicide may be brought against a person in the United Kingdom, irrespective of that person's nationality at the time of the alleged offence, if the offence (a) was committed during the Second World War in either Germany or territory under German occupation, and (b) constituted a violation of the laws and customs of war.[233]

1.12 In recognition of the particular sensitivity of the subject matter of the offences and the particular difficulty of ensuring fairness, the 1991 Act makes provision for various safeguards, including the requirement that any proceedings brought by virtue of the Act should be by or with the consent of the Attorney-General.[234]

Law Reform (Year and a Day Rule) Act 1996[235]

1.13 On the recommendation of the Law Commission[236] and the House of Commons Home Affairs Select Committee, the year and a day rule in homicide was abolished without replacement by the Law Reform (Year and a Day Rule) Act 1996. In our report, Law Com No 230, we acknowledged that repeal of the rule would give rise to two particular difficulties:[237]

(1) an increase in the number of cases in which a considerable period of time had lapsed between the incident which had caused the death of the victim and the institution of criminal proceedings in relation to that incident, and

(2) an increase in the number of cases in which a defendant would be exposed to the risk of prosecution for a homicide offence despite having already

[231] In Part V.

[232] Report of the War Crimes Inquiry (Members: Sir Thomas Hetherington KCB CBE TD QC and William Chalmers Esq CB MC) Cm 744, published in July 1989.

[233] War Crimes Act 1991, s 1(1).

[234] War Crimes Act 1991, s 1(3).

[235] At para 7.12 below, we set out the reasons why we no longer consider it necessary for the Law Reform (Year and a Day) Act 1996 to include a consent provision.

[236] Legislating the Criminal Code: The Year and a Day Rule in Homicide (1995) Law Com No 230.

[237] See Law Com No 230, paras 5.1 – 5.2.

been prosecuted for a non-fatal offence arising out of the same incident (such as assault or attempted murder) before the death had occurred.[238]

1.14 In view of these difficulties, we recommended that, in stale cases and those involving a second trial, the institution of proceedings for an offence of homicide should require the consent of the Attorney-General. We favoured the Attorney-General on the ground that

> The Attorney-General is uniquely placed as the Government's senior law officer to carry out the important exercise of using "his best informed judgment before authorising proceedings to commence."[239]

We acknowledged that there was no suggestion that the CPS had wrongly exercised its discretion to prosecute in cases where a second prosecution is brought against a defendant where the victim had subsequently died. We, nonetheless, decided against recommending that the DPP should have the power of consent rather than the Attorney-General. This was on the ground that, given that a consent by the DPP could be granted by any Crown Prosecutor,[240] a DPP's consent provision would not provide an "adequate safeguard".[241]

1.15 Our recommendation was taken up by Parliament, and section 2 of the 1996 Act provides that the Attorney-General's consent is necessary for the institution of proceedings in circumstances where

(1) the injury alleged to have caused the death was sustained more than three years before the death occurred,[242] or

(2) the proposed defendant has previously been convicted of an offence committed in circumstances alleged to be connected with the death.[243]

Jurisdiction (Conspiracy and Incitement) Bill 1997

1.16 The Jurisdiction (Conspiracy and Incitement) Bill[244] was, according to its sponsor,[245] primarily intended as an anti-terrorism measure. Its effect, had it been enacted, would have been to make criminal any act which amounted to incitement or conspiracy to carry out activities in a foreign jurisdiction if those activities were illegal both in the United Kingdom and the foreign jurisdiction. The sensitivity of criminalising the activities of, for example, those conspiring to commit acts of

[238] The pleas in bar of autrefois convict and acquit will not prevent a prosecution for a homicide offence following a previous conviction for a non-fatal offence based on the same facts: *Thomas* [1950] 1 KB 26; *De Salvi* (1867) 10 Cox CC 481.

[239] Law Com No 230, para 5.22. Quotation taken from J Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 19.

[240] By virtue of s 1(7) of the POA 1985. See para 3.19 above.

[241] Law Com No 230, para 5.23.

[242] Law Reform (Year and a Day Rule) Act 1996, s 2(2)(a).

[243] *Ibid*, s 2(2)(b).

[244] The Bill fell at the end of the last Parliamentary session.

[245] Nigel Waterson MP. It was a Private Member's Bill.

violence against foreign governments led to the inclusion of an Attorney-General consent provision as a safeguard. One Member of Parliament,[246] speaking in support of the consent provision, justified it as follows:

> [T]he political delicacy of many of the decisions that had to be made, meant that the Crown Prosecution Service was not equipped for the task, however skilled it was in its work. Frequently, the decisions that need to be taken are well outside its domain; they entail an in-depth investigation of overseas law and a sensitive appraisal of the effect on race relations in this country – another matter for which the CPS is not equipped, but on which the Government, with their wider responsibilities, are well equipped to decide.[247]

CONCLUSION

1.17 In this Part we have set out the standard justification for consent provisions being included in particular offences. In the next Part we shall look at the criticisms of the consent regime, both in principle and in practice. The brief descriptions given at the beginning of this Part of the Attorney-General's memorandum to the Select Committee on Obscene Publications and the Home Office memorandum to the Franks Committee give the impression that the consent regime is underpinned by a foundation of coherent principle; we shall see, however, that, of the criticisms of the regime, not least is that the *appearance* of coherent principle belies the reality of a system which is in fact "full of anomalies and even absurdities".[248] We shall also see that there are those who, far from regarding the Attorney-General's experience and knowledge as an advantage, are critical that a member of the executive should have the quasi-judicial power to circumscribe the right to institute a private prosecution.

[246] Donald Anderson MP.

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

[248] Report of the Select Committee on Obscene Publications, 1958, HC 123–1, App 1, p 23, para 2.

PART V
CRITICISM OF THE CONSENTS REGIME

1.1 In this Part we consider the criticisms made of the consents regime. We analyse them in terms of two categories: on the one hand, criticism based on principle and, on the other hand, criticism of the practical operation of the *present* regime.

CRITICISM BASED ON PRINCIPLE

1.2 We have identified two main arguments, both contentious:

(1) that consent provisions per se, irrespective of *whose* consent is required, remove the right of private prosecution;

(2) that consent provisions involving a decision by a Law Officer risk being politically biased, or having the appearance of political bias.

The right of private prosecution

The argument

1.3 Although consent provisions usually[249] apply to offences irrespective of who requests the consent – whether the police, the CPS or a private prosecutor – their primary impact is on the private prosecutor. Whereas it seems unlikely that there should be any conflict of interest, in respect of a decision to prosecute or continue a prosecution, between the Attorney-General on the one hand and the DPP (and the CPS) on the other, there is a real risk of conflict between either the Attorney-General or the DPP and a private prosecutor. Indeed, in view of the difficulty in bringing a private prosecution,[250] resort to that measure is likely to happen only after there has been some disagreement between the individual and the prosecuting authorities.

1.4 The right of private prosecution is regarded by many as fundamental to the criminal legal system. Lord Simon of Glaisdale, speaking from the cross benches during the Second Reading debate on the Prosecution of Offences Bill in 1984, spoke strongly in favour of the right to private prosecution. The principle upon which that right was founded, he said, was the general "fundamental constitutional principle of individual liberty based on the rule of law".[251] And, speaking of clause 6 of the Bill, preserving the right of private prosecution, he said:

> The right of private prosecution is an important element in the rule of law. Every citizen should be entitled to say: "You, the authorities of bureaucracy, the Ministers, may say that there are social or political grounds whereby one should not prosecute. I, who claim to live under

[249] In some cases, the "person aggrieved" in relation to an offence may bring proceedings without consent. See, eg, the Building Act 1984 s 113, the Highways Act 1980 s 312 and the Public Health Act 1936 s 298.

[250] See para 5.12 below.

[251] *Hansard* (HL) 29 November 1984, vol 457, col 1068.

> the rule of law, proclaim my right to set the law in motion." I think that this Bill is entirely right to preserve that important personal liberty.[252]

1.5 Lord Diplock, in *Gouriet v Union of Post Office Workers*,[253] spoke of the right to private prosecution as follows:

> In English public law every citizen still has the right … to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law … . It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, … but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.[254]

1.6 In the same case, Lord Wilberforce similarly took the view that the right to bring a private prosecution, "though rarely exercised in relation to indictable offences … remains a valuable constitutional safeguard against inertia or partiality on the part of authority".[255]

1.7 The Philips Commission in 1981, whilst noting that private prosecutions did not feature significantly apart from prosecutions for common assault[256] and prosecutions by retail stores for shop-lifting, referred to the right to bring a private prosecution as the right "upon which … the whole prosecution system is in theory built."[257] The report refers to the widespread support for retaining the right to private prosecution:

> Prosecutions by private citizens … are very rare indeed and scarcely seem a sufficient base to justify the position of the great majority of our witnesses who argue in one way or another that the private prosecution is one of the fundamental rights of the citizen in this country and that

[252] *Ibid*, col 1050.

[253] [1978] AC 435. The appellant had applied to the Attorney-General for his consent to act as plaintiff in relator proceedings for an injunction to restrain the Union of Post Office Workers from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet between England and Wales and South Africa, as they had threatened to do, contrary to certain provisions of the Post Office Act 1953 and the Telegraph Act 1863. Consent was refused and the appellant made an application for a declaration that the Attorney-General, by refusing his consent, had acted improperly and had wrongfully exercised his discretion. The House of Lords held that such an exercise of discretion over the bringing of a relator action could not be reviewed in the courts.

[254] *Ibid*, pp 497H-498B.

[255] *Ibid*, p 477B-C.

[256] Explaining the reason for common assault being a privately prosecuted offence, the Philips Report said (para 7.46) that it may well be to do with the way in which the offence is treated by the Offences Against the Person Act 1861. It noted that the Act made common assault "an essentially private wrong", any proceedings having to be brought by or on behalf of the aggrieved person. The relevant section of the 1861 Act, s 42, was repealed by the Criminal Justice Act 1988, s 170(2), Sch 16.

[257] Philips Report, para 7.48.

> it is the ultimate safeguard for the citizen against inaction on the part of authorities.[258]

1.8 And in 1958, in his submission to the Select Committee on Obscene Publications, the Attorney-General had expressed the view that the "fundamental principle … that proceedings may be instituted by private individuals" should not be restricted "unless some very good reason to the contrary exists".[259]

The counter-argument

1.9 On the other hand, we note that the right of private prosecution is not without its critics. For example, Edwards[260] refers to the comments made in the Eighth Report, published in 1845, of the Commissioners on the Criminal Law, in which it was said that "intrusting the conduct of the prosecution to a private individual opens a wide door to bribery, collusion and illegal compromises." During the passage of the Prosecution of Offences Bill through Committee Stage in the House of Lords in 1985, Lord Hutchinson of Lullington, a distinguished criminal silk, echoing the sentiments of the Metropolitan Police Courts Act 1839,[261] said of private prosecutions:

> The mischief of continuing private prosecutions is that the motivation of those who bring private prosecutions may well not be the good of society but may be based on personal spite, on revenge, on financial gain, on blackmail, on fanaticism – all sorts of motivations.[262]

1.10 And the Philips Commission made proposals which would have, in effect, abolished the right to bring a private prosecution, replacing it with a system of publicly financed "private" prosecutions subject to the leave of the court.[263]

1.11 We note also that the right of private prosecution is not one that is treated as constitutionally inviolable. Not only is it subject to the constraint, in regard to specific offences, of a consent requirement, but also, as we have seen in Part II, private prosecutions may be stayed by the Attorney-General's prerogative power to enter a *nolle prosequi*[264] or terminated by the power of the DPP to take over and discontinue proceedings under sections 6 and 23 of the POA 1985.[265]

1.12 Furthermore, there is what is described in the Philips Report as the "more important"[266] constraint on the right of private prosecution: the cost of bringing a

[258] *Ibid*, para 7.47.

[259] Report of the Select Committee on Obscene Publications, HC 123-1, App 1, p 23, para 3.

[260] J Ll J Edwards, *The Law Officers of the Crown* (1964) p 340.

[261] See para 4.2, n 3 above.

[262] *Hansard* (HL) 17 January 1985, vol 458, col 1149.

[263] See n 18 below.

[264] See para 2.34 – 2.35 above.

[265] See para 2.41 – 2.42 above.

[266] Philips Report, para 7.48. The Philips Commission took the view that if the power to bring a private prosecution was to be "an effective safeguard against improper inaction by the prosecuting authority" then "the financial difficulty must be removed" (para 7.50). It

prosecution. To this may be added other deterrents not raised in the Philips Report – the private prosecutor's lack of investigative resources, and the risk a prosecutor runs of being sued in the civil courts for malicious prosecution or false imprisonment. We now consider these constraints in a little more detail.

THE COSTS CONSTRAINT

1.13 Legal aid in criminal proceedings, granted under Part V of the Legal Aid Act 1988, is not available to a private prosecutor save only for the purpose of resisting an appeal to the Crown Court.[267] A claim for costs may be made either against central funds or against the accused but, even if successful, an award might not meet the full cost of a prosecution.

1.14 A private prosecutor can claim costs out of *central funds* in any proceedings, whether or not the defendant is convicted, in respect of an indictable offence or proceedings involving a summary offence before a Divisional Court of the Queen's Bench Division or the House of Lords; and a court, if making an award, will allow an amount which it "considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred".[268] Although there is a presumption that an order will be made "save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause",[269] the costs covered by any award might not fully recompense the prosecutor in that it will not take account of "expenses which do not directly relate to the proceedings themselves, such as loss of earnings".[270]

1.15 A claim might, alternatively, be made against the *accused*. Where an accused is convicted before a magistrates' court, or is unsuccessful on appeal to the Crown Court against conviction or sentence, or is convicted before a Crown Court, a court may order him or her to pay those costs of the prosecutor which the court considers "just and reasonable".[271] The power is subject to two specific statutory limitations:

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recommended a procedure by which, in the event of the authorities refusing to prosecute, a private citizen could apply for the leave of the court to institute proceedings, which, if granted, would be accompanied by the right to claim the reasonable costs of the prosecution from central funds. This recommendation was not taken up by the government: see
J Rozenberg, *The Case for the Crown* (1987) p 170.

[267] Section 21(1) of the Legal Aid Act 1988 provides:

> Representation under this Part for the purposes of any criminal proceedings shall be available in accordance with this section to the accused or convicted person but shall not be available to the prosecution except in the case of an appeal to the Crown Court against conviction or sentence, for the purpose of enabling an individual who is not acting in an official capacity to resist the appeal.

[268] POA 1985, s 17(1).

[269] *Practice Direction (Costs in Criminal Proceedings)* (1991) 93 Cr App R 89, para 3.1.

[270] *Ibid*, para 1.5.

[271] POA 1985, s 18(1).

(1) where a person, on summary conviction, is fined £5 or less, no order for costs may be made "unless in the particular circumstances of the case [the court] considers it right to do so";[272]

(2) where a person under the age of 18 is convicted before a magistrates' court, the amount of costs he or she is ordered to pay cannot be greater than the amount of any fine imposed on him or her.[273]

More significantly, an order to pay costs will not be made against an accused unless the court is satisfied that he or she has "the means and ability to pay".[274] In addition, factors such as whether or not the accused pleaded guilty,[275] the remainder of the sentence,[276] the conduct of the defence, the conduct of the prosecution[277] and the question of apportionment of costs between co-defendants can influence a court's decision as to whether to make a costs order against the accused.[278]

1.16 The cost of a private prosecution can be substantial. Some braver[279] private prosecutors may, therefore, choose to represent themselves in order to reduce costs. Under the Courts and Legal Services Act 1990,[280] the Crown Court now has the discretion to allow a private individual to conduct a private prosecution before it. It is likely, however, that that discretion will be exercised only occasionally.[281]

ACCESS TO INVESTIGATIVE MACHINERY

1.17 The authors of a research study on non-police prosecutions commissioned by the Philips Commission[282] and published in 1980 said of prosecutions by private citizens:

> So long as legal aid is not available for such prosecutions, and perhaps more important, so long as the citizen has not access to the

[272] POA 1985, s 18(4).

[273] POA 1985, s 18(5).

[274] *Practice Direction (Costs in Criminal Proceedings)* (1991) 93 Cr App R 89, para 6.4.

[275] See, eg, *Matthews* (1979) 1 Cr App R (S) 346; *Maher* (1983) 5 Cr App R (S) 39.

[276] If an accused is given an immediate custodial sentence, the court will not impose a costs order as well unless it is satisfied that the accused has the means to comply with the order immediately or has a reasonable prospect of an adequate income on his or her release from custody: see, eg, *Baker* (1992) 14 Cr App R (S) 242.

[277] See, eg, *Hall* [1989] Crim LR 228, in which, on the Crown's election, a case was taken to the Crown Court where the accused's plea to careless driving, offered in the magistrates' court, was accepted.

[278] See generally *Blackstone*, para D27.42.

[279] See the Philips Report, para 7.48.

[280] Section 27(2)(c).

[281] See *Blackstone*, para D2.41, referring to *R v Southwark Crown Court, ex p Tawfick* [1995] Crim LR 658.

[282] K W Lidstone, R Hogg and F Sutcliffe (in collaboration with A E Bottoms and M A Walker), *Prosecutions by Private Individuals and Non-Police Agencies*, Research Study Number 10 of the Philips Commission.

> investigative machinery necessary to obtain the evidence to sustain most prosecutions, the private prosecution will probably continue to be inadequate and underused as a constitutional safeguard.[283]

1.18 Although, once a case has been committed for trial, a private prosecutor can compel the police through an application for a witness summons under the Criminal Procedure (Attendance of Witnesses) Act 1965 to produce all statements and exhibits relevant to the case that they have in their possession,[284] there is no obligation on the police or the CPS to disclose material if the prosecution has yet to be instituted.[285]

LIABILITY IN TORT

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

1.20 In order to succeed in an action for *malicious prosecution*, a plaintiff must prove the following: that he or she was prosecuted by the defendant; that the prosecution was determined in his or her favour; that it was without reasonable and probable cause; and that it was malicious.[286] Although the first two requirements will present little difficulty, establishing the absence of reasonable and probable cause is less straightforward. According to *Clerk and Lindsell on Torts*,

> [T]he peculiarity of the inference of reasonable and probable cause is that it has to be drawn by the judge without any precedent to guide him. The facts with which he has to deal are nearly always materially different from those which he may find recorded elsewhere.[287]

1.21 Further, to prove want of reasonable and probable cause, the plaintiff must establish not only that the facts disclosed no criminal liability on his part, but also that the defendant was aware of that.[288]

1.22 To pursue a claim of *false imprisonment,* the plaintiff has to prove the fact of his or her detention, and it is for the defendant to establish its lawfulness.[289] A private prosecutor can be liable in this tort only in certain limited circumstances. In *Austin v Dowling*,[290] a police officer initially refused to arrest B on a charge made by A, but finally did so when A signed the charge sheet. It was held that A could be liable for false imprisonment. But there can be no false imprisonment if the exercise of a discretion is interposed between the defendant's act and the plaintiff's detention. Where, for example, the defendant goes before a magistrate who then

[283] *Ibid*, p 197.

