

## **REPORT ON THE HANDLING OF CUSTODY TIME LIMITS BY THE CPS**

### **EXECUTIVE SUMMARY**

#### **Introduction**

This report on the handling of custody time limits (CTLs) by the Crown Prosecution Service (CPS) follows an audit exercise undertaken by Her Majesty's Crown Prosecution Service Inspectorate (HMCPsi).

Since its inception in 2000, HMCPsi has examined the CPS's handling of CTLs in area effectiveness inspections, overall performance assessments, and bespoke audits. This work has revealed a continuing lack of consistency and reliability in the operation of the CTL systems across the 42 CPS areas. In response to this, as well as an increase in the number of cases involving failures to extend CTLs in recent years, the CPS has sought to reinvigorate its CTL compliance procedures.

This report focuses primarily on current levels of compliance against the national standard, highlighting those aspects in which the CPS is under-performing, and in some cases outlining good practice found whilst undertaking area visits. We then go on to look more widely at the challenges presented by the overall CTL regime, and the case for overall change.

#### **Context**

Custody time limits regulate the length of time that unconvicted defendants may be held in custody before trial. Introduced by the Prosecution of Offences Act 1985, they set out the maximum custody periods during the initial stages of proceedings in the magistrates' courts and the Crown Court, to ensure that defendants are not deprived of their liberty for longer than is reasonable.

Accordingly, the courts and the CPS aim to expedite custody cases by moving to trial as quickly as possible, and certainly within the custody time limit. Where this cannot be achieved, the effect of the legislation is that the CPS must apply to the court for an extension of the expiry date, if the defendant is to remain in custody. The application can only be granted where it is made in advance of the expiry date, where there is "good and sufficient cause" for such an extension, and where the CPS can demonstrate that it has acted with "all due diligence and expedition" in its efforts to prepare the case. Failure to meet any of these three requirements will inevitably result in the grant of bail, irrespective of the seriousness of the case and the level of danger presented to the public by the release of the defendant.

Therefore, it has been necessary for CPS areas to develop monitoring systems to ensure that the first requirement is met, namely that applications are timely. Whilst the statutory CTL regime is relatively simple at its basic level, any number of common circumstances can serve to complicate the process of accurately calculating

the expiry date, which is the foundation of any monitoring system. It is very common for different expiry dates to apply in one case with a single defendant. The position becomes even more complicated in cases with multiple defendants, and expiry dates can change throughout their life. Developments in criminal justice procedure, as well as in the nature of the CPS caseload, have also made the task of compliance more complicated year on year. Therefore, CPS area systems have needed to become more sophisticated to take account of this, taking greater levels of resource, sometimes at the expense of other aspects of case preparation. Even then, full compliance cannot be guaranteed because the CPS does not always have knowledge of all relevant circumstances, such as the location of the defendant in custody, and the exact number of days he has spent in custody.

The CPS is often unable to affect whether the second requirement is met, namely that there must be "good and sufficient cause" for the extension to be granted. It follows that no system could be designed to ensure compliance in this respect. For example, there is a body of case law to the effect that 'routine listing difficulties' do not constitute good and sufficient cause for an extension. Therefore, a defendant might be released because the court does not have the capacity to bring the case on for trial within the time limit; or because there is no courtroom or judge to try the case on the day the trial had been listed to start. It may not be possible to bring a case on because the defence are not ready. Nonetheless, the onus for making the application still lies with the prosecution, and the failure to make such an application in time would be attributable to the CPS.

CPS areas have also had to develop ways to ensure that they can meet the third statutory requirement, namely by demonstrating "all due diligence and expedition" when the need to extend the expiry date arises. Many factors can serve to undermine what amounts to case progression effectiveness, especially in complex cases. Investigation techniques now routinely involve time consuming analysis of forensic and technical evidence such as forensic traces, CCTV footage, and mobile telephone records. Although the court will take evidential complexity into account, it is more difficult in complex cases for the prosecution to show all due diligence where the cause of delay in the case has been dependent on evidence gathered from outside agencies.

Overall, the resource available to operate monitoring systems has reduced since the implementation of the CTL regime. Each agency has introduced more demanding performance monitoring and targets and there has been substantial legislative change. The workload associated with these initiatives and the redeployment of experienced staff has further increased the potential for mistakes in monitoring CTL expiry dates and in progressing custody cases effectively.

So for all these reasons, whilst CPS systems have operated with relative success, there have been instances where applications were either not made or were not granted. Where this has occurred, a "failure" is said to have taken place, which must be reported to CPS Headquarters and logged. If it has been an omission to make an application in time, then it is a failure of the monitoring system, and if it is a failure to show all due diligence and expedition, then it is a failure of case progression systems.

Whilst monitoring type failures have actually reduced since 2008-09, the introduction of the need to record "due diligence" type failures since May 2008 has served to increase the overall level of failures since then to the point where in the year 2009-2010 to date, it has exceeded the 2006-07 figure of 41.

Although responsibility has defaulted to the CPS to monitor the CTL expiry dates, other agencies in the criminal justice system have an interest in the effective monitoring of CTLs, most notably the court which formally remands the defendant in custody, and the police who are actively involved in requesting the remand, and preparing the case. It is, perhaps, an anomalous position where the CPS is ready for trial, but must apply for extension where the court is not able to provide a date for the trial within the CTL period. Further, such an application is never a foregone conclusion because 'routine listing difficulties', for example, do not always constitute good and sufficient cause for an extension.

It is against this background that our audit findings must be considered.

## **Audit findings**

Progress had been made since the last thematic review in the monitoring of CTLs with the introduction of a national standard. However, compliance by the CPS areas with the standard varies and more work needs to be done to ensure consistent application of the standard.

Progress has also been made in engaging the courts in agreeing the CTL expiry date in open court. Protocols have been agreed in most areas. Observations in court during the audit revealed that this agreement was still in the very early stages and its application appeared to rely on the attitude of individuals, be that the prosecutor, the court legal advisor, or the judge.

The standard of file endorsements continues to hamper efforts to monitor CTLs effectively, and poor endorsement is a common cause of CTL failures where the CPS failed to make a timely application to extend. Examples of files were seen in which it was difficult to follow court endorsements in terms of identifying whether a defendant remained in custody. However, very recent improvements were noted in some areas where the involvement of the prosecutor in agreeing the expiry date with the court appears to have triggered clearer court endorsements, which contain the information required to identify and therefore monitor defendants who have been remanded in custody.

Prosecutors are taking on more responsibility for CTLs. This is a positive change since the last review when many lawyers felt that calculating, monitoring and applying for extensions to CTLs were administrative functions.

Despite improvements in the written area systems, there continue to be CTL failures. It has been necessary to report the new category of "due diligence" type failure to CPS Headquarters since May 2008. At the time of the audit visits, a number of areas had only recently become aware of this requirement, nearly a year later, and had not been reporting such failures to Headquarters. Since the introduction of the new definition the numbers of failures reported has increased.

The CPS has recently developed the optimum business model system of case progression designed to streamline its processes. A consequence of this is the move away from case ownership by prosecutors which runs contrary to the requirement for personal responsibility inherent in the CTL national standard. This has been addressed in guidance to CPS areas to ensure that CTL files are allocated to an individual lawyer. The audit found that this was not necessarily being followed (due to resource issues).

The assistance available centrally to areas, and the guidance issued by Headquarters, has improved recently, although this has involved an increase in the volume of material which now runs to more than 33,000 words. The work of the lead chief crown prosecutor on CTLs and the Headquarters lead on this subject has helped to raise awareness of this important aspect and provides an accessible source of assistance for staff in CPS areas.

The quality of the area written CTL systems varied, with most complying with the national standard in most aspects. However, area visits revealed that staff were not always following the area system in every respect. In some areas this meant that checks were not being carried out to ensure the CTL expiry had been correctly calculated or that entry of information into the monitoring system had not be checked by a second person.