[284] *Pawsey* [1989] Crim LR 152.

[285] *R v DPP, ex p Hallas* [1988] Crim LR 316.

[286] *Clerk and Lindsell on Torts* (17th ed 1995) para 15–05.

[287] *Ibid*, para 15–22.

[288] *Ibid*, para 15–20.

[289] See W V H Rogers, *Winfield and Jolowicz on Tort* (14th ed 1994) pp 63–73.

[290] (1870) LR 5 CP 534.

issues a warrant for the plaintiff's arrest, he has set a judicial officer, whose opinion interposes between the defendant's act and the plaintiff's arrest, in motion, rather than a ministerial officer, and the defendant cannot be liable for false imprisonment.[291]

The risk of political bias or the appearance of political bias

The argument

1.23 As we have seen,[292] the Law Officers occupy two fundamentally different roles: on the one hand, they are members of the legislature[293] and of the executive, and as such are required to act on party political lines; on the other hand, they have prerogative and statutory powers which can be described as "quasi judicial" and which have to be exercised impartially and without reference to party politics. Whether or not an Attorney-General or Solicitor-General is able, in practice, to compartmentalise the functions of the office in this way is doubted by some. Recently, for example, Lord Steyn, in his 1996 Annual Lecture of the Administration Law Bar Association,[294] said:

> The power of the Attorney-General to take civil proceedings on behalf of the general community and his control over criminal prosecution is quasi judicial. Yet he is also a political figure responsive to political pressures. It is argued that abuse is avoided by two constitutional conventions. First, in his quasi judicial function the Attorney-General is not subject to collective responsibility and he does not take orders from the Government. But he may seek the views of other ministers and they may volunteer their views. Secondly, it is said that the Attorney-General is not influenced by party political considerations. On the other hand, he make take into account public policy considerations. These conventions are weak. Their efficacy depends on Chinese walls in the mind of the Attorney-General.[295]

1.24 Referring to comments made by Sir Harry Woolf[296] in 1990 to the effect that the unhappy tension between the various functions of the Attorney-General should be resolved, as regards civil law functions, by the creation of a Director of Civil Proceedings, Lord Steyn proposed that the office of Attorney-General should be independent of politics; or, if it were to remain political, then functions in relation to legal proceedings, civil and criminal, should be performed by an independent officer.[297]

[291] *Ibid*, p 540.

[292] See para 3 5 – 3.6 above.

[293] The Attorney-General will always be a member of the House of Commons (see, eg, Sir Elwyn Jones "The Office of Attorney-General" [1969] CLJ 43, 44-45). The present Solicitor-General, Lord Falconer, is a member of the House of Lords.

[294] See the Rt Hon Lord Steyn, "The Weakest and Least Dangerous Department of Government" [1997] PL 84.

[295] *Ibid*, pp 91–92.

[296] Now Lord Woolf, Master of the Rolls.

[297] The Rt Hon Lord Steyn, "The Weakest and Least Dangerous Department of Government" [1997] PL 84, 92.

1.25 The Franks Committee was "in no doubt" that there was widespread unease – albeit, in the view of the Committee, "not well founded" – amongst those "outside governmental and Parliamentary circles" about the Attorney-General carrying out both political and quasi-judicial functions.[298]

1.26 Two journalists, commenting on the potentially controversial Jurisdiction (Conspiracy and Incitement) Bill 1997,[299] said of the consent "safeguard":

> The concession was to give the Attorney General and Director of Public Prosecutions the final say in any politically-sensitive prosecutions. That would merely compound the dangers by introducing an additional political ingredient and making prosecutions dependent on the diplomatic whim of the day.[300]

The counter-argument

1.27 Against the argument that the Attorney-General's office requires the office holder to perform the impossible task of being at once political and impartial, is the counter-argument that it is because of the very nature of the Attorney-General's constitutional position that he or she is the appropriate officer to decide whether to institute criminal proceedings in cases of particular sensitivity.

1.28 The Franks Committee, in proposing a new Official Information Act, also proposed that prosecutions for offences under the Act relating to defence, internal security, foreign relations, the currency and reserves, and other matters should be subject to the consent of the Attorney-General. The reasons given in the Franks Report were:

> The point of central importance is that these decisions are irremediably decisions of a political nature, in that they are concerned with questions of public policy although not partisan advantage. Control by the Attorney General is a safeguard, which has the effect of reducing and not increasing the number of actual prosecutions. He alone is in a proper position to exercise that control, and he is accountable to Parliament for the way in which he does so.[301]

1.29 Summing up the views of a number of witnesses,[302] the Franks Committee identified the particular contribution of the Attorney-General as follows:

> The main point made by these witnesses was that when a decision involves questions of public policy, or of a political or international character, it is essential that the person with responsibility for the decision should have experience of the kind of issues involved, and essential that he should be able to consult directly the Minister

[298] Franks Report, paras 250 and 251.

[299] See para 4.16 above.

[300] S Milne and R Norton-Taylor, "A bill which chills", *The Guardian* 17 February 1997.

[301] Franks Report, para 255.

[302] Franks Report, para 249. The witnesses were: the Attorney-General and his Legal Secretary, the previous Attorney-General, the DPP, Sir Philip Allen and Sir William Armstrong.

> concerned with the area of Government business in question so as to ensure that, before taking his decision, he is made fully aware of the views of the Government on any questions of national interest involved. No one except the Attorney-General fits this specification.[303]

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

CRITICISM OF THE *PRESENT* CONSENTS REGIME

1.31 We now turn to criticism of the present consent regime based not on principle but on the practical operation of the regime. We have identified a number of points of criticism:

(1) The first set concerns the haphazardness of the regime:

(a) the consent regime is not underpinned by any unifying principle to justify the list of offences for which consent is needed;

(b) there are anomalies between the offences which require consent and those which do not;

(c) there are anomalies between the offences which require the consent of the Attorney-General and those which require the consent of the DPP.

(2) The second set focuses on the administration of the regime:

(a) the administrative burden of servicing the unnecessary proliferation of consent provisions; and

(b) whether consent decisions by the DPP are delegable to too great a degree.

The haphazardness of the consents regime

Absence of unifying principle

1.32 One of the best informed commentators expressing this criticism is Lord Simon of Glaisdale who, during the Second Reading debate in the House of Lords on the Prosecution of Offences Bill in 1984,[304] spoke enthusiastically about the right of private prosecution. Referring to clause 6[305] of the Bill which, to a degree, preserved that right, Lord Simon said:

[303] Franks Report, para 249.

[304] To become the POA 1985.

[305] See para 2.28 above.

> My only question on it is the considerable erosion that has taken place in that fundamental principle. I have here the Prosecution of Offences Regulations 1978, which give the various exceptions where the consent of the Attorney-General, of the Law Officers or of the Director is required. It is an absolute hotch-potch. When, very long ago, I was a Home Office Minister I asked the officials to explain to me the animating principle, and they were quite incapable of doing so. When I joined the Law Officers' Department, I again asked the same question there, but with no more result. Since then, the only guide that I have been able to get is that each curtailment of private right to prosecution, or each attempt to do so, seems to have been based on a desire to inhibit Mrs Whitehouse from taking action in relation to an offence which might disturb her. But I would ask the noble Lord to tell us, if he can, on what principle the right of private prosecution is now eroded; and your Lordships will probably wish to be satisfied, before passing from Clause 6, that the whole system is rationalised and not left as it is as just a hotch-potch.[306]

In his closing speech, the Minister of State for the Home Office, Lord Elton, was unable to answer Lord Simon's point.[307]

1.33 A number of other commentators have also noted that, despite the theoretical justification for the consents regime, in practice it is full of anomalies. For example, the Philips Commission in 1981 said in its report:

> The rationale for imposing such restrictions was given in the Home Office Memorandum to the Departmental Committee on section 2 of the Official Secrets Act 1911 but the reasons given there do not seem to be the basis of any coherent policy and an examination of the Acts concerned suggests that some of the restrictions have been arbitrarily imposed.[308]

1.34 In the Home Office memorandum to the Franks Committee, it was acknowledged that "[s]urviving records … would not support any thesis that there was a firmly established general policy which had been closely adhered to over the years."[309]

1.35 Speaking in favour of a legislative attempt to rationalise the consent regime in 1979,[310] the Attorney-General[311] explained:

> The reasons for these [consent] provisions seem to have been many and various. In some instances they seem to have been the result of some parliamentary whim, the cause of which is lost in history.[312]

[306] *Hansard* (HL) 29 November 1984, vol 457, col 1050.

[307] *Ibid*, col 1068.

[308] Philips Report, para 7.56 (footnote omitted).

[309] Franks Report, vol 2, p 125, para 6.

[310] Consent to Prosecution Bill 1979. For further details, see paras 7.20 – 7.25 above.

[311] Rt Hon Sam Silkin QC MP.

[312] *Hansard* (HC) 14 March 1979, vol 964, col 657.

And a former Attorney-General, Sir Reginald Manningham-Buller, took the view that "the list of restrictions is full of anomalies and even absurdities".[313]

1.36 As for academic opinion, B M Dickens, writing in 1974, suggested that the inconsistency within the consent regime was unexplainable "unless one stoically accepts the inevitability of anomalies arising from the pragmatic nature of English legislation".[314] And Edwards, in 1984, observed that "[a]ny attempt to derive a set of uniform principles that would provide a rational basis for the various categories of consent provisions is frankly an impossible task."[315]

Common law anomalies

1.37 We have noted that there is an absence of unifying principle underlying the consent regime and that, as a result, there are anomalies within the regime. A comparison between those offences requiring consent and those which do not reveals further anomalies, the clearest illustrations being those in which a statutory offence (requiring consent) has some sort of common law counterpart. We consider two examples, one involving the substantive offence of bribery and the other the inchoate offence of incitement to commit an offence.

CORRUPTION OFFENCES

1.38 The criminal law of corruption is both common law and statutory. The offer or receipt of a bribe, for example, may in certain cases[316] be charged under the common law of bribery *or* the Prevention of Corruption Acts 1889 to 1916.[317] If the former, no consent is required; if the latter, the consent of a Law Officer must be given prior to the institution of proceedings.[318]

INCHOATE OFFENCES

1.39 As regards offences of *conspiracy*, the Criminal Law Act 1977 provides that where a prosecution for the substantive offence can only be brought by or with the

[313] Report of the Select Committee on Obscene Publications (1958) HC 123-1, App 1, p 23, para 2.

[314] B M Dickens, "The prosecuting roles of the Attorney-General and Director of Public Prosecutions" [1974] PL 50, 55.

[315] J Ll J Edwards, *The Attorney General, Politics and the Public Interest* (1984) p 25.

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

[317] The collective name given, by s 4(1) of the 1916 Act, to the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and Prevention of Corruption Act 1916.

[318] In the case of *R v Currie, Jurasek, Brooks, Greenway and Plasser Railway Machinery (GB) Ltd* (unreported), tried at the Central Criminal Court in 1992, an allegation of bribery was made against a Member of Parliament, Harry Greenway (later acquitted). Charges were brought under the common law – it being a widely held view that the statute law does not apply to Members of Parliament – and consent of a Law Officer was, therefore, unnecessary. *If*, of course, consent had been required, one matter of particular concern would have been the problem of political bias, or the *appearance* of political bias, in proceedings involving a political figure such as a Member of Parliament.

consent of the Attorney-General or the DPP, proceedings charging a conspiracy to commit that offence will be subject to the same restriction.[319] Similarly, as regards *attempts*, the Criminal Attempts Act 1981 provides that if the institution or continuation of proceedings in relation to a substantive offence requires the consent of any person, proceedings in relation to an attempt to commit that offence also require the consent of that person.[320]

1.40 *Incitement*, on the other hand, remains a common law offence, and it appears that the institution of proceedings for inciting the commission of an offence does not require the consent of any person even if, were the substantive offence charged, consent would be required.[321] In the case of *R v Assistant Recorder of Kingston-upon-Hull, ex p Morgan,*[322] an assistant recorder refused jurisdiction to try a case of incitement to commit gross indecency with a young boy on the ground that, by virtue of section 8 of the Sexual Offences Act 1967, such proceedings required the consent of the DPP, which had not been obtained. Section 8 provides that the DPP's consent is required in proceedings "against any man for the offence of buggery with, or gross indecency with, another man, [for attempting to commit either offence,][323] or for aiding, abetting, counselling, procuring or commanding its commission where either of those men was at the time of its commission under the age of 21". Granting an order of mandamus directing the assistant recorder to assume jurisdiction and try the case, Lord Parker CJ held that "inciting" did not fall within the terms of section 8, an otherwise very broadly drafted provision, and accordingly a proceeding in which a defendant is charged with inciting an offence to which section 8 applies does not require the consent of the DPP.

Statutory anomalies

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

> If a wife alleges, or a third party alleges, that her husband has obtained her property by deception, blackmailed her, wounded her or

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

[320] Criminal Attempts Act 1981, s 2(2)(a).

[321] Had the Jurisdiction (Conspiracy and Incitement) Bill (see para 4.16 above) been enacted, the tortuous situation could have arisen whereby proceedings for a substantive offence might have required consent, but proceedings for incitement at common law would *not* have required consent, while proceedings under the proposed Jurisdiction (Conspiracy and Incitement) Act *would* have required consent.

[322] [1969] 2 QB 58.

[323] The words in brackets were repealed by s 10 of the Criminal Attempts Act 1981. This situation is now provided for by ss 2(1) and 2(2)(a) of that Act.

committed sodomy with her, no consent is required. … It is not obvious why this clause … should be thus limited.[324]

Anomalies in the designation of consent authority

1.42 Not only have consent provisions been applied inconsistently but the authority to grant or refuse consent has been assigned inconsistently. For example, the Children and Young Persons (Harmful Publications) Act 1955 stipulates that no prosecution can be instituted without the consent of the Attorney-General,[325] while the Obscene Publications Act 1959, which similarly prohibits the publication of certain types of material, and therefore contains a similar restriction on the freedom of expression, provides for the consent of the DPP.[326] In the case of offences relating to incitement to racial hatred, now contained in Part III of the Public Order Act 1986, the Attorney-General's consent[327] is required. The earlier Incitement to Disaffection Act 1934, on the other hand, which also raises the issue of freedom of speech, provides for the consent of the DPP.[328]

Administrative issues

Administrative burden

1.43 Aside from any objection to a consent provision on the basis that it might amount to an unjustifiable departure from the principle that the right to prosecution should not be constrained without very good reason, a proliferation of consent provisions might, depending on the frequency of relevant prosecutions, increase the administrative burden on the Law Officers and the DPP. In addition to the preparation necessary for a decision to be made by the DPP or a Crown Prosecutor in cases requiring the consent of the DPP, the DPP will also be expected to express a view in difficult cases requiring the consent of the Attorney-General.[329]

Delay

1.44 Although, to the best of our knowledge, there is no suggestion that obtaining a consent takes an unreasonable amount of time,[330] an additional stage to the institution of criminal proceedings is likely to delay the institution of those proceedings.

The DPP and delegation

1.45 Although we understand that the CPS has internal arrangements for ensuring that different categories of offence are dealt with at an appropriate level within the

[324] J C Smith, *The Law of Theft* (7th ed 1993) para 14–30.

[325] Section 2(2) in relation to an offence under s 2(1) of that Act. See Appendix A.

[326] Section 2(3)(A) in relation to an offence under that section. See Appendix A.

[327] Section 27(1) in relation to an offence under Part III of that Act. See Appendix A.

[328] Section 3(2) in relation to any offence under that Act. See Appendix A.

[329] Para 3.14.

[330] The LSLO would expect to turn cases round within five working days, although substantial cases may take a little longer.

organisation,[331] we are mindful that, by virtue of section 1(7),[332] a consent decision may be taken by any Crown Prosecutor.[333]

CONCLUSION

1.46 For the reasons set out in this Part, **we provisionally conclude**

(1) **that the present consents regime is in an unsatisfactory state, and**

(2) **that it should, therefore, be reformed.**

1.47 Bearing in mind the strength of opinion[334] to the effect that attempts at justification of the present regime have been, at best, only partial and bearing in mind previous reform efforts such as the 1979 Consents to Prosecution Bill, to which we shall turn in Part VII, we do not anticipate that this provisional conclusion will provoke controversy. We also draw support from the Philips Report which, following criticism of the consent regime, said that "[r]ationalisation of the consent provisions need not be delayed".[335]

1.48 We now turn to the principles which we shall provisionally propose should underlie a reformed regime.

[331] See *Blackstone*, para D1.83.

[332] See para 3.19 above.

[333] As we have seen in para 4.14 above, it was for this reason that we rejected a DPP consent provision in favour of an Attorney-General consent provision in Law Com No 230, para 5.23.

[334] See para 4.17 above.

[335] Philips Report, para 7.57.

PART VI
PRINCIPLES FOR THE REFORM OF THE CONSENTS REGIME

1.1 As we have shown,[336] there are both arguments of principle and practical arguments against maintaining the present consents regime. In this Part we attempt to identify the principles which should underlie a reformed regime.

1.2 We approach this task in the following way.

(1) In Part V, we noted

(a) that the primary impact of a consent requirement is on the right of the individual to bring a private prosecution;[337]

(b) that the right of private prosecution is widely regarded as fundamental; and

(c) that, therefore, the erosion of that fundamental right by a consent provision is one of the principal objections to such a provision.

(2) In this Part,

(a) we seek to preserve the "fundamental principle" that the right of private prosecution should be unrestricted unless some very good reason to the contrary exists;

(b) we consider, however, whether any harm might be caused by an unfettered right of private prosecution, thereby providing a reason for restricting that right, and we conclude that it might;

(c) we consider whether that harm is best avoided by way of a consent provision rather than any other method of controlling a private prosecution, and we conclude that it is;

(d) we then consider whether a reformed consents regime should be one in which, as at present, the consent attaches to a particular offence or whether some other criteria should be adopted, and we conclude in favour of retaining an offence-structured regime; and

(e) finally, we attempt to identify the sorts of offences the prosecution of which would be most likely to give rise to the harm identified and which would, therefore, most appropriately include a consent provision.

[336] See Part V above.

[337] See para 5.3 above.

THE FUNDAMENTAL PRINCIPLE

1.3 Lord Simon of Glaisdale spoke of the constitutional principle underlying the right to private prosecution as the "principle of individual liberty based on the rule of law".[338] And in the House of Lords case of *Gouriet*,[339] both Lord Diplock and Lord Wilberforce emphasised that, although resort was rarely had to instituting a private prosecution, the right to bring a private prosecution provided a constitutional safeguard against "capricious, corrupt or biased failure or refusal"[340] by the authorities to prosecute, and "inertia or partiality on the part of the authority".[341]

1.4 We respectfully agree. Indeed, we expressed a similar view in our recent report on involuntary manslaughter,[342] in which we said of that right that it was "an important one which should not be lightly set aside".[343] We acknowledge that the right of private prosecution cannot be easily exercised: it can prove expensive, and private individuals do not have the expertise or resources which are available to the police and CPS. However, for some members of our society – those, for example, who have doubts about the impartiality of the prosecuting authorities, or who believe that an official prosecutor has misjudged the evidence in a case – the right of private prosecution provides an important safeguard against abuse. We therefore begin our consideration of the principles underlying a reformed consent regime by setting out this "fundamental principle": that the right of private prosecution should be unrestricted unless some very good reason to the contrary exists.

THE HARM CAUSED BY AN UNFETTERED RIGHT OF PRIVATE PROSECUTION

1.5 Arguably, the proper objective of a prosecution system is to prosecute all those who have committed a crime and to avoid prosecuting those who have not. This formulation, however, makes no allowance for the fact that the outcome of a trial is very uncertain and that it is wholly unrealistic to expect proceedings to be instituted only in those cases in which there is a guaranteed prospect of conviction and no risk of acquittal. It also fails to take into account the fact that there are circumstances in which, despite the strength of evidence against a defendant, it might not be in the public interest for that defendant to be prosecuted.

1.6 The Code for Crown Prosecutors,[344] on the other hand, takes into account both these matters: the evidential sufficiency test (requiring there to be a "realistic prospect of conviction" if the case is to continue) marks what might be regarded as the acceptable risk of acquittal and the public interest test provides the prosecutor with a discretion not to continue a prosecution despite evidential sufficiency.

1.7 The private prosecutor is not bound by the Code for Crown Prosecutors. Indeed, he or she is likely to institute proceedings in the very cases which fail the Code

[338] See para 5.4 above.

[339] *Gouriet v Union of Post Office Workers* [1978] AC 435.

[340] *Ibid*, at p 498B, *per* Lord Diplock.

[341] *Ibid*, at p 477C, *per* Lord Wilberforce.

[342] Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

[343] *Ibid*, para 8.66.

[344] Set out in Appendix C.

tests: the difficulty in bringing a private prosecution is such that if a case were to pass the Code tests but the CPS, nonetheless, refused to prosecute it, a preferable course would be to apply for judicial review of the CPS decision.[345] If this is the case, then, depending on which of the Code tests is failed, either or both of the following kinds of harm are likely to result from a private prosecution:

(1) the harm that results from an unsuccessful prosecution;

(2) the harm that results from any prosecution (successful or not) which is not in the public interest.

1.8 But the interplay between public and private interests is more complex than this suggests. It is clear from the Code that some of the factors relevant to the "public interest" test relate to the harm that a prosecution would do to the *private* interests of the various individuals involved. For example, one reason for not prosecuting is that the defendant is "suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated".[346]

1.9 Another factor is the effect that a prosecution would be likely to have on the physical or mental health of the *victim*.[347]

> The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.[348]

Thus the "public interest" *includes* the private interests of the victim. It also includes the private interest of the *defendant* (and his or her family) in not being subjected to the mental anguish, damaged reputation, disruption to career and financial costs (direct or indirect) of a prosecution. The greater the likely harm to the individuals involved, the less likely it is that the public interest will require a prosecution.

1.10 Similarly, an *unsuccessful* prosecution can damage both private and public interests. An unsuccessful prosecution is obviously likely to do less harm to the interests of the defendant, and his or her family, than a successful one; but even for a defendant who is innocent, and is eventually acquitted, the harm done by a prosecution can be considerable.

1.11 In addition, all prosecutions involve public costs, such as those of running the courts. The more likely a prosecution is to result in an acquittal, the harder it is to justify incurring those costs. On the other hand a *private* prosecution which is unsuccessful, and which is therefore less likely to result in an award of costs to the

[345] As to which, see paras 2.23 – 2.24.

[346] Para 6.5(f).

[347] Para 6.5(e).

[348] Para 6.7.

prosecutor,[349] may for this reason involve *less* cost to the public purse than an unsuccessful prosecution brought by the CPS.

1.12 We conclude that the object of the two Code tests is to avoid various kinds of harm, both public and private, which might result from a prosecution, by ensuring that a case is not prosecuted if the risk of such harm outweighs the general public interest in prosecuting those who appear to be guilty of crime. Where that is the case, *any* prosecution must logically be undesirable. This conclusion is, on the face of it, directly contrary to our fundamental principle that the right of private prosecution should be unrestricted: if there is an unacceptable risk of harm in bringing a prosecution in any circumstance which fails to satisfy the Code tests, and if it is to be assumed that the CPS will continue proceedings in any case which satisfies the tests, then it would seem to follow that there should be no right of private prosecution at all.

1.13 We take the view, however, that this line of reasoning places too much reliance on the Code tests:[350] there is always a risk that an individual Crown Prosecutor will either misapply the Code or – more likely, given the width of the Code tests – apply a personal interpretation to the tests which, although not wrong, might differ from that of other prosecutors.[351] More fundamentally, the Code itself may, in the eyes of some, fail to achieve a proper balance between the rights of the defendant and the interests of the community. We appreciate that in cases where the failure lies not in the Code itself but in its misapplication, judicial review[352] is the more obvious remedy. Nonetheless, the rarity with which a right is exercised does not diminish the significance of protecting that right.

1.14 Furthermore, that line of reasoning assumes that the Code tests are appropriate for all prosecutions, public *and* private. It assumes that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. We agree that this assumption is likely to be right if a case is refused or discontinued by the CPS on the grounds of public interest: it is difficult to imagine why a prosecution

[349] As to the rules on awards of costs, see paras 5.13 – 5.16.

[350] See A Ashworth and J Fionda, "The New Code for Crown Prosecutors: (1) Prosecution, Accountability and the Public Interest" [1994] Crim LR 895, in which the authors welcomed the present Code but with a number of reservations. These include the fact that there is no attempt to rank the factors in favour of and against prosecution, and the absence of any commitment to a policy of diverting cases away from the prosecution system.

[351] See A Hoyano, L Hoyano, G Davis and S Goldie, "A Study of the Impact of the Revised Code for Crown Prosecutors" [1997] Crim LR 556, 559:

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

[352] As to the availability of judicial review, see paras 2.22 – 2.25 above.

which is private should not be prejudicial to the public interest when it would be if it were public.

1.15 On the other hand, if, for example, a case is turned down by the CPS because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if the case is a serious one, then a private prosecution might be thought desirable. The Philips Commission favoured an evidential sufficiency test along the lines of the Code test[353] because they thought a less demanding one would be "both unfair to the accused and a waste of the restricted resources of the criminal justice system".[354] The evidential sufficiency test does, indeed, provide a threshold to enable the CPS to carry out its role as "a filter for evidentially weak cases";[355] and it properly takes into account fairness to the defendant. However, where a defendant is guilty, there is arguably, in principle, no moral unfairness in bringing a private prosecution against him or her.[356] As for the risk of court and other legal resources being wasted, whilst it is true that limited resources will be used at the expense of other pending cases, it may be argued that bringing a guilty defendant to trial is a good use for those resources *even if he or she is acquitted*, so long as the evidence against the defendant, whilst not meeting the Code test of evidential sufficiency, is reasonably substantial.[357]

1.16 **We provisionally conclude that the harm which might result from an unfettered right of private prosecution will be either or both of the following**:

(1) **the harm that results from an unsuccessful prosecution of an innocent defendant,**

(2) **the harm (whether to any individual involved in the criminal process or the public interest in the strict sense) that results from any prosecution (successful or not) which is not in the public interest.**

CONSENT PROVISIONS: THE PREFERRED MECHANISM FOR PREVENTING THE HARM

1.17 We have suggested that generally[358] a private prosecution is likely to be undesirable if it fails either or both of the tests in the Code for Crown Prosecutors. Where an

[353] Philips Report, para 8.8.

[354] *Ibid*, para 8.9.

[355] A Hoyano, L Hoyano, G Davis and S Goldie, "A Study of the Impact of the Revised Code for Crown Prosecutors" [1997] Crim LR 556, 564.

[356] Unless the prosecution can be said to amount to an abuse of process.

[357] If, of course, proceedings are instituted which are so insubstantial that they can be said to have been brought "without good cause", the private prosecutor will not be awarded costs from central funds. See para 5.14 and 6.11 above.

[358] In para 6.15 we acknowledge that there might be a circumstance in which a private prosecution should not be regarded as harmful despite the case not meeting the evidential sufficiency test, and even if it results in an acquittal.

undesirable prosecution is brought, it should be terminated as soon as possible; but it would be better if the prosecution were not brought at all. Consequently, a prosecutorial control mechanism that prevents an undesirable private prosecution being brought is preferable to one which terminates proceedings once they have begun.[359] A consent provision has this advantage. Whereas the other principal mechanisms of control (that is, the power of the CPS to take over a prosecution and terminate it, or the power of the Attorney-General to enter a *nolle prosequi*) are retrospective and operate by terminating proceedings that are under way, a consent provision is pre-emptive, preventing the institution of proceedings in the first place.[360] **We provisionally conclude, therefore, that a consent mechanism is the preferred mechanism for preventing the harm that would be caused by an undesirable prosecution.**

AN OFFENCE-STRUCTURED CONSENTS REGIME?

1.18 The present consent regime is, by and large, offence-structured. By this we mean that the consent attaches to a particular offence rather than, say, to a particular type of offender or a particular set of circumstances. There are, however, some examples of hybrid criteria. As we have seen,[361] the Law Reform (Year and a Day Rule) Act 1996 imposes a requirement of consent on the prosecution of homicide offences but only in certain circumstances, namely (a) when there is a lapse of time of more than three years between the date of the injury and the date of death and (b) when the defendant has already been convicted in relation to the injury. The War Crimes Act 1991 imposes a requirement of consent on the prosecution of homicide offences committed as war crimes in Germany or German-occupied territory during the period of the Second World War.

1.19 We now turn to the question whether we should retain an offence-structured regime or adopt a different structure. In approaching this question we bear in mind the crucial importance of certainty as to when consent is and is not required. It would not be satisfactory for the criteria to be framed in such a way that only a ruling at the start of the trial could determine whether or not the prosecution was valid.

1.20 Bearing this in mind, our approach is to focus on the kinds of prosecution that we are trying to prevent: that is, prosecutions which are unlikely to succeed or which, even if likely to succeed, are undesirable because the public interest in prosecuting the guilty is outweighed by other interests (public, private or both) militating against prosecution. In the case of prosecutions which are unlikely to succeed, we believe that the most important kind of harm to be averted is that likely to be suffered by the (presumably) innocent defendant, who may be subjected to stress,

[359] Not only would it have the advantage that the defendant would not suffer the harm caused by an aborted prosecution, but the legal and administrative costs would not be incurred. Furthermore, it is a less attractive option for the CPS to intervene after a private prosecutor has gone to the trouble of instituting proceedings than if those proceedings had been prevented at the start.

[360] A criminal proceedings order under s 42 of the Supreme Court Act 1981 (as to which, see paras 2.36 – 2.37 above) is also pre-emptive but, as we have seen, concerns only those who are found to be vexatious litigants.

[361] See paras 4.13 – 4.15.

expense and damage to his or her career or reputation. These same kinds of private harm may also result from a prosecution which, though likely to succeed, is not justified in all the circumstances, and thus fails what the Code for Crown Prosecutors describes as the "public interest" test; but in this case an equally important consideration may be the public interest in the strict sense – that is, the interests of the public *as distinct from those of the individuals involved.*

1.21 As regards harm to innocent defendants, a distinction should be drawn between those innocent defendants who are particularly likely to be privately prosecuted (and therefore to suffer harm) and those who, *if* privately prosecuted, are likely to suffer *serious* harm. We suspect that the first category of individuals is an abstract which has no actuality; we cannot see why a particular class of individuals (defined other than by way of the offence charged) should attract inappropriate private prosecutions. As regards the second category, on the other hand, we have been made aware, for example, of the concern of doctors who, it is said, are likely, if privately prosecuted for manslaughter in the event of a patient dying, to suffer particularly serious harm. We acknowledge this concern and will be asking consultees to express a view about it. However, even if we were able to make an unambiguous classification of protected classes, we doubt whether this would be a sufficiently comprehensive way of deciding when consents should be applied.

1.22 As regards harm to the public interest, we again take the view that it is unlikely that we could identify particular sorts of individuals who are more likely than others to be defendants in a private prosecution which may, for public interest reasons, be regarded as inappropriate.

1.23 For the reasons given above, **we provisionally conclude that a reformed consents regime should, in general, be offence-structured.** We recognise, however, that it is arguable that such a regime could be usefully supplemented by certain consent provisions which attach not to an offence but to the character of the defendant. Therefore, after we have considered the contents of the main offence-structured regime, we shall look at what we describe as the supplementary regime.

DEPARTURES FROM THE FUNDAMENTAL PRINCIPLE: OFFENCE-STRUCTURED

1.24 So far we have, on the one hand, asserted the fundamental principle in favour of the right of private prosecutions but, on the other hand, acknowledged that an unfettered right of private prosecution creates a risk of harm either to an innocent defendant or to the public interest (whether in terms of the public interest in a strict sense or to those private interests which are put in the balance when the public interest test is applied). We have also argued that, if measures need to be taken to avoid that harm, the most effective (in terms of minimising potential harm) is a consent provision, and that the consents regime should be, by and large, offence-structured.

1.25 We now turn to the more difficult task of identifying the sorts of offences which should attract a consent provision. A simple approach might be to ask which offences, if "wrongly prosecuted",[362] give rise to the harm which we are seeking to

[362] That is, if prosecuted despite failing one or other of the Code tests.

avoid. Unfortunately this is *too* simple: a private prosecution, if brought inappropriately, in respect of *any* offence is likely to have some adverse effect. Another approach is to attempt to identify those offences the prosecution of which would be *most likely* to give rise to the harm identified and which would, therefore, most appropriately include a consent provision. Bearing in mind the kinds of harm identified in paragraphs 6.5 – 6.16, this approach will involve answering the following questions:

(1) which offences, when privately prosecuted, are particularly likely to fail because of evidential weakness; and, of these, which offences are more likely than others to involve proceedings against innocent defendants?

(2) which offences are most at risk of being brought by a private prosecutor contrary to the public interest?

Evidential weakness

1.26 We are, in principle, in favour of using a consent provision as a means of controlling those private prosecutions which cause harm because they are particularly likely to fail because of evidential weakness. We cannot see, however, how particular *offences* can be identified as falling into this category. One approach is to consider whether there are any offences which tend not to be prosecuted by the CPS because of the difficulty in proving them at trial, giving rise to the supposition that it is these sorts of offences which are more likely than others to be privately prosecuted. Even with this information, however, it would be difficult to see how one could go on to distinguish those offences which, if they are privately prosecuted without success, are harmful because they tend to involve *innocent* defendants, and those which we have suggested are not harmful because the defendant is guilty and the evidence against him or her is substantial (even if not "sufficient" in Code terms). **We provisionally conclude, therefore, that a consent provision cannot be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions.**

Contrary to public interest

1.27 We now consider, however, whether it is any easier to identify offences for which a prosecution (even if successful) is particularly likely to be undesirable. A useful starting point is to examine the various circumstances in which consent provisions have been justified in the past, using as a basis for our examination the five overlapping reasons for consent provisions identified by the Home Office in its memorandum to the Franks Committee.[363]

Imprecise offences

1.28 The first reason given in the Home Office memorandum for including a consent requirement is

[363] See para 4.6 above.

to secure consistency of practice in bringing prosecutions, for example, where it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations.[364]

1.29 We have said repeatedly that it is "not merely desirable, but obligatory, that legal rules imposing serious criminal sanctions should be stated with the maximum clarity that the imperfect medium of language could attain".[365] Our view remains that "the criminal law should have no place for an offence which is not sufficiently precise that it is possible to say with reasonable certainty whether any combination of facts constitutes the offence".[366] As we have seen in Part IV,[367] consent provisions proliferated with the pressure of social welfare legislation at the time of the Second World War. Those were exceptional times which have now passed. We take the view that best efforts should be made to ensure that offences are not imprecise.

1.30 We acknowledge, however, that even best efforts might nonetheless give rise to imprecisely drafted offences and that, in any event, many common law offences[368] are well known for their uncertain scope. Whether or not this circumstance should attract a consent provision will depend, in theory, on whether or not it can be said that the prosecution of an imprecise offence is, if privately conducted, particularly likely to be contrary to the public interest. If we construe the public interest in this context in terms of executing the intention of Parliament and not exceeding it, then it is likely that it would be. However, **we provisionally conclude that the prosecution of imprecise offences, statutory or common law, should not be restricted by a consent provision.** Our reasons are practical. We do not want the availability of consent provisions to be treated as an alternative to the precise formulation of offences; and as regards those offences which are unavoidably imprecise, given that the absence or presence of precision is a matter of degree, we cannot see how we can distinguish those offences which are *so* imprecise that they justify a consent provision.

Offences attracting vexatious and trivial prosecutions

1.31 The problem of vexatious and trivial private prosecutions is reflected in the second of the Home Office reasons for consent provisions:

to prevent abuse, or the bringing of the law into disrepute, eg, with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases.[369]

1.32 For the purposes of our analysis, it is helpful to distinguish between "vexatious" and "trivial". By "trivial" proceedings we mean those which, although founded on sufficient evidence, concern conduct which is technically criminal but barely

[364] Franks Report, vol 2, p 125, para 7(a).

[365] Binding Over (1994) Law Com No 222, para 4.12, referring to Working Paper No 50 (1973) para 9. See also Working Paper No 57 (1974) para 44.

[366] Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, para 3.10.

[367] See para 4.2 above.

[368] Such as conspiracy to defraud and misconduct in a public office.

[369] Franks Report, vol 2, p 125, para 7(b).

regarded as such; by "vexatious" proceedings, on the other hand, we mean those which are not well-founded and are inspired by some improper motive.[370]

TRIVIAL CASES

1.33 The public interest in not prosecuting trivial cases is recognised by the CPS Code. The Code list of "factors against prosecution" includes the fact that "the court is likely to impose a very small or nominal penalty"[371] or that "the loss or harm can be described as minor and was the result of a single incident".[372]

1.34 We agree that it is in the public interest that trivial cases should not be prosecuted and that, therefore, if it were practical, the consent regime should be used to prevent private prosecutions of trivial cases. We cannot see, however, how particular *offences* can be identified as trivial.[373] Triviality is not necessarily a characteristic of an offence but may be simply a description of a particular example of an offence which may, in other circumstances, be very serious.[374] **We provisionally take the view, therefore, that preventing the harm to the public interest caused by private prosecutors bringing trivial prosecutions is not a matter for the consent regime.**

VEXATIOUS PROSECUTIONS

1.35 It is argued that the particular character of certain sorts of offences attracts vexatious prosecutions and that a consent requirement provides a necessary safeguard in such cases. For example, when Parliament was debating the introduction of a new offence covering acts intended or likely to stir up racial hatred[375] Lord Janner's response to such concerns was that the requirement for the consent of the Attorney-General would be "sufficient safeguard against anyone bringing a prosecution which is not based on thorough grounds".[376] If the defining feature of a vexatious prosecution is that it is not well-founded then the issue with which we are concerned is the one considered in paragraph 6.26 above: namely, whether it is possible to identify those offences which, if privately prosecuted, are particularly likely to be unsuccessful (because of evidential weakness) and are particularly likely to cause harm to an innocent defendant. We provisionally concluded that a consent provision could not be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions.

[370] Sir Reginald Manningham-Buller, in his memorandum to the Select Committee on Obscene Publications, App 1, p 23, para 4(b), defined vexatious proceedings as "proceedings instituted rather to gratify some whim of the prosecutor than to vindicate his rights or assist in the administration of justice".

[371] Code for Crown Prosecutors, para 6.5(a).

[372] *Ibid*, para 6.5(c).

[373] Describing an offence as trivial would suggest that the conduct criminalised should not be an offence at all.

[374] Eg the offence of theft is made out if a person takes an item off a shop shelf dishonestly and with the intention of permanently depriving the owner of it, even if he or she immediately replaces it. This is an example of a trivial case of theft. Stealing a large amount of money from an employer is an example of a serious case of theft.

[375] Now s 18 of the Public Order Act 1986. The consent provision is in s 27(1).

[376] *Hansard* (HL) 15 November 1976, vol 377, col 1097.

1.36 An alternative approach is to focus on vexatious prosecutions as the sorts of cases which tend to be brought for some improper motive. For example, it is arguable that there is likelihood of improper motive when a defendant is the prosecutor's spouse. This is recognised by section 30(4) of the Theft Act 1968, which provides that the DPP's consent is required for prosecutions for theft of or unlawful damage to property where the defendant is the spouse of the victim.[377] Speaking during the Second Reading debate on the Theft Bill in 1968, Lord Stonham, for the Government, explained that the reason behind the consent requirement was to prevent vexatious prosecutions.[378] Leaving aside the particular anomaly of section 30(4), which we have already noted in Part V,[379] **we provisionally take the view that the likelihood of an offence being prosecuted for an improper motive is not, in itself, a reason for restricting private prosecutions which are otherwise well-founded and not contrary to the public interest.**

Allowing mitigating factors to be taken into account

1.37 Another reason given in the Home Office memorandum for including a consent requirement is

> *to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition.*[380]

1.38 The public interest test applied by the CPS will tend against prosecution in circumstances where, for example, the penalty would be likely to be very small or nominal,[381] where the offence was committed as a result of a genuine mistake or misunderstanding,[382] or where the loss or harm is minor and was a result of a single incident, particularly if it was caused by a misjudgement.[383] A private prosecution which is brought despite the presence of mitigating factors may well be against the public interest. We are again, however, presented with the difficulty that the presence or absence of mitigating factors is not a characteristic of an *offence*, but rather of the *circumstances* of an offence. **We provisionally take the view, therefore, that it is not practicable to use a consent provision to prevent private prosecutions which fail to take into account mitigating factors.**

Controlling the use of particularly sensitive or controversial criminal laws

1.39 The fourth reason given in the Home Office memorandum justifying the consent provisions is

[377] This provision is criticised by Sir John Smith. See para 5.41.

[378] *Hansard* (HL) 15 February 1968, vol 289, col 222.

[379] Para 5.41.

[380] Franks Report, vol 2, p 125, para 7(c).

[381] Code for Crown Prosecutors, para 6.5(a).

[382] *Ibid*, para 6.5(b).

[383] *Ibid*, para 6.5(c).

> *to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship.*[384]

1.40 Examples of such offences are

(1) offences of stirring up racial hatred under the Public Order Act 1986 – referring to its precursor, the Race Relations Act 1965, in its memorandum to the Franks Committee, the Home Office suggested that an Attorney-General's consent "provide[d] the necessary safeguard, and enable[d] prosecutions to be confined to the ringleaders and organisers of incitement";[385]

(2) offences relating to the production, publication and distribution of "horror comics" under the Children and Young Persons (Harmful) Publications Act 1955 – the Home Office justified the inclusion of an Attorney-General (as opposed to a DPP) consent provision on the ground that the Act dealt with "a subject which intimately affects the liberty of the subject and it involves questions of censorship";[386]

(3) offences relating to the presentation of obscene performances of plays under the Theatres Act 1968 – according to the Home Office, "[t]he reasons for restricting the right to prosecute were to secure uniformity of enforcement in a difficult field, and to protect those who present plays … from ill-judged prosecutions."[387]

1.41 We agree that, from time to time, it is necessary for a government to pass legislation which creates offences that are controversial – controversial because they erode rights fundamental to democratic society. We note in particular that the fundamental right most particularly protected under the present consent regime is the right to free expression. Bearing in mind that the decision to prosecute in such circumstances might involve balancing countervailing fundamental principles (the right to bring a private prosecution against the right to free expression), that it might involve questions of public policy going beyond the facts of the case under consideration, and that it is in the democratic interest that such decisions should be made by an officer who is directly or indirectly accountable to Parliament, we provisionally conclude that in circumstances where the subject matter of an offence impinges on the right of free expression it will be appropriate to limit the right of private prosecution by way of a consent provision.[388] Our provisional

[384] Franks Report, vol 2, p 126, para 7(d).

[385] Home Office memorandum to the Franks Committee: Franks Report, vol 2, p 126, para Ib.

[386] *Ibid*, para Ia.

[387] *Ibid*, para Ic.

[388] In Criminal Law: Report on Criminal Libel (1985) Law Com No 149, a report which has not been implemented, we recommended abolition of the common law offence of criminal libel and its replacement by a statutory offence of criminal defamation. An ancillary recommendation was that prosecutions for the new offence should require the consent of the Attorney-General. Para 7.68 states:

> It is … necessary to include a provision for consent to institution of proceedings since we believe that every case of criminal defamation will require particular

conclusion is limited to offences which encroach on freedom of expression. We are not aware of problems in relation to offences which might be said to impinge on any other fundamental freedoms and we do not propose that consent provisions should attach to such offences.

1.42 **We provisionally conclude that a consent provision should be used to control the prosecution of those offences which directly affect freedom of expression.**

Ensuring that prosecutorial decisions take account of public policy of a political or international character

1.43 The final reason given in the Home Office memorandum is

> *to ensure that decisions on prosecution take account of important considerations of public policy or of a political or international character, such as may arise, for instance, in relation to official secrets or hijacking.*[389]

1.44 This was the only ground which, in the view of the Home Office, merited the exclusive consent of the Attorney-General. The Philips Commission went further, taking the view that this was the only ground which merited *any* consent requirement at all:

> The only considerations that should apply, in our view, statutorily and absolutely to restrict prosecution relate to those very few cases where national interests may be thought to be particularly involved. These are cases where the decisions to prosecute have to take account of important considerations of a political or international character, such as offences against national security or in relation to international law or the country's international obligations. The duty for making prosecution decisions in these cases should rest with the Attorney-General, or, if he considers it appropriate to delegate, with the Director of Public Prosecutions.[390]

1.45 As we saw in Part V,[391] when considering the arguments for and against the power of consent being vested in a political figure such as the Attorney-General, the Franks Committee took the view that the Attorney-General was uniquely well placed to assess the public interest in bringing a criminal prosecution in circumstances involving a political or international element. Similarly, during the debates on the Jurisdiction (Conspiracy and Incitement) Bill 1997,[392] it was acknowledged that the international repercussions of bringing proceedings by

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> consideration of whether it is in the public interest that the criminal law should intervene, having regard to the possible effects upon the victim of the defamatory information in question. We also accept the suggestion that, in offences closely concerned with the issue of freedom of speech, it is preferable to require the consent of the Attorney General … .

[389] Franks Report, vol 2, p 126, para 7(e).

[390] Philips Report, para 7.56.

[391] See paras 5.28 – 5.29 above.

[392] As to which, see para 4.16 above.

virtue of the extended jurisdiction created by the Bill warranted the Attorney-General's intervention.

1.46 We agree. In arriving at this view, we bore in mind that the decision to prosecute in such circumstances might involve questions of public policy, international and national, going beyond the facts of the case under consideration, and that it is in the democratic interest that such decisions should be made by an officer who is directly or indirectly accountable to Parliament. Therefore, **we provisionally conclude that the prosecution of offences involving the national security or some international element should be restricted by a consent provision. By offences involving some "international element", we mean those which**

(1) **are related to the international obligations of the state;**

(2) **involve measures introduced to combat international terrorism;**

(3) **involve measures introduced in response to international conflict; or**

(4) **have a bearing on international relations.**

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

1.47 This category does not feature in the Home Office memorandum. We are concerned, however, that, as regards certain offences which might be the subject of either criminal or civil proceedings, the public interest might not require the institution of criminal proceedings because civil proceedings would be more appropriate. We bear in mind the particular danger that a private prosecutor might be tempted to institute criminal proceedings *because* civil proceedings are already under way, or are contemplated, as a means of bolstering his or her negotiating position in those proceedings.

1.48 It does not follow that a consent provision would be justified in the case of *any* offence which might be the subject of civil proceedings as well as criminal: this would include the majority of criminal offences. The question is whether a disinterested judge of the matter, such as a Crown Prosecutor, would be likely to conclude that, because civil proceedings are available, it is *unnecessary* to prosecute. No-one would suggest that, because murder and rape (for example) are actionable in the civil courts, the public interest might not require a prosecution for these crimes. But if a particular offence is not so serious that only a prosecution will suffice (for example because the loss caused is comparatively minor, and the defendant's conduct was not dishonest), and is committed both *by* a person of substance (who is likely to be able to satisfy a judgment) and *against* such a person (who is likely to be able to afford the cost of civil litigation), it may be that a prosecution would be oppressive and inappropriate.

1.49 Copyright law arguably provides an illustration of the sort of offence we have in mind.[393] Not only can a civil action be brought against a defendant for infringement of copyright, but also criminal proceedings – for example, under section 107(1)(a) of the Copyright Designs and Patents Act 1988 it is an offence to make for sale or hire any article which is an "infringing copy"[394] without the licence of the copyright holder.[395] It is, therefore, possible to envisage circumstances in which a defendant might be subject to two sets of proceedings, civil and criminal, which are for all practical purposes the *same* proceedings.

1.50 In *Thames and Hudson Ltd v Design and Artists Copyright Society Ltd,*[396] an application was made to stay criminal proceedings under the Copyright Designs and Patents Act 1988 brought against the plaintiffs in circumstances where civil proceedings were later commenced in the Chancery Division. The plaintiffs alleged that the criminal proceedings had been brought "not for the purpose of deterring crime" but for the "illegitimate collateral purpose" of pressurising them into settling a commercial dispute. Although the court in this instance found against the plaintiffs' submission that the criminal proceedings were vexatious and an abuse, and therefore refused to grant the application, this does not, in our view, mean that the CPS, applying the Code tests, would have concluded that the proceedings were needed in the public interest. On the contrary, the CPS might have well have taken the view that the matter could safely be left to the civil courts.

1.51 **We provisionally conclude that a consent provision may be justified for those offences in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution.**

DEPARTURES FROM THE FUNDAMENTAL PRINCIPLE: SUPPLEMENTARY REGIME

1.52 So far we have considered what sorts of *offences* should attract a consent provision. We are aware, however, that some take the view that there are offences in respect of which a consent provision would not be generally justified but would be justified if the offence were alleged to have been committed by certain *defendants* – the reason being that such defendants, if innocent, would suffer particularly serious harm in the event of a private prosecution. An example which has been drawn to our attention is prosecutions against doctors for manslaughter.

[393] Although it should be noted that there is no consent provision in the Copyright Designs and Patents Act 1988. At para 7.16 below, we shall be inviting consultees to tell us whether copyright *is* a practical example of the situation we have in mind.

[394] Section 27(2) of the 1988 Act provides that an article "is an infringing copy if its making constituted an infringement of the copyright in the work in question".

[395] 1988 Act, s 107(1)(a).

[396] (1995) 22 FSR 153.

Medical manslaughter

1.53 In a recent report,[397] we describe "involuntary manslaughter" as the name given to those *unintentional* killings that are criminal at common law: causing death in the course of doing an unlawful act, and causing death by gross negligence or recklessness. We noted that involuntary manslaughter is not recognised as a separate crime in its own right: it is simply a label used to describe certain ways of committing the very broad common law crime of manslaughter.[398]

Are doctors vulnerable to particularly harmful private prosecution?

1.54 We appreciate the strength of feeling understandably engendered by fatal accidents, and we acknowledge the intense pressure that can be brought to bear by the relatives of the deceased seeking a prosecution.

1.55 A particular area of concern that has been drawn to our attention is the position of doctors who may be prosecuted for involuntary manslaughter if, as a result of some professional act or omission, a patient should die.[399] It has been suggested to us that criminal prosecution, even if subsequently dropped before proceedings had concluded, would be likely to cause irreparable damage to a doctor's reputation, thereby placing his or her career in serious jeopardy. If this is correct, then the issue arises as to whether, in this special circumstance, consent should be required before doctors can be prosecuted for manslaughter. Against this, one has to bear in mind that many occupations carry with them the risk of exposing others to death or serious injury: dentists, nurses, lorry drivers, train drivers, to name but a few. And an unsuccessful private prosecution for manslaughter is likely to cause the defendant substantial harm whatever his or her occupation. Some might, therefore, ask why doctors should be given special protection.

1.56 Further, if the argument in favour of a consent provision in the present context is that it averts the risk of substantial harm to a (presumably) innocent defendant's working life, given that it seems likely that prosecution for a variety of other offences (other than manslaughter) would be damaging to those in a range of different occupations (such as allegations of dishonesty against a bank manager, or of indecency against a school teacher), then the logical consequence of favouring a consent provision for proceedings against doctors for manslaughter would appear to be the untenable proposition that there should be a consent provision for all cases involving allegations against defendants whose working lives are likely to be substantially damaged if they are prosecuted for (even though subsequently acquitted of) an offence particularly harmful to his or her position.

[397] Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, paras 1.3 and 1.4. In this report, we recommended that the broad offence of involuntary manslaughter be replaced by two different offences of unintentional killing based on different fault elements: reckless killing and killing by gross carelessness.

[398] *Ibid*, at para 1.3. The other ways of committing manslaughter, commonly called "voluntary manslaughter", require the same intention as for murder (viz to kill or cause serious injury), mitigated by provocation, diminished responsibility or agreement to enter into a suicide pact (when the killer is a survivor of the pact): Homicide Act 1957, ss 2–4.

[399] See Law Com No 237, paras 2.8 – 2.25 and 3.7 – 3.13.

1.57 We recently recommended there should be no requirement of consent to the bringing of private prosecutions for our proposed offence of corporate manslaughter,[400] but we raise the question as to whether the position is different in the case of prosecutions against doctors or any other category of individuals.

1.58 **We ask, therefore, for views on whether**

(1) **the protection afforded by a requirement of consent should be applied in respect of the institution of criminal proceedings for involuntary manslaughter brought against some or any class of person involved in an occupation vulnerable to such an allegation;**

(2) **and, if so, whether that protection should confined to allegations made against**

(a) **a doctor;**

(b) **any other specified class of persons, or**

(c) ***any* class of person particularly exposed, by virtue of the nature of his or her occupation, to an allegation of involuntary manslaughter.**

1.59 **We ask those consultees who favour any of the options set out in the second question above to provide evidence of specific examples to support the option selected.**

AN ANCILLARY MATTER: AUTOMATIC NOTIFICATION OF PRIVATE PROSECUTIONS

1.60 We have provisionally concluded that the consents regime should continue to be offence-structured. In drawing this conclusion, we are not suggesting that an offence-structured system is entirely satisfactory, but rather that it is better than any other structure. Whilst a regime based on offences has the advantage of certainty, a disadvantage is that it cannot accommodate the particular circumstances of individual private prosecutions. If, therefore, a particular private prosecution is instituted and it is one which the CPS takes the view should not be continued, the CPS will resort to its power to discontinue under section 7(4) of the POA 1985. As we have seen,[401] however, the DPP is not automatically notified of all private prosecutions, but only of those which are withdrawn or not proceeded with in reasonable time for no apparently good reason.

1.61 It would, in practice, be unlikely for a private prosecution to take place without the CPS knowing about it: the difficulty in mounting a private prosecution means that the private prosecutor is likely to have first attempted to persuade the CPS to institute proceedings and, if a private prosecution *is* instituted, the defendant is

[400] *Ibid*, para 8.66. We recommended that there should be no requirement of consent for corporate manslaughter because, in our view, it is in precisely this sort of case that public pressure for a prosecution is at its greatest and it would "be perverse to remove the right to bring a private prosecution in the very case where it is most likely to be invoked".

[401] See para 2.40 above.

likely to try to persuade the CPS to take it over and discontinue it. However, **we invite consultees to consider whether there should be automatic notification of *all* private prosecutions to the DPP** on the ground that this would make the power of the CPS to discontinue private prosecutions a more effective safeguard against inappropriate private prosecutions.[402]

CONCLUSION

1.62 Having attempted in this Part to identify the circumstances in which a consent provision should, in principle, be used, we consider in the next Part how the present consents regime should be reformed.

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

PART VII
PROVISIONAL PROPOSALS FOR THE REFORM OF THE CONSENTS REGIME

1.1 In this Part we shall set out our provisional proposals for the reform of the consent regime. For completeness, however, we begin by setting out two options which we reject.

THE REJECTED OPTIONS

1.2 At the end of Part V, in the light of the criticisms of the consents regime, we concluded:

(1) that the present consents regime is in an unsatisfactory state, and

(2) that it should be reformed.

We therefore provisionally reject the option of making no change to the consents regime.

1.3 In Part VI we provisionally concluded that consent provisions are useful for certain purposes. **We therefore provisionally reject the option of abolishing *all* consent provisions requiring the consent of either the Law Officers or the DPP.**

RATIONALISING THE CONSENTS REGIME

1.4 It will not, we believe, provoke any controversy[403] to state that **we provisionally propose that the consent regime should be reformed by way of *rationalisation***. The contentious issues, of course, lie in the details. In examining how the present system should be changed, there are two basic variables to consider:

(1) the pool of offences affected by the consents regime; and

(2) of the offences in that pool, the distribution of consent functions between the Law Officers and the DPP.

The pool of offences

1.5 In Appendix A we have set out a list of those offences which we have identified as presently requiring the consent of either the Law Officers or the DPP.[404] As we said in Part I,[405] however, it is not our objective in this consultation paper to indicate

[403] Save, of course, from those who advocate the abolition either of private prosecutions or of consent provisions.

[404] Although we are not concerned in this paper with those offences for which there is provision for officers other than the DPP or a Law Officer to give consent, we have, for completeness, included joint authority offences in the list.

[405] Para 1.9 above.

with regard to *each particular offence* whether or not a consent provision should be retained, amended or abolished – rather, it is our objective to identify *guiding principles* as to when a consent provision should be used. Following from the conclusions we reached in Part VI, **we provisionally conclude**

(1) that a requirement of consent should be used to control prosecutions for those offences

(a) which directly affect freedom of expression;

(b) which may involve the national security or have some international element;[406] or

(c) in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution; and

(2) that, in the case of all other offences which at present have a consent requirement, that requirement should be dispensed with.

Examples of offences for which the consent requirement would be either abolished, retained or added if our principles were adopted

Offences for which consent would be abolished

1.6 Although it is not our objective to make provisional proposals about specific offences, the following are illustrations of the effect of our provisional conclusions regarding the underlying principles for reform of the consents regime. They are, in particular, examples of offences for which the implication of our provisional conclusions is that the consent requirement should be abolished.

EXPLOSIVE SUBSTANCES ACT 1883

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

FRAUDULENT MEDIUMS ACT 1951

1.8 The purpose of the Fraudulent Mediums Act was to provide penalties to deter fraudulent mediumship whilst alleviating the "harsh and oppressive" effects of the preceding legislation on those claiming to be spiritualist mediums.[407] A consent provision was included in order to "protect mediums against frivolous accusations".[408]

[406] Defined in para 6.46.

[407] *Hansard* (HL) 3 May 1951, vol 171, cols 718–719, *per* Lord Dowding.

[408] *Ibid*, col 722, *per* Lord Dowding.

AGRICULTURAL LAND (REMOVAL OF SURFACE SOIL) ACT 1953

1.9 This Act makes it an offence to remove surface soil from land in certain circumstances. During committee stage in the House of Lords it was proposed that the Bill should include a consent provision to avoid "trivial and annoying prosecutions".[409]

THEFT ACT 1968

1.10 As we saw in Part VI,[410] the Theft Act includes a consent provision for a specific circumstance: namely, when proceedings are brought for theft or unlawful damage to property and the defendant is the spouse of the victim. It was said to be necessary to prevent vexatious prosecutions.

ANIMALS (SCIENTIFIC PROCEDURES) ACT 1986

1.11 The Animals (Scientific Procedures) Act 1986 sought to control experimentation on animals by licensing. A consent provision was included to prevent "vexatious and ill-informed" prosecutions.[411]

LAW REFORM (YEAR AND A DAY RULE) ACT 1996

1.12 As we have seen in Part IV, the existence of a consent provision in this Act flowed from a recommendation made in Law Com No 230.[412] At that time, we took the view that the consent requirement was necessary because we believed that there was a likelihood that the number of stale and second trial cases would increase, some of them instituted by private prosecutors, and these cases would present exceptionally difficult problems for prosecutors. In the event, our fears have not been justified: there have been no applications for consent under the Act during the year since the Act came into force, and we take the view that a consent provision is not needed.

Offences for which consent would be retained or added

FREEDOM OF EXPRESSION

1.13 The following are examples of statutes in which we believe the consent provision should be retained on the ground that the substance of the statute impacts on the right of freedom of expression: the Public Order Act 1986, the Children and Young Persons (Harmful Publications) Act 1955, the Theatres Act 1968, the Contempt of Court Act 1981 and the Obscene Publications Act 1959.

OFFENCES INVOLVING THE NATIONAL SECURITY OR WITH AN INTERNATIONAL ELEMENT

1.14 The following are examples of statutes in which we believe the consent provision should be retained on the ground that the substance of the statute has potential international repercussions or some impact on national security: the War Crimes

[409] *Per* Earl Jowitt, *Hansard* (HL) 27 January 1953, vol 180, cols 19-20.

[410] Para 5.41.

[411] *Hansard* (HL) 17 December 1985, vol 469, col 790, *per* Lord Glenarthur.

[412] See paras 4.13 – 4.15. Our recommendations as to the conditions, however, differed.

Act 1991, the Taking of Hostages Act 1982, the Biological Weapons Act 1974, the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Official Secrets Acts 1911 to 1989.

OFFENCES LIKELY TO BE THE SUBJECT OF "CONCURRENT LITIGATION"

1.15 In Part VI,[413] we suggested that an implication of the principles we provisionally proposed is that copyright offences might be subject to a consent provision.

Consultation issue

1.16 Although our objective is not to make comprehensive proposals in respect of all offences which, under a reformed regime, would or would not require consent, **we would welcome the views of our consultees on the examples given in paragraphs 7.6 to 7.15; and, in particular, we would welcome views on whether copyright law is a good example of our provisionally proposed third category of consent offences,[414] namely those liable to concurrent proceedings.**

The distribution of consent functions

Distribution of functions between the Law Officers and the DPP

1.17 We concur with the view expressed in the Franks Report[415] and the Philips Report[416] that prosecutorial decisions involving an international element benefit from the complex governmental role of the Law Officers, and, for this reason, **we provisionally propose that those offences requiring consent because they involve the national security or some international element should require the consent of a Law Officer.**

1.18 **As regards those offences which fall into the other categories of offences which, in our provisional view, should attract a consent provision, we provisionally propose that the consent should be that of the DPP.** The DPP is in a position to take a properly informed decision when applying the public interest test, and the office of the DPP has the advantage that it is less exposed to the risk of allegations of political bias than that of a Law Officer.

Delegation of the DPP's power to consent

1.19 As we have seen,[417] under the present system, a DPP's consent can be given by any Crown Prosecutor. We appreciate that there are arrangements within the CPS governing the level at which consent decisions are made. We take the view, however, that, given the exceptional seriousness or difficulty of the issues involved in the consent decision, formal provision should be made for the scope of

[413] See para 6.49.

[414] See paras 6.49 – 6.51 above, where we suggest that copyright law is arguably an illustration of the third category.

[415] Para 255; and see para 5.29 above.

[416] Para 7.56; and see para 6.44 above.

[417] See para 3.19 above.

delegation to be limited. **We provisionally propose, therefore, that a DPP consent decision should be made either by**

(1) **the DPP, or**

(2) **a senior Crown Prosecutor (namely one of the Chief Crown Prosecutors appointed, following the recent announcement of the Attorney-General,[418] to oversee the work of the proposed new CPS areas).**

An ancillary matter: transfer of authority

A previous reform proposal: the Consent to Prosecution Bill 1979

1.20 On 24 June 1977, the Prime Minister[419] announced the setting up of the Philips Commission. At the same time, it was announced that, as the Commission would be concerned "essentially with matters of principle", the Home Secretary and the Attorney-General would undertake a review of arrangements for prosecutions and the relationship between the DPP and other prosecutors with a view to improvements "within the existing structure".[420]

1.21 As a part of that review, the Working Party on Prosecution Arrangements was set up under the auspices of the Law Officers and the DPP. The terms of reference of the working party included an examination of consent provisions. It concluded that a number of the consent functions vested in the Attorney-General (either solely or with the Solicitor-General) could be safely transferred to the DPP.[421]

1.22 Its proposals led to the introduction of the Consent to Prosecutions Bill in the House of Commons in February 1979. The Bill, which failed to pass through Parliament because a general election was called, was intended to update and clarify the law on consent to prosecution. The Attorney-General[422] described the purpose of the Bill as follows:

> It is right that from time to time these provisions should be reviewed to demote or weed out those that are no longer needed. The Bill's principal purpose is to perform that function.[423]

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

> All functions of a Law Officer under the enactments specified in the Schedule to this Act[424] (which confer functions relating to prosecutions

[418] See para 2.13 above.

[419] The Rt Hon James Callaghan MP.

[420] Written Answer, *Hansard* (HC) 24 June 1977, vol 933, cols 603-605.

[421] *Hansard* (HC) 14 March 1979, vol 964, col 659.

[422] The Rt Hon Sam Silkin QC MP.

[423] *Hansard* (HC) 14 March 1979, vol 964, col 658.

[424] The schedule listed a variety of offences including the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Explosive Substances Act 1883.

and consents to prosecutions) are hereby transferred to the Director of Public Prosecutions or, if exercised by a Law Officer concurrently with the Director, shall cease to be exercisable by the Law Officer.

1.24 The reasons given for the transfer were, according to Edwards, "more practical than theoretical": they concerned saving the time of the Law Officers in having to consider run-of-the-mill cases, and that of the DPP in having to prepare a statement of relevant facts for the Attorney-General in each case presented to the Attorney-General for consideration.[425] The Attorney-General sought to reassure the Second Reading Committee that in "important and sensitive" cases the DPP would consult the Law Officers and that the transfer of functions would not affect the DPP's duty to act under the general superintendence of the Attorney-General.[426]

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

Our provisional proposal

1.26 A consequence of our provisional view that the consents regime should be rationalised – both in terms of the offences to which a consent provision should be attached and the officer to whom the power of consent should be assigned – is that, for some offences, it might be appropriate for the consent power to be transferred from one officer to another.[427]

1.27 Bearing in mind the provisions of the Consents to Prosecution Bill, we recognise also that there are advantages in allowing a transfer of function by way of secondary rather than primary legislation. The principal advantages are:[428]

(1) secondary legislation allows for greater flexibility to deal with administrative difficulties or changes in circumstances which may arise after the primary legislation has been passed;

(2) it saves parliamentary time and avoids the need for a new statute;

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

[426] *Ibid*, col 660.

[427] A consequence of our provisional conclusions would be, eg, that the consent power in relation to offences under Part III of the Public Order Act 1986 should be transferred from the Attorney-General to the DPP.

[428] E C S Wade and A W Bradley, *Constitutional and Administrative Law* (11th ed 1993) pp 625–626.

(3) it affords greater opportunity for consideration of and consultation about legislation on technical subjects, and keeps highly technical provisions off the statute book;

(4) it allows government to act promptly in times of emergency.

1.28 There are two procedures by which statutory instruments are created. Under the affirmative procedure, the instrument has no effect, or no continuing effect, until Parliament has expressly approved it. Under the negative procedure, the instrument has effect but may be annulled within a time-limit if either House records its disapproval.[429] The negative procedure is more frequently used than the affirmative,[430] but clearly involves a lesser degree of parliamentary scrutiny.

1.29 Some attempts have been made to formulate the criteria for choosing between the affirmative and negative procedures, most notably in the Second Report from the Joint Committee on Delegated Legislation.[431] But, using language redolent of that used to describe the absence of any principle underpinning the present consent regime, the Report suggests that any attempt to deduce criteria from past precedents is

> full of difficulties and pitfalls ... . Parliament has chosen in the past between the Affirmative and Negative procedures not always in any specifically rational way on a consideration of the merits of the choice, but often arbitrarily and, even at times, capriciously for reasons which have often had nothing whatever to do with the merits.[432]

1.30 In *Erskine May* it is suggested that the affirmative procedure is used "principally for substantial and important portions of delegated legislation, on which a high degree of scrutiny is sought".[433] We are inclined to take the view that a transfer of authority to consent warrants the level of scrutiny afforded by the affirmative procedure. In coming to this view, we bear in mind the following comments contained in the minutes of evidence to the Joint Committee made by the First Parliamentary Counsel:[434]

[429] A request to have an instrument annulled is known as a "prayer".

[430] *Erskine May*, p 547.

[431] HL (1972-73) 204; HC (1972-73) 468.

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

[433] At p 546.

[434] Mr A N Stainton CB.

> The field where one is considering affirmative resolution procedure … is where perhaps in the past it has usually been in an Act and this is now the first occasion when it is a question of dealing with it in subordinate legislation.[435]

Conclusion

1.31 For the reasons set out above, **we provisionally propose**

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

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

(a) by way of a general power, or

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

[435] Second Report of the Joint Committee on Delegated Legislation HL (1972-73) 204; HC (1972-73) 468, pp 1–2.

PART VIII
SUMMARY OF PROVISIONAL CONCLUSIONS, PROPOSALS AND CONSULTATION ISSUES

In this Part we summarise our provisional conclusions and proposals, and other issues on which we seek respondents' views. More generally, we invite comments on *any* of the matters contained in, or the issues raised by, this paper, and any other suggestions that consultees may wish to put forward. **For the purpose of analysing the responses it would be very helpful if, as far as possible, consultees could refer to the numbering of the paragraphs in this summary.**

THE NEED FOR REFORM

1.1 We provisionally conclude

(1) that the present consents regime is in an unsatisfactory state, and

(2) that it should, therefore, be reformed.

(paragraph 5.47)

PRINCIPLES FOR THE REFORM OF THE CONSENT REGIME

The harm caused by an unfettered right of private prosecution

1.2 We provisionally conclude that the harm which might result from an unfettered right of private prosecution will be either or both of the following:

(1) the harm that results from an unsuccessful prosecution of an innocent defendant,

(2) the harm (whether to any individual involved in the criminal process or the public interest in the strict sense) that results from any prosecution (successful or not) which is not in the public interest.

(paragraph 6.16)

Consent provisions: the preferred mechanism for preventing the harm

1.3 We provisionally conclude that a consent mechanism is the preferred mechanism for preventing the harm that would be caused by an undesirable prosecution.

(paragraph 6.17)

An offence-structured consents regime?

1.4 We provisionally conclude that a reformed consents regime should, in general, be offence-structured.

(paragraph 6.23)

Departures from the fundamental principle: offence-structured

Evidential weakness

1.5 We provisionally conclude that a consent provision cannot be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions.

(paragraph 6.26)

Contrary to public interest

IMPRECISE OFFENCES

1.6 We provisionally conclude that the prosecution of imprecise offences, statutory or common law, should not be restricted by a consent provision.

(paragraph 6.30)

OFFENCES ATTRACTING VEXATIOUS AND TRIVIAL PROSECUTIONS

Trivial cases

1.7 We provisionally take the view that preventing the harm to the public interest caused by private prosecutors bringing trivial prosecutions is not a matter for the consent regime.

(paragraph 6.34)

Vexatious prosecutions

1.8 We provisionally take the view that the likelihood of an offence being prosecuted for an improper motive is not, in itself, a reason for restricting private prosecutions which are otherwise well-founded and not contrary to the public interest.

(paragraph 6.36)

ALLOWING MITIGATING FACTORS TO BE TAKEN INTO ACCOUNT

1.9 We provisionally take the view that it is not practicable to use a consent provision to prevent private prosecutions which fail to take into account mitigating factors.

(paragraph 6.38)

CONTROLLING THE USE OF PARTICULARLY SENSITIVE OR CONTROVERSIAL CRIMINAL LAWS

1.10 We provisionally conclude that a consent provision should be used to control the prosecution of those offences which directly affect freedom of expression.

(paragraph 6.42)

ENSURING THAT PROSECUTORIAL DECISIONS TAKE ACCOUNT OF PUBLIC POLICY OF A POLITICAL OR INTERNATIONAL CHARACTER

1.11 We provisionally conclude that the prosecution of offences involving the national security or some international element should be restricted by a consent provision. By offences involving some "international element", we mean those which

(1) are related to the international obligations of the state;

(2) involve measures introduced to combat international terrorism;

(3) involve measures introduced in response to international conflict;

(4) have a bearing on international relations.

(paragraph 6.46)

CONTROLLING THE PROSECUTION OF OFFENCES WHICH WILL OFTEN BE MORE APPROPRIATELY LEFT TO THE CIVIL COURTS

1.12 We provisionally conclude that a consent provision may be justified for those offences in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution.

(paragraph 6.51)

Departures from the fundamental principle: supplementary regime

Medical manslaughter

1.13 We ask for views on whether

(1) the protection afforded by a requirement of consent should be applied in respect of the institution of criminal proceedings for involuntary manslaughter brought against some or any class of person involved in an occupation vulnerable to such an allegation;

(2) and, if so, whether that protection should confined to allegations made against

(a) a doctor;

(b) any other specified class of persons, or

(c) *any* class of person particularly exposed, by virtue of the nature of his or her occupation, to an allegation of involuntary manslaughter.

(paragraph 6.58)

1.14 We ask those consultees who favour any of the options set out in the second question above to provide evidence of specific examples to support the option selected.

(paragraph 6.59)

An ancillary matter: automatic notification of private prosecutions

1.15 We invite consultees to consider whether there should be automatic notification of *all* private prosecutions to the DPP.

(paragraph 6.61)

PROVISIONAL PROPOSALS FOR THE REFORM OF THE CONSENT REGIME

The rejected options

1.16 We provisionally reject the option of making no change to the consents regime.

1.17 We provisionally reject the option of abolishing *all* consent provisions requiring the consent of either the Law Officers or the DPP.

(paragraph 7.3)

Rationalising the consents regime

1.18 We provisionally propose that the consent regime should be reformed by way of *rationalisation*.

(paragraph 7.4)

The pool of offences

1.19 We provisionally conclude

(1) that a requirement of consent should be used to control prosecutions for those offences

(a) which directly affect freedom of expression;

(b) which may involve the national security or have some international element; or

(c) in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution, and

(2) that, in the case of all other offences which at present have a consent requirement, that requirement should be dispensed with.

(paragraph 7.5)

Examples of offences for which the consent requirement would be either abolished, retained or added if our principles were adopted

1.20 We would welcome the views of our consultees on the examples given in paragraphs 7.6 to 7.15, and, in particular, we would welcome views on whether copyright law is a good example of our provisionally proposed third category of consent offences, namely those liable to concurrent proceedings.

(paragraph 7.16)

The distribution of consent functions

DISTRIBUTION OF FUNCTIONS BETWEEN THE LAW OFFICERS AND THE DPP

1.21 We provisionally propose that those offences requiring consent because they involve the national security or some international element should require the consent of a Law Officer.

(paragraph 7.17)

1.22 As regards those offences which fall into the other categories of offences which, in our provisional view, should attract a consent provision, we provisionally propose that the consent should be that of the DPP.

(paragraph 7.18)

DELEGATION OF THE DPP'S POWER TO CONSENT

1.23 We provisionally propose, therefore, that a DPP consent decision should be made either by

(1) the DPP, or

(2) a senior Crown Prosecutor (namely one of the Chief Crown Prosecutors appointed, following the recent announcement of the Attorney-General, to oversee the work of the proposed new CPS areas).

(paragraph 7.19)

An ancillary matter: transfer of authority

1.24 We provisionally propose

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

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

(a) by way of a general power, or

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

(paragraph 7.31)

APPENDIX A
OFFENCES REQUIRING THE CONSENT OF THE ATTORNEY-GENERAL OR THE DPP

PROVISIONS REQUIRING THE CONSENT OF THE ATTORNEY-GENERAL

(1) **Agricultural Credits Act 1928, s 10(3)** in relation to the s 10(1) offence of printing for publication or publishing any list of agricultural charges or the names of farmers who have created agricultural charges.

(2) **Agriculture and Horticulture Act 1964, s 20(3)** in relation to any offence created in Part III of the Act which makes provisions regarding the grading and transport of fresh horticultural produce. The consent of the Secretary of State will also suffice.

(3) **Agricultural Land (Removal of Surface Soil) Act 1953, s 3** in relation to any offence created by the Act. The Act makes it an offence to remove surface soil from land in certain circumstances. The consent of the DPP will also suffice.

(4) **Auctions (Bidding Agreements) Act 1927, s 1(3)** in relation to s 1 of the Act which renders certain bidding agreements illegal. The consent of the Solicitor-General will also suffice.

(5) **Aviation Security Act 1982, s 8(1)(a)** in relation to offences against the safety of aircraft under ss 1, 2, 3, 5 and 6 of the Act.

(6) **Aviation and Maritime Security Act 1990, s 1(7)** in relation to the offence of endangering safety at aerodromes under that section.

(7) **Biological Weapons Act 1974, s 2(1)(a)** in relation to the offence of developing certain biological agents and toxins and biological weapons under s 1 of the Act.

(8) **Building Act 1984, s 113** in relation to any offence created by or under the Act unless proceedings are taken by a party aggrieved or local authority or body whose function it is to enforce the provision in question.

(9) **Cancer Act 1939, s 4(6)** in relation to the offence of advertising cancer treatments created by s 4(1) of the Act. The consent of the Solicitor-General will also suffice.

(10) **Chemical Weapons Act 1996, s 31(1)(a)** in relation to offences of using chemical weapons or constructing premises or equipment for producing chemical weapons under ss 2 and 11 of that Act. By s 31(2) offences under the Act other than those in these sections can only be instigated by or with the consent of the Secretary of State.

(11) **Children and Young Persons (Harmful Publications) Act 1955, s 2(2)** in relation to the offence of printing, publishing and selling works to which the Act applies under s 2(1) of the Act.

(12) **Contempt of Court Act 1981, ss 7 and 8(3).** Section 7 relates to proceedings for contempt under the strict liability rule. Section 8(3) relates to proceedings for contempt regarding breaches of confidentiality

of jury deliberations. In both cases a court having jurisdiction may of its own motion bring proceedings.

(13) **Counter Inflation Act 1973, s 17(9)** in relation to any offence created under the Act. This subsection is prospectively repealed by the Competition Act 1980, s 33(4), Sch 2 as from 1 Jan 2011, by virtue of the Competition Act 1980 (Commencement No 1) Order 1980 SI 1980/497.

(14) **Criminal Attempts Act 1981, ss 2(1) and 2(2)(a),** the former of which provides that any provision to which the section applies shall have effect with respect to an offence under s 1 of attempting to commit an offence as it has effect with respect to the offence committed, and the latter of which expressly provides that any consent provisions in those offences apply equally to attempts.

(15) **Criminal Justice Act 1987, s 11(13)** in relation to the offence of breach of reporting restrictions under s 11 of the Act.

(16) **Criminal Justice Act 1988, s 135(a)** in relation to offences of torture under s 134 of the Act.

(17) **Criminal Law Act 1977, ss 4(2), 4(3), 9(6)**.The first two sections relate to the offence of conspiracy to commit an offence created by s 1 of the Act. Section 4(1) provides that the DPP's consent is required for summary proceedings. Section 4(2) provides that where the offence in question requires the consent of the Attorney-General then on a charge of conspiracy such consent is also required, if necessary substituting that of the DPP set out in s 4(1). Section 4(3) preserves the situation where the offence requires the consent of the DPP. Section 9(6) provides that proceedings for the offence of trespassing on premises of foreign missions created by s 9 require the consent of the Attorney-General.

(18) **Customs and Excise Management Act 1979, s 145(5)**. Section 145(1) provides that no proceedings for an offence under the Customs and Excise Acts shall be instituted except by order of the Commissioners. Section 145(5) provides that this does not affect the institution of such proceedings by the law officers.

(19) **Explosive Substances Act 1883, s 7(1)** in relation to any offence under the Act.

(20) **Genocide Act 1969, s 1(3)** in relation to the offence of genocide as defined in Article II of the Genocide Convention as set out in the Schedule to the Act.

(21) **Highways Act 1980, s 312** in relation to offences under ss 167 and 177 or byelaws made under them and the provisions of the Act specified in Sch 22. Proceedings may also be taken by a person aggrieved or by the highway authority or council having an interest in the enforcement of the provisions of byelaws in question. Section 312(3) provides that a constable may take proceedings for an offence under ss 171(6)(b) and (c) and s 174 without the consent of the Attorney-General.

(22) **Horticultural Produce Act 1986, s 5(c)** which applies s 20(3) of the Agriculture and Horticulture Act 1964 (see above) to all offences under the Act.

(23) **Income and Corporation Taxes 1988, s 766(4)** in relation to s 765 which makes certain transactions unlawful if they are conducted without the Treasury's consent.

(24) **Judicial Proceedings (Regulation of Reports) Act 1926, s 1(3)** in relation to any offence under the Act.

(25) **Internationally Protected Persons Act 1978, s 2(1)** in relation to proceedings for an offence which would not be an offence apart from s 1 (attacks and threats on protected persons), disregarding the provisions of the Suppression of Terrorism Act 1978 and the Nuclear Material (Offences) Act 1983.

(26) **Law of Property Act 1925, s 183(4)** in relation to the fraudulent concealment of documents and falsification of pedigrees under that section.

(27) **Law Reform (Year and a Day Rule) Act 1996, s 2(1)** in relation to proceedings under s 2(2) against a person for a "fatal offence" where (a) the injury alleged to have caused the death was sustained more than three years before the death occurred or (b) the person has previously been convicted of an offence committed in circumstances alleged to be connected with the death. By s 2(4) no provision that proceedings may be instituted only by or with the consent of the DPP shall apply to any such proceedings.

(28) **Legal Aid Act 1988, s 38(5)** in relation to the offence of improper disclosure of information relating to the seeking or receiving of advice under that section.

(29) **Magistrates' Courts Act 1980, ss 8(6) and 71(4).** Section 8(6) relates to the offence of breaching reporting restrictions on committal proceedings under that section. Section 71(4) relates to the offence of breaching reporting restrictions on domestic proceedings under that section.

(30) **Marine Insurance (Gambling Policies) Act 1909, s 1(3)** in relation to offences under the Act which prohibits gambling on loss by maritime perils.

(31) **Mines and Quarries Act 1954, s 164** in relation to an offence under s 151(1) of the Act which requires the fencing of abandoned or disused mines and quarries.

(32) **National Health Service Act 1977, s 124(6)** unless proceedings are taken by a party aggrieved or the Health authority concerned, in relation to a failure to give notice of birth in accordance with s 124(4) of the Act.

(33) **Newspaper, Printers and Reading Rooms Repeal Act 1869, Sch II, para 1** in relation to the printing, publishing or dispersing of papers which do not bear the printer's name and address or assisting in so doing. The consent of the Solicitor-General will also suffice.

(34) **Official Secrets Act 1911, s 8** in relation to any offence under the Act.

(35) **Official Secrets Act 1920, s 8(2)** which provides that the consent of the Attorney-General under the Act or the 1911 Act is required for offences to be tried summarily.

(36) **Official Secrets Act 1989, s 9** in relation to any offence under the Act except s 4(2) for which the consent of the DPP will suffice.

(37) **Prevention of Corruption Act 1906, s 2(1)** in relation to any offence under the Act. The consent of the Solicitor-General will also suffice.

(38) **Prevention of Oil Pollution Act 1971, s 19(1)(a)** in relation to any offence under the Act. Section 2(2)(b) provides that for an offence under

ss 2 and 18 proceedings may be brought by a harbour authority. Section 2(2)(c) provides that in all cases where the harbour authority may not bring proceedings the consent of the Secretary of State or a person authorised by any special or general direction of the Secretary of State will suffice.

(39) **Prevention of Terrorism (Temporary Provisions) Act 1989, s 19(1)(a)** in relation to offences under ss 2, 3, 8–11, 17, 18 and 18A of the Act.

(40) **Protection of Trading Interests Act 1980, s 3(3)** in relation to a failure to comply with any requirement imposed under s 1(2) or knowing contravention of a direction under s 1(3) or s 2(1). The consent of the Secretary of State will also suffice.

(41) **Public Bodies Corrupt Practices Act 1889, s 4(1)** in relation to any offence under the Act. Section 4(2) provides that the consent of the Solicitor-General will also suffice.

(42) **Public Health Act 1936, s 298** in relation to any offence under the Act unless proceedings are taken by a party aggrieved, a council, or a body whose function is to enforce the provisions or byelaws in question.

(43) **Public Health (Control of Diseases) Act 1984, s 64(1)** in relation to any offence under the Act unless proceedings are taken by a party aggrieved, a local authority, or a body whose function it is to enforce the provision or byelaw in question. Section 64(2) provides that a constable may take proceedings in respect of an offence against a byelaw.

(44) **Public Order Act 1936, s 2(2)** in relation to an offence under that section which places a prohibition on quasi-military organisations.

(45) **Public Order Act 1986, s 27(1)** in relation to an offence under Part III of the Act which makes provision for offences involving racial hatred.

(46) **Registered Homes Act 1984, s 53(1)** in relation to an offence of carrying on a nursing home or mental nursing home without being registered, or failing to affix a certificate of registration in a conspicuous place in the home under ss 23(1) and (6). Section 53(1) further provides that proceedings may be taken by a party aggrieved or the Secretary of State.

(47) **Sexual Offences (Amendment) Act 1976, s 5(5)** in relation to proceedings for an offence of publishing information likely to lead to the identification of the complainant of rape under s 4(5) of the Act.

(48) **Solicitors Act 1974, s 42(2)** in relation to an offence under that section of failing to disclose the fact of being struck off or suspended.

(49) **Suppression of Terrorism Act 1978, s 4(4)** in relation to an offence which, disregarding certain named statutes would not be an offence apart from s 4. (This section is concerned with jusrisdiction,e g, if a person does an act in certain foreign countries which would be an offence under the Act if performed in the United Kingdom, that person shall be guilty as if he or she had done that act here: s 4(1)).

(50) **Taking of Hostages Act 1982, s 2(1)(a)** in relation to any offence under the Act.

(51) **Theatres Act 1968, s 8** in relation to offences of the presentation of obscene performances of plays, and provocation of a breach of the peace by means of a public performance of a play under ss 2 and 6 of the Act,

or for an offence at common law committed by the publication of defamatory matter in the course of a performance of a play.

(52) **War Crimes Act 1991, s 1(3)** in relation to proceedings for murder, manslaughter or culpable homicide under that section.

(53) **Water Act 1945, s 46** in relation to any offence under the Act. The section further provides that proceedings may also be taken by the Secretary of State, a local authority, statutory water undertakers or by a person aggrieved. Most of this Act has been repealed with savings for byelaws.

(54) **Water Industry Act 1991, s 211** in relation to sewerage offences derived from the Public Health Act 1936, s 298 as applied by the Water Act 1973, s 14(2) and as read with the Water Act 1989, s 69, Sch 8, para 1. Subsections (a), (b) and (c) respectively provide that a party aggrieved, a sewerage undertaker, or a body whose function it is to enforce the provisions in question may also take proceedings.

Offences under Local Government Acts

The following offences require the consent of the Attorney-General for the laying of an information for an offence created by or under the Act by a person other than a party aggrieved, a local authority or a police constable.

(55) **Cheshire County Council Act 1980, s 105**.

(56) **County of Kent Act 1981, s 125**. A parish council may also lay an information without the consent of the Attorney-General.

(57) **County of Merseyside Act 1980, s 134(1)**.

(58) **County of South Glamorgan Act 1976, s 67**.

(59) **Greater Manchester Act 1981, s 175**. A parish council may also lay an information without the consent of the Attorney-General.

(60) **Isle of Wight Act 1980, s 60**.

(61) **South Yorkshire Act 1980, s 102**. The executive or a parish council may also lay an information without the consent of the Attorney-General.

(62) **Tyne and Wear Act 1980, s 51**.

(63) **West Midlands County Council Act 1980, s 114**.

(64) **West Yorkshire Act 1980, s 88**.

Offences committed by military personnel

These comprise an exceptional category of offences requiring the Attorney-General's consent.

(65) **Air Force Act 1955, s 132** provides that the Attorney-General must consent to prosecutions for civil offences committed by Air Force personnel outside the United Kingdom.

(66) **Army Act 1955, s 132** provides that the Attorney-General must consent to prosecutions for civil offences committed by Army personnel outside the United Kingdom.

(67) **Naval Discipline Act 1957, s 52** provides that the Attorney-General must consent to prosecutions for civil offences committed by naval personnel outside the United Kingdom.

However, the **Air Force Act 1955, s 204A, Army Act 1955, s 204A and Naval Discipline Act 1957 s 129A** all provide that no enactment, with the exception of the three given above, which requires the consent of the Attorney-General or the DPP to prosecution shall have effect under the above Acts.

PROVISIONS REQUIRING THE CONSENT OF THE DIRECTOR OF PUBLIC PROSECUTIONS[436]

(68) **Agricultural Land (Removal of Surface Soil) Act 1953, s 3** in relation to any offence created by the Act. The Act makes it an offence to remove surface soil from land in certain circumstances. The consent of the Attorney-General also suffices.

(69) **Agricultural (Miscellaneous Provisions) Act 1954, s 9(7)** in relation to offences regarding s 9(5) of wilfully depositing anything unsuitable for animal feeding stuffs in any receptacle provided by the local authority for that purpose, and under s 9(6) concerning offences against byelaws regulating the collection of waste for animal feeding stuffs. Section 9(7) further provides that local authorities in whose area the offence is alleged to have been committed may take proceedings.

(70) **Animals (Scientific Procedures) Act 1986, s 26(1)** in relation to offences under the Act or under s 1 of the Protection of Animals Act 1911 where it is alleged that the offence was committed in respect of an animal at a designated establishment. By s 26(3) time limits for summary offences may be extended where, in the opinion of the DPP, this is justified.

(71) **Antarctic Act 1994, s 28(1)(b)** in relation to proceedings for any offence under the Act. By s 28(1)(a) the Secretary of State or a person authorised by him may also institute proceedings.

(72) **Atomic Energy Act 1946, s 14(4)** in relation to proceedings for an offence of disclosure of information relating to a plant to any other person except an authorised person without the consent of the Minister under s 11 of the Act.

(73) **Bail Act 1976, s 9(5)** in relation to the offence of agreeing to indemnify sureties in criminal proceedings under s 9(1) of the Act.

(74) **Banking Act 1987, s 96(5)(a)** in relation to proceedings for any offence under the Act. Proceedings may also be brought by or on behalf of, the bank.

(75) **Broadcasting Act 1990, Sch 15, paras 4(1) and (2)** in relation to an offence under s 2 of the Obscene Publications Act 1959 of publishing an obscene article where that took place in the course of inclusion in a programme in a programme service or was to take place in the course of the inclusion of a programme in a programme service.

(76) **Building Societies Act 1986** as amended by the Bankers Act 1987, s 96(5) and (6). The DPP's consent is not required if proceedings are brought by the Building Societies Commission.

[436] In addition to these consent provisions, s 218 of the Insolvency Act 1986 specifies that the DPP shall be the "prosecuting authority" for offences committed in relation to a company which is being wound up.

(77) **Cereals Marketing Act 1965, s 22(1)(b)** in relation to proceedings for an offence under the Act. Section 22(1)(a) provides that the Home-Grown Cereals Authority may also bring proceedings.

(78) **Charities Act 1993, s 94(1)** in relation to an offence under ss 5, 11, 18(14), 49 or 73(1).

(79) **Child Abduction Act 1984, ss 4(2) and 5**. Section 4(2) relates to an offence of abduction of a child by a person connected with the child under s 1 of the Act. Section 5 relates to an offence of kidnapping a child under sixteen by a person connected with the child within the meaning of s 1 of the Act.

(80) **Civil Aviation Act 1982, ss 44(11)(a), 45(7)(a), 50(6)(a), 83(3)(a) and 92(2)(a).** Section 44(11)(a) relates to offences under that section which deals with the power of the Secretary of State to make orders to obtain rights over land. The consent of the Secretary of State will also suffice. Section 44(11) further provides that proceedings may be instituted by the Civil Aviation Authority (CAA) if they are the authority in whose favour the order in question was made. Section 45(7)(a) relates to offences under that section which deals with the power of the Secretary of State to restrict the use of land for the purpose of securing safety at aerodromes. The consent of the Secretary of State will also suffice. Section 45(7) further provides that the CAA may institute proceedings if the order in question was made in respect of an aerodrome owned or managed by them. Section 50(6)(a) relates to offences under that section which deals with the power of the Secretary of State to authorise the entry of the Civil Aviation Authority onto land for surveying purposes. The consent of the Secretary of State will also suffice. Section 50(6) further provides that the CAA may institute proceedings in a case falling within s 50(6)(1)(a)-(c) and that in a case falling within s 50(6)(1)(d) the person in respect of whom the order in question has been, or is to be, made, may institute proceedings. Section 83(3)(a) relates to offences under that section regarding the recording and registration of births and deaths on aircraft. Section 92(2)(a) relates to proceedings for any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft while in flight elsewhere than in or over the United Kingdom, subject to any provision to the contrary passed after 14 July 1967.

(81) **Coal Industry Nationalisation Act 1946, s 59(1).**[437]

(82) **Companies Act 1985, ss 732(1) and (2)(a) and (b).** Section 732(2)(a) relates to offences under ss 210, 324 and 329 of the Act. The consent of the Secretary of State will also suffice. Section 732(2)(b) relates to offences under ss 447-451 for which the consent of the Secretary of State or the Industrial Assurance Commissioner will also suffice. Section 732(2)(c) provides that for an offence under s 455 only the Secretary of State can grant consent.

(83) **Consumer Protection Act 1987, s 11(3)(c)** allows the Secretary of State to require the consent of the DPP for proceedings brought for any safety regulations made under the Act. The consent of Secretary of State will suffice.

[437] Prospectively repealed by s 67(8) and Sch 11 of the Coal Industry Act 1994, which is not yet in force.

(84) **Criminal Attempts Act 1981, ss 2(1) and (2)(a)** the former of which provides that any provision to which the section applies shall have effect with respect to an offence under s 1 of attempting to commit an offence as it has effect with respect to the offence committed, and the latter of which expressly provides that any consent provisions in those offences apply equally to attempts.

(85) **Criminal Justice Act 1988, s 160(4)** in relation to an offence under that section of possession of an indecent photograph of a child.

(86) **Criminal Justice Act 1993, s 61(2)(b)** in relation to offences of insider dealing under Part V of the Act. By s 61(2)(a) proceedings may also be brought by or with the consent of the Secretary of State.

(87) **Criminal Justice (International Co-operation) Act 1990, s 21(2)(a)** in relation to proceedings under Part II or Sch 3 of the Act. The consent of the Commissioners of Customs and Excise will also suffice.

(88) **Criminal Law Act 1967, ss 4(4) and 5(3).** Section 4(4) relates to an offence under s 4(1) of doing any act with intent to impede the arrest or prosecution of any person knowing or believing that person to have committed an arrestable offence. Section 5(3) relates to an offence under that section of concealing offences or giving false information.

(89) **Criminal Law Act 1977, ss 4(1) and 4(3).** Section 4(1) relates to proceeding under s 1 of the Act for conspiracy to commit any summary offence and s 4(3) relates to proceedings under s 1 for conspiracy to commit any non-summary offence which requires the consent of the DPP.

(90) **Data Protection Act 1984**, s 19(1)(a) in relation to proceedings for any offence under the Act. The Data Protection Registrar may also institute proceedings.

(91) **Deep Sea Mining (Temporary Provisions) Act 1981, s 14(2)(a)** in relation to any proceedings under the Act or any regulations made thereunder. Section 14(2)(c) provides that the consent of the Secretary of State or a person authorised by him on that behalf will also suffice.

(92) **Detergents (Composition) Regulations 1978 SI No 564, regulation 10(3)** (made under section 2 of the European Communities Act 1972). The DPP's consent is not required if proceedings are brought by or with the consent of the Secretary of State.

(93) **Emergency Laws (Re-enactments and Repeals) Act 1964, s 14(1)** in relation to proceedings for an offence against an order or direction under ss 1 or 2 of the Act. The consent of the Board of Trade or the Treasury will also suffice.

(94) **Energy Act 1976, Sch 2, paras 6(1) and 6(2).** Para 6(1) relates to proceedings for an offence of contravening or failing to comply with a direction of the Secretary of State under s 6 of the Act. The consent of the Secretary of State also suffices. Para 6(2) relates to an offence of contravening or failing to comply with price controls. The consent of the Secretary of State will suffice. Proceedings may also be taken by or on behalf of a local weights and measures authority.

(95) **Environmental Protection Act 1990, s 118(10)** in relation to various offences under that section. The consent of the Secretary of State will also suffice.

(96) **Fair Trading Act 1973, s 62(4)** in relation to an offence of being knowingly concerned in an unlawful newspaper merger or breach of a condition attached to such by a Secretary of State under that section.

(97) **Finance Act 1965, s 92(6)** in relation to an offence under that section which deals with grants towards duty charged on bus fuel. The consent of the Minister of Transport also suffices.

(98) **Financial Services Act 1986, ss 201(1)(a) and 201(3)(a).** Section 210(1)(a) relates to all offences under the Act except for ss 133 and 185. The consent of the Secretary of State also suffices. Section 201(2)(a) provides that for an offence under s 133 the consent of the Secretary of State or the Friendly Societies Commission will also suffice. Section 201(3)(a) provides that for an offence under s 185 the consent of the Treasury will also suffice.

(99) **Firearms Act 1968, s 51(4)** which extends the time limits for the prosecution of any summary offence under the Act other than an offence under s 22(3) or an offence relating specifically to air weapons.

(100) **Fraudulent Mediums Act 1951, s 1(4)** in relation to an offence under that section of purporting to act as a medium with intent to deceive or using any fraudulent device.

(101) **Gas Act 1965, s 21(2)** which applies s 43(2) of the Gas Act 1986 (see below) to Part II of the Act which deals with the underground storage of gas by gas authorities.

(102) **Gas Act 1986, s 43(2)** in relation to an offence under that section of making a false statement. The consent of the Secretary of State will also suffice.

(103) **Geneva Conventions Act 1957, ss 1(3) and 6(7)**. Section 1(3) relates to grave breaches of conventions set out in the Schedules of the Act and s 6(7) concerning the unauthorised use of the Red Cross and other emblems.

(104) **Health and Safety at Work Etc Act 1974, s 38** in relation to proceedings for an offence under Part I of the Act any relevant statutory provision in the Act or any health and safety regulations made thereunder. The consent of an inspector appointed by the Health and Safety Executive or of the Environment Agency will also suffice.

(105) **Housing Associations Act 1985, ss 27(4) and 30(6).** Section 27(4) relates to an offence under that section with deals with responsibility for securing compliance for accounting requirements. Section 30(6) relates to an offence of contravention of an order not to part with association money or securities without the approval of the Housing Corporation under s 30(1)(c) of the Act. In both cases the consent of the Corporation also suffices.

(106) **Human Fertilisation and Embryology Act 1990, s 42(a)** in relation to any proceedings for an offence under the Act.

(107) **Human Organ Transplants Act 1989, s 5** in relation to offences under ss 1 and 2 of the Act of commercial dealing in organs and breaching restrictions on transplants between persons not genetically related.

(108) **Incitement to Disaffection Act 1934, s 3(2)** in relation to any offence under the Act.

(109) **Insurance Companies Act 1982, ss 93(a) and 94(2).** Section 93(a) relates to any offence under the Act. Section 94(2) extends the time limit for bringing summary proceedings under the Act. In both cases the consent of the Secretary of State or the Industrial Assurance Commission suffices.

(110) **Interception of Communications Act 1985, s 1(4)(a)** in relation to the offence of intentionally intercepting a communication under that section.

(111) **Land Commission Act 1967, s 82(2)(a)** in relation to offences under ss 80, 81(1),(2) and (4) of the Act of failing to comply with notices issued by the Commission under s 43 without reasonable excuse.

(112) **Local Government Act 1972, s 94(3)** in relation to offences under that section of the Act regarding councillors who fail to disclose pecuniary interests and take part and vote on matters in which they have such interests.

(113) **Local Government and Housing Act 1989, s 19(3)** in relation to an offence under s 19(2) of failure by a member of a local authority to set out his or her pecuniary interests or the giving of misleading information.

(114) **Lotteries and Amusements Act 1976, s 2(3)** in relation to any matter published in a newspaper which would constitute the offence of calculated inducement to persons to participate in a lottery under s 2(1)(c)(iii) of the Act.

(115) **Marine, &c., Broadcasting (Offences) Act 1967, s 6(5)** in relation to any offence under the Act. The consent of the Secretary of State also suffices.

(116) **Mental Health Act 1959, s 128(4)** in relation to offences under that section of unlawful sexual intercourse with patients.

(117) **Mental Health Act 1983, s 127(4)** in relation to an offence of ill-treatment of patients at hospitals or mental nursing homes under that section.

(118) **Merchant Shipping (Liner Conferences) Act 1982, s 10(3)** in relation to an offence under s 10(2) of unlawful disclosure of information obtained by the Secretary of State for the purposes of the Code.

(119) **Mines and Quarries (Tips) Act 1969, s 27(1)** in relation to proceedings under Part II of the Act which makes provisions for the prevention of danger to the public from disused tips. The local authority may also bring proceedings.

(120) **National Health Service Act 1977, Sch 10, para 1(7)** in relation to an offence under that paragraph which makes additional provisions as to the prohibition of sale of medical practices.

(121) **Nuclear Installations Act 1965, s 25(3)** in relation to offences under ss 2(2) or 19(5) of the Act. The section further provides that the Minister may bring proceedings.

(122) **Obscene Publications Act 1959, s 2(3A)** in relation to proceedings for the offence of publication of obscene matter under that section.

(123) **Official Secrets Act 1989, s 9** in relation to an offence under s 4(2).

(124) **Oil and Gas (Enterprise) Act 1982, s 27(3)(b)** in relation to proceedings under s 27(1) of the Act. Section 27(3)(a) provides that the

Secretary of State or a person authorised by the Secretary of State may institute proceedings in certain cases.

(125) **Petroleum Act 1987, s 13(1)(b)** in relation to offences under ss 2, 5, 9, or 10 of the Act or under regulations made under s 11. By s 13(1)(a) the consent of the Secretary of State will also suffice.

(126) **Petroleum and Submarine Pipe-Lines Act 1975, s 29(2)(a)** in relation to an offence under Part III of the Act which makes provisions for the construction and use of pipe-lines. Section 29(2)(c) further provides that the consent of the Secretary of State or a person authorised by the Secretary of State will also suffice.

(127) **Prevention of Oil Pollution Act 1971, s 19(7)** in relation to offences of discharge of certain oils from pipe-lines or discharge as a result of exploration in a designated area under s 3 of the Act.

(128) **Prison Security Act 1992, s 1(5)** in relation to an offence of prison mutiny under s 1(1).

(129) **Protection of Children Act 1978, s 1(3)** in relation to proceedings for any offence under the Act.

(130) **Protection of Military Remains Act 1986, s 3(3)** in relation to the offence under s 2(2) where a prohibited excavation or operation is carried out in international waters.

(131) **Public Order Act 1986, s 7(1)** in relation to the offence of riot or incitement to riot under s 1 of the Act.

(132) **Public Passenger Vehicles Act 1981, s 69(1)** in relation to proceedings under Parts II or III of the Act. Proceedings may also be instituted by or on behalf of a traffic commissioner, a chief officer of police or the council of a county or district by or a person authorised in that behalf. Section 69(2) provides that s 69(1) shall not apply to proceedings for the breach of regulations having effect by virtue of ss 25 or 26 of the Act. Section 69(3) provides that s 69(1) shall not prevent the Secretary of State instituting proceedings under s 27 of the Act.

(133) **Radioactive Substances Act 1993, ss 38(1)(c)** in relation to proceedings for any offence under the Act. Section 38(a) and (b) further provide that the consent of the Secretary of State or the chief inspector will also suffice.

(134) **Railways Act 1993, ss 118(8), 119(10), 120(5), 121(6), 146(2).** Section 118(8) relates to an offence under that section which deals with the control of railways in time of hostilities, severe international tension or great national emergency. Section 119(10) relates to an offence failing to do anything required by an instruction of the Secretary of State regarding security under s 119(9). Section 120(5) relates to an offence under s 120(4) of failing to do anything required by an enforcement notice issued by the Secretary of State regarding security. Section 121(6) relates to an offence under s 121(4) of that section. Section 146(2) relates to an offence of making false statements under that section. All further provide that the consent of the Secretary of State also suffices.

(135) **Rehabilitation of Offenders Act 1974, s 9(8)** in relation to the offence of unauthorised disclosure of spent convictions under s 9(2) of the Act.

(136) **Reservoirs Act 1975, s 22(6)** in relation to proceedings for an offence under that section. Proceedings may be instituted by any local authority, London borough council or district council in whose area the reservoir in

question or any part of it is situated, but otherwise proceedings may be instituted by or with the consent of the DPP or by the Secretary of State.

(137) **Restrictive Trade Practices Act 1976, s 39(1)(a)** in relation to an offence under any preceding provisions of the Act. The consent of the Director General of Fair Trading also suffices.

(138) **Sexual Offences Act 1956, s 37(2) and Sch 2, Pt 2, paras 14 and15** which relates to offences of incest or attempted incest under ss 10 and 11 of the Act.

(139) **Sexual Offences Act 1967, s 8** in relation to proceedings against any man for offences of buggery or gross indecency, or aiding and abetting such offences where either of the men was under the age of twenty-one at the time of the offence. (Section 48 of the Criminal Justice Act 1972 provides that s 8 of the 1967 Act has no application to proceedings under the Indecency with Children Act 1969).

(140) **Solicitors Act 1974, s 44(4)** in relation to proceedings under s 44(1) against a person who has had an order made against him not to be employed or remunerated by a solicitor for the offence of seeking or accepting any employment or remuneration from a solicitor without previously informing the solicitor of the order. The DPP's consent is not required if proceedings are brought by the Law Society or a person acting on its behalf.

(141) **Suicide Act 1961, s 2(4)** in relation to proceedings for an offence of complicity in another's suicide under that section.

(142) **Surrogacy Arrangements Act 1985, s 4(2)** in relation to proceedings for an offence under the Act.

(143) **Theft Act 1968, s 30(4)** in relation to proceedings against a person for any offence of stealing or doing unlawful damage to property which at the time of the offence belongs to that person's spouse.

(144) **Trading with the Enemy Act 1939, s 1(4)** in relation to a prosecution for an offence of trading with the enemy.

(145) **Transport and Works Act 1992, s 58** in relation to offences under the various safety provisions of Part II of the Act, other than ss 41 or 43. The consent of the Secretary of State also suffices.

(146) **Unsolicited Goods and Services Act 1971, s 4(3)** in relation to an offence under that section of sending or causing to be sent any book, magazine or leaflet which is known or ought reasonably be known to be unsolicited and which describes or illustrates human sexual techniques.

(147) **Water Industry Act 1991, s 207(2)** in relation to an offence under s 207(1) of furnishing false information in making any application under or for the purposes of any provision of the Act. The consent of the Secretary of State or the Minister for Agriculture, Fisheries and Food will also suffice.

(148) **Weights and Measures Act 1985, s 83(2)** in relation to an offence under s 57(2) involving the failure by packers and importers to furnish particulars of marks when required to do so by notice from the Secretary of State. The consent of the National Metrological Co-ordinating Unit will also suffice.

(149) **Wildlife and Countryside Act 1981, s 28(10)** in relation to an offence under s 28(7) regarding the contravention of a condition attached to a

notice that land is of special interest by reason of its flora, fauna or geological or physiological features. Proceedings may also be brought by the Nature Conservancy Council.

Offences under Local Government Acts

The following offences require the consent of the Director of Public Prosecutions for the laying of an information for an offence created by or under the Act by a person other than a party aggrieved, a local authority or a police constable.

(150) **Cornwall County Council Act 1984, s 44**. A parish council may also lay an information without the consent of the DPP.

(151) **County of Lancashire Act 1984, s 134**.

(152) **Derbyshire Act 1981, s 59**.

(153) **Staffordshire Act 1983, s 68**.

APPENDIX B
EXTRACTS FROM RELEVANT LEGISLATION

PROSECUTION OF OFFENCES ACT 1985

1 The Crown Prosecution Service

(1) There shall be a prosecuting service for England and Wales (to be known as the "Crown Prosecution Service"), consisting of –

(a) the Director of Public Prosecutions, who shall be head of the Service;

(b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and

(c) the other staff appointed by the Director under this section.

(2) The Director shall appoint such staff for the Service as, with the approval of the Treasury as to numbers, remuneration and other terms and conditions of service, he considers necessary for the discharge of his functions.

(3) The Director may designate any member of the Service who has a general qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990) for the purposes of this subsection, and any person so designated shall be known as a Crown Prosecutor.

(4) The Director shall divide England and Wales into areas and, for each of those areas, designate a Crown Prosecutor for the purposes of this subsection and any person so designated shall be known as a Chief Crown Prosecutor.

(5) The Director may, from time to time, vary the division of England and Wales made for the purposes of subsection (4) above.

(6) Without prejudice to any functions which may have been assigned to him in his capacity as a member of the Service, every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director.

(7) Where any enactment (whenever passed) –

(a) prevents any step from being taken without the consent of the Director or without his consent or the consent of another; or

(b) requires any step to be taken by or in relation to the Director;

any consent given by or, as the case may be, step taken by or in relation to, a Crown Prosecutor shall be treated, for the purposes of that enactment, as given by or, as the case may be, taken by or in relation to the Director.

2 The Director of Public Prosecutions

(1) The Director of Public Prosecutions shall be appointed by the Attorney General.

(2) The Director must be a person who has a ten year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990.

(3) There shall be paid to the Director such remuneration as the Attorney General may, with the approval of the Treasury, determine.

3 Functions of the Director

(1) The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.

(2) It shall be the duty of the Director, subject to any provisions contained in the Criminal Justice Act 1987 –

(a) to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person);

(b) to institute and have the conduct of criminal proceedings in any case where it appears to him that –

(i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or

(ii) it is otherwise appropriate for proceedings to be instituted by him;

(c) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person);

(d) to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles);

(e) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences;

(f) to appear for the prosecution, when directed by the court to do so, on any appeal under –

(i) section 1 of the Administration of Justice Act 1960 (appeal from the High Court in criminal cases);

(ii) Part I or Part II of the Criminal Appeal Act 1968 (appeals from the Crown Court to the criminal division of the Court of Appeal and thence to the House of Lords); or

(iii) section 108 of the Magistrates' Courts Act 1980 (right of appeal to Crown Court) as it applies, by virtue of subsection (5) of section 12 of the Contempt of Court Act 1981, to orders made under section 12 (contempt of magistrates' courts); and

(g) to discharge such other functions as may from time to time be assigned to him by the Attorney General in pursuance of this paragraph.

(3) In this section –

"the court" means –

(a) in the case of an appeal to or from the criminal division of the Court of Appeal, that division;

(b) in the case of an appeal from a Divisional Court of the Queen's Bench Division, the Divisional Court; and

(c) in the case of an appeal against an order of a magistrates' court, the Crown Court;

"police force" means any police force maintained by a police authority under the Police Act 1996 and any other body of constables for the time being specified by order made by the Secretary of State for the purposes of this section; and

"specified proceedings" means proceedings which fall within any category for the time being specified by order made by the Attorney General for the purposes of this section.

(4) The power to make orders under subsection (3) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

6 Prosecutions instituted and conducted otherwise than by service

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

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

7 Delivery of recognisances etc to Director

(1) Where the Director or any Crown Prosecutor gives notice to any justice of the peace that he has instituted, or is conducting, any criminal proceedings, the justice shall –

(a) at the prescribed time and in the prescribed manner; or

(b) in a particular case, at the time and in the manner directed by the Attorney General;

send him every recognisance, information, certificate, deposition, document and thing connected with those proceedings which the justice is required by law to deliver to the appropriate officer of the Crown Court.

(2) The Attorney General may make regulations for the purpose of supplementing this section; and in subsection (1) above "prescribed" means prescribed by the regulations.

(3) The Director or, as the case may be, Crown Prosecutor shall –

(a) subject to the regulations, cause anything which is sent to him under subsection (1) above to be delivered to the appropriate officer of the Crown Court; and

(b) be under the same obligation (on the same payment) to deliver to an applicant copies of anything so sent as that officer.

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

(a) a prosecution for an offence before the magistrates' court to which he is clerk is withdrawn or is not proceeded with within a reasonable time;

(b) the Director does not have the conduct of the proceedings; and

(c) there is some ground for suspecting that there is no satisfactory reason for the withdrawal or failure to proceed.

10 Guidelines for Crown Prosecutors

(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them –

(a) in determining, in any case –

(i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or

(ii) what charges should be preferred; and

(b) in considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case.

(2) The Director may from time to time make alterations in the Code.

(3) The provisions of the Code shall be set out in the Director's report under section 9 of this Act for the year in which the Code is issued; and any alteration in the Code shall be set out in his report under that section for the year in which the alteration is made.

17 Prosecution costs

(1) Subject to subsection (2) below, the court may –

(a) in any proceedings in respect of an indictable offence; and

(b) in any proceedings before a Divisional Court of the Queen's Bench Division or the House of Lords in respect of a summary offence;

order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

(2) No order under this section may be made in favour of –

(a) a public authority or;

(b) a person acting –

(i) on behalf of a public authority; or

(ii) in his capacity as an official appointed by such an authority.

(3) Where a court makes an order under this section but is of the opinion that there are circumstances which make it inappropriate that the prosecution should recover the full amount mentioned in subsection (1) above, the court shall –

(a) assess what amount would, in its opinion, be just and reasonable; and

(b) specify that amount in the order.

(4) Subject to subsection (3) above, the amount to be paid out of central funds in pursuance of an order under this section shall –

(a) be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the prosecutor agrees the amount; and

(b) in any other case, be determined in accordance with regulations made by the Lord Chancellor for the purposes of this section.

(5) Where the conduct of proceedings to which subsection (1) above applies is taken over by the Crown Prosecution Service, that subsection shall have effect as if it referred to the prosecutor who had the conduct of the proceedings before the intervention of the Service and to expenses incurred by him up to the time of intervention.

(6) In this section "public authority" means –

(a) a police force within the meaning of section 3 of this Act;

(b) the Crown Prosecution Service or any other government department;

(c) a local authority or other authority or body constituted for purposes of –

(i) the public service or of local government; or

(ii) carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or

(d) any other authority or body whose members are appointed by Her Majesty or by any Minister of the Crown or government department or whose revenue consist wholly or mainly of money provided by Parliament.

18 Award of costs against accused

(1) Where –

(a) any person is convicted of an offence before a magistrates' court;

(b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or

(c) any person is convicted of an offence before the Crown Court;

the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.

(2) Where the Court of Appeal dismisses –

(a) an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968; or

(b) an application by the accused for leave to appeal to the House of Lords under Part II of that Act; or

(c) an appeal or application for leave to appeal under section 9(11) of the Criminal Justice Act 1987;

it may make such order as to the costs to be paid by the accused, to such person as may be named in the order, as it considers just and reasonable.

(3) The amount to be paid by the accused in pursuance of an order under this section shall be specified in the order.

(4) Where any person is convicted of an offence before a magistrates' court and –

(a) under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation; and

(b) the sum so ordered to be paid does not exceed £5;

the court shall not order the accused to pay any costs under this section unless in the particular circumstances of the case it considers it right to do so.

(5) Where any person under the age of eighteen is convicted of an offence before a magistrates' court, the amount of any costs ordered to be paid by the accused under this section shall not exceed the amount of any fine imposed on him.

(6) Costs ordered to be paid under subsection (2) above may include the reasonable cost of any transcript of a record of proceedings made in accordance with rules of court made for the purposes of section 32 of the Act of 1968.[438]

23 Discontinuance of proceedings in magistrates' courts

(1) Where the Director of Public Prosecutions has the conduct of proceedings for an offence, this section applies in relation to the preliminary stages of those proceedings.

(2) In this section, "preliminary stage" in relation to proceedings for an offence does not include –

(a) in the case of a summary offence, any stage of the proceedings after the court has begun to hear evidence for the prosecution at the trial;

(b) in the case of an indictable offence, any stage of the proceedings after –

(i) the accused has been committed for trial; or

(ii) the court has begun to hear evidence for the prosecution at a summary trial of the offence.

(3) Where, at any time during the preliminary stages of the proceedings, the Director gives notice under this section to the clerk of the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice but may be revived by notice given by the accused under subsection (7) below.

(4) Where, in the case of a person charged with an offence after being taken into custody without a warrant, the Director gives him notice, at a time when no magistrates' court has been informed of the charge, that the proceedings against him are discontinued, they shall be discontinued with effect from the giving of that notice.

(5) The Director shall, in any notice given under subsection (3) above, give reasons for not wanting the proceedings to continue.

(6) On giving any notice under subsection (3) above the Director shall inform the accused of the notice and of the accused's right to require the proceedings to be continued; but the Director shall not be obliged to give the accused any indication of his reasons for not wanting the proceedings to continue.

[438] Criminal Appeal Act 1968.

(7) Where the Director has given notice under subsection (3) above, the accused shall, if he wants the proceedings to continue, give notice to that effect to the clerk of the court within the prescribed period; and where notice is so given the proceedings shall continue as if no notice had been given by the Director under subsection (3) above.

(8) Where the clerk of the court has been so notified by the accused he shall inform the Director.

(9) The discontinuance of any proceedings by virtue of this section shall not prevent the institution of fresh proceedings in respect of the same offence.

(10) In this section "prescribed" means prescribed by rules made under section 144 of the Magistrates' Courts Act 1980.

25 Consents to prosecutions etc

(1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except –

(a) with the consent (however expressed) of a Law Officer of the Crown or the Director; or

(b) where the proceedings are instituted or carried on by or on behalf of a Law Officer of the Crown or the Director;

and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).

(2) An enactment to which this section applies –

(a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; and

(b) shall be subject to any enactment concerning the apprehension or detention of children or young persons.

(3) In this section "enactment" includes any provision having effect under or by virtue of any Act; and this section applies to enactments whenever passed or made.

26 Consents to be admissible in evidence

Any document purporting to be the consent of a Law Officer of the Crown, the Director or a Crown Prosecutor for, or to –

(a) the institution of any criminal proceedings; or

(b) the institution of criminal proceedings in any particular form;

and to be signed by a Law Officer of the Crown, the Director or, as the case may be, a Crown Prosecutor shall be admissible as prima facie evidence without further proof.

COURTS AND LEGAL SERVICES ACT 1990

27 Rights of audience

(1) The question whether a person has a right of audience before a court, or in relation to any proceedings, shall be determined solely in accordance with the provisions of this Part.

(2) A person shall have a right of audience before a court in relation to any proceedings only in the following cases –

(a) where –

(i) he has a right of audience before that court in relation to those proceedings granted by the appropriate authorised body; and

(ii) that body's qualification regulations and rules of conduct have been approved for the purposes of this section, in relation to the granting of that right; …

(c) where paragraph (a) does not apply but he has a right of audience granted by that court in relation to those proceedings …

LAW OFFICERS ACT 1944

1 Attorney General and Solicitor General

(1) Any functions authorised or required, by any enactment to which this subsection applies, to be discharged by the Attorney General may be discharged by the Solicitor General, if –

(a) the office of Attorney General is vacant; or

(b) the Attorney General is unable to act owing to absence or illness; or

(c) the Attorney General authorises the Solicitor General to act in any particular case.

The enactments to which this subsection applies are –

(i) any enactment passed before the commencement of this Act which makes no provision for enabling the Solicitor General to discharge the functions of the Attorney General thereunder, or which makes provision enabling him to discharge them only in certain circumstances defined by the enactment; and

(ii) any enactment passed after the commencement of this Act which does not expressly provide that this section shall not apply thereto.

(2) During any period when the office of Attorney General is vacant, any certificate, petition, direction, notice, proceeding or other document, matter or thing whatsoever authorised or required, by any enactment to which this subsection applies, to be given, delivered, served, taken or done to, on or against the Attorney General, may be given, delivered, served, taken or done to, on or against the Solicitor General.

The enactments to which this subsection applies are –

(a) any enactment passed before the commencement of this Act; and

(b) any enactment passed after the commencement of this Act which does not expressly provide that this subsection shall not apply thereto.

LAW OFFICERS ACT 1997

1 The Attorney General and the Solicitor General

(1) Any function of the Attorney General may be exercised by the Solicitor General.

(2) Anything done by or in relation to the Solicitor General in exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General.

(3) The validity of anything done in relation to the Attorney General, or done by or in relation to the Solicitor General, is not affected by a vacancy in the office of Attorney General.

(4) Nothing in this section –

(a) prevents anything being done by or in relation to the Attorney General in the exercise of or in connection with any function of his; or

(b) requires anything done by the Solicitor General to be done in the name of the Solicitor General instead of the name of the Attorney General.

(5) It is immaterial for the purposes of this section whether a function of the Attorney General arises under an enactment or otherwise.

MAGISTRATES' COURTS ACT 1980

1 Issue of summons to accused or warrant for his arrest

(1) Upon an information being laid before a justice of the peace for an area to which this section applies that any person has, or is suspected of having, committed an offence, the justice may, in any of the events mentioned in subsection (2) below, but subject to subsections (3) to (5) below, –

(a) issue a summons directed to that person requiring him to appear before a magistrates' court for the area to answer to the information, or

(b) issue a warrant to arrest that person and bring him before a magistrates' court for the area or such magistrates' court as is provided in subsection (5) below.

(2) A justice of the peace for an area to which this section applies may issue a summons or warrant under this section –

(a) if the offence was committed or is suspected to have been committed within the area, or

(b) if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being proceeded against, within the area, or

(c) if the person charged resides or is, or is believed to reside or be, within the area, or

(d) if under any enactment a magistrates' court for the area has jurisdiction to try the offence, or

(e) if the offence was committed outside England and Wales and, where it is an offence exclusively punishable on summary

conviction, if a magistrates' court for the area would have jurisdiction to try the offence if the offender were before it.

(3) No warrant shall be issued under this section unless the information is in writing and substantiated on oath.

(4) No warrant shall be issued under this section for the arrest of any person who has attained the age of eighteen years unless –

(a) the offence to which the warrant relates is an indictable offence or is punishable with imprisonment, or

(b) the person's address is not sufficiently established for a summons to be served on him.

(5) Where the offence charged is not an indictable offence –

(a) no summons shall be issued by virtue only of paragraph (c) of subsection (2) above, and

(b) any warrant issued by virtue only of that paragraph shall require the person charged to be brought before a magistrates' court having jurisdiction to try the offence.

(6) Where the offence charged is an indictable offence, a warrant under this section may be issued at any time notwithstanding that a summons has previously been issued.

(7) A justice of the peace may issue a summons or warrant under this section upon an information being laid before him notwithstanding any enactment requiring the information to be laid before two or more justices.

(8) The areas to which this section applies are commission areas in England or preserved county in Wales.

SUPREME COURT ACT 1981

42 Restriction of vexatious legal proceedings

(1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground –

(a) instituted vexatious civil proceedings, whether in the High Court or any inferior court, and whether against the same person or against different persons; or

(b) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another, or

(c) instituted vexatious prosecutions (whether against the same person or different persons),

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.

(1A) In this section –

"civil proceedings order" means an order that –

(a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;

(b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and

(c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;

"criminal proceedings order" means an order that –

(a) no information shall be laid before a justice of the peace by the person against whom the order is made without leave of the High Court; and

(b) no application for leave to prefer a bill of indictment shall be made by him without the leave of the High Court; and

"all proceedings order" means an order which has the combined effect of the two other orders.

(2) An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.

(3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application.

(3A) Leave for the laying of an information or for an application for leave to prefer a bill of indictment by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the institution of the prosecution is not an abuse of the criminal process and that there are reasonable grounds for the institution of the prosecution by the applicant.

(4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section.

(5) A copy of any order made under subsection (1) shall be published in the London Gazette.

APPENDIX C
CODE FOR CROWN PROSECUTORS

A new edition of the Code was issued in June 1994. It is set out below, verbatim and in its entirety.

1. INTRODUCTION

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

1.2 The Code contains information that is important to police officers, to others who work in the criminal justice system and to the general public. It helps the Crown Prosecution Service to play its part in making sure that justice is done.

2. GENERAL PRINCIPLES

2.1 Each case is unique and must be considered on its own, but there are general principles that apply in all cases.

2.2 The duty of the Crown Prosecution Service is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court.

2.3 Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must also not be affected by improper or undue pressure from any source.

3. REVIEW

3.1 Proceedings are usually started by the police. Sometimes they may consult the Crown Prosecution Service before charging a defendant. Each case that the police send to the Crown Prosecution Service is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in this Code. Crown Prosecutors may decide to continue with the original charges, to change the charges or sometimes to stop the proceedings.

3.2 Review, however, is a continuing process so that Crown Prosecutors can take into account any change in circumstances. Wherever possible, they talk to the police first if they are thinking about changing the charges or stopping the proceedings. This gives the police the chance to provide more information that may affect the decision. The Crown Prosecution Service and the police work closely together to reach the right decision, but the final responsibility for the decision rests with the Crown Prosecution Service.

4. THE CODE TESTS

4.1 There are two stages in the decision to prosecute. The first stage is **the evidential** test. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does pass the evidential test, Crown Prosecutors must decide if a prosecution is needed in the public interest.

4.2 This second stage is **the public interest test**. The Crown Prosecution Service will only start or continue a prosecution when the case has passed both tests. The

evidential test is explained in section 5 and the public interest test is explained in section 6.

5. THE EVIDENTIAL TEST

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

5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

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

Can the evidence be used in court?

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

Is the evidence reliable?

(b) Is it likely that a confession is unreliable, for example, because of the defendant's age, intelligence or lack of understanding?

(c) Is the witness's background likely to weaken the prosecution case? For example, does the witness have any dubious motive that may affect his or her attitude to the case or a relevant previous conviction?

(d) If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?

5.4 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

6. THE PUBLIC INTEREST TEST

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

6.2 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.

6.3 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

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

Some common public interest factors in favour of prosecution

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

(a) a conviction is likely to result in a significant sentence;

(b) a weapon was used or violence was threatened during the commission of the offence;

(c) the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);

(d) the defendant was in a position of authority or trust;

(e) the evidence shows that the defendant was a ringleader or an organiser of the offence;

(f) there is evidence that the offence was premeditated;

(g) there is evidence that the offence was carried out by a group;

(h) the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;

(i) the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference;

(j) there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;

(k) the defendant's previous convictions or cautions are relevant to the present offence;

(l) the defendant is alleged to have committed the offence whilst under an order of the court;

(m) there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or

(n) the offence, although not serious in itself, is widespread in the area where it was committed.

Some common public interest factors against prosecution

6.5 A prosecution is less likely to be needed if:

(a) the court is likely to impose a very small or nominal penalty;

(b) the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);

(c) the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;

(d) there has been a long delay between the offence taking place and the date of the trial, unless:

   - the offence is serious;
   - the delay has been caused in part by the defendant;
   - the offence has only recently come to light; or
   - the complexity of the offence has meant that there has been a long investigation;

(e) a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;

(f) the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;

(g) the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or

(h) details may be made public that could harm sources of information, international relations or national security.

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

The relationship between the victim and the public interest

6.7 The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.

Youth offenders

6.8 Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a youth offender or a young adult. Young offenders can sometimes be dealt with without going to court. But Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the offender's past behaviour may make prosecution necessary.

Police cautions

6.9 The police make the decision to caution an offender in accordance with Home Office guidelines. If the defendant admits the offence, cautioning is the most common alternative to a court appearance. Crown Prosecutors, where necessary, apply the same guidelines and should look at the alternatives to prosecution when they consider the public interest. Crown Prosecutors should tell the police if they think that a caution would be more suitable than a prosecution.

7. CHARGES

7.1 Crown Prosecutors should select charges which:

(a) reflect the seriousness of the offending;

(b) give the court adequate sentencing powers; and

(c) enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always continue with the most serious charge where there is a choice. Further, Crown Prosecutors should not continue with more charges than are necessary.

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

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

8. MODE OF TRIAL

8.1 The Crown Prosecution Service applies the current guidelines for magistrates who have to decide whether cases should be tried in the Crown Court when the offence gives the option. (See the "National Mode of Trial Guidelines" issued by the Lord Chief Justice.) Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.

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

9. ACCEPTING GUILTY PLEAS

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

10. RE-STARTING A PROSECUTION

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

10.2 These reasons include:

(a) rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;

(b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again;

(c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

11. CONCLUSION

11.1 The Crown Prosecution Service is a public service headed by the Director of Public Prosecutions. It is answerable to Parliament through the Attorney General. The Code for Crown Prosecutors is issued under section 10 of the Prosecution of Offences Act 1985 and is a public document. This is the third edition and it replaces all earlier versions. Changes to the Code are made from time to time and these are also published.

11.2 The Code is designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. Police officers should take account of the principles of the Code when they are deciding whether to charge a defendant with an offence. By applying the same principles, everyone involved in the criminal justice system is helping the system to treat victims fairly, and to prosecute defendants fairly but effectively.

11.3 The Code is available from:

Crown Prosecution Service
Information Branch
50 Ludgate Hill
London
EC4M 7EX
Telephone: 0171-273 8078
Facsimile: 0171-329 8377