### **Commentary and conclusions**

The need to monitor custody status at so many points in the life of a case in order to recheck and, if necessary, revise the expiry date of the custody time limit, reinforces concerns about the complexity of the overall CTL regime. The need for the system to be fail-safe has resulted in dual schemes of electronic monitoring linked to manual diaries with a requirement for double-checking of all entries and routine quality assurance by senior managers. Even so, it is clear from the number of CTL failures that cases slip through the net. This suggests that the scheme has become so detailed as to be unduly vulnerable to human error. The circumstances of some of the failures we considered tends to confirm that. For example, where a case is listed for trial in the Crown Court the day before the expiry date, the CPS may receive a telephone call late the day before because circumstances have arisen which mean that the case cannot proceed. Unless the individual receiving the call is in a position immediately to realise that the effect will be to cause a breach of the time limit, that is what may occur, possibly leading to the release of the defendant.

It is also impossible to avoid commenting on a statutory infrastructure which requires the prosecution to make application for extensions in circumstances when the prosecution itself has no need for an extension and may indeed wish the case to proceed. An observer viewing the current scheme for the first time might well conclude that operation of the system of CTLs has necessarily become an end in its own right in order to minimise the risk of harm which could flow if a failure led to the release of a dangerous individual. It is the CPS which bears this burden alone, when its focus should be on the substantive prosecution of the case. By contrast, the intention of Parliament was a simple one; to ensure that defendants awaiting trial who could not be granted bail should not spend any longer in custody of their trial than was reasonable for the proper administration of justice.

The approach adopted by many of the practitioners involved in the process suggests that they too would prefer to focus on the preparation and conduct of cases rather than the administration of a complicated set of rules. Prosecutors within the CPS have historically tended to regard CTLs as a matter for administrators; counsel are often disinclined to become involved, in part because lack of understanding is accompanied by a failure to appreciate the seriousness of the consequences which can flow from non-compliance. Judges do not necessarily see the regime assisting in their case management. Bringing custody cases to trial expeditiously is something which they would instinctively wish to do.

It is also pertinent to note that CTLs were introduced by the 1985 legislation at a time when the judiciary were less directly involved in the management of cases and there were extensive delays in bringing cases to trial. Both situations have changed significantly. Although the picture is a variable one, delays are not now as extensive as they were at that time. There is also now a strong expectation, formally set out in the Criminal Procedure Rules, that judges and magistrates will take a firm grip on the management of cases from an early stage and ensure that they proceed through the system with the maximum expedition consistent with the proper administration of justice.

Against this background, it is right to consider whether the CTL regime as it operates at present (together with its complex administrative requirements and the attendant scope for error) remains the right one. There are some steps which could be taken to make it more flexible and manageable and to reduce the risk of outcomes which are contrary to the public interest. There is also an argument for a more radical approach which would build on the increasing assumption of responsibility for case management by the judiciary and make the CTL regime more proportionate.

The fundamental purpose of this audit report was to assess the performance of the CPS in managing the application of the CTL regime for which it bears, by default, the primary responsibility. There is scope for some criticism of the present position – which is significantly improved compared with previously – and some examples of good practice on the part of the CPS.

We also conclude that the time is right for a more substantial review than would be proper in the context of this report. That review should consider not only the scope for modification of the existing regime but a more radical approach building on the increased role of the judiciary in case management.

## **Recommendations and compliance points**

### **Recommendations**

- 1 It is suggested that the good practice points in chapter 4 are added to the national standard (paragraph 4.16).
- 2 Consideration should be given to redesigning the CPS file jacket in the magistrates' courts sections and the Crown Court to allow consistent use of the file for CTL monitoring (paragraph 5.18).
- 3 CPS Headquarters should consider amending the national standard to set out more fully the proactive role required of paralegal officers at the Crown Court (paragraph 6.6).
- 4 Cases should only be removed from the monitoring system by staff with authorisation to do so (paragraph 7.10).
- 5 CPS Headquarters should consider whether the definition of a failure should be further extended to include cases in which a decision is taken by the lawyer not to apply for an extension as it would not be possible to demonstrate CPS had acted with due diligence (paragraph 7.13).
- 6 Areas should ensure that the culture change aimed at engaging a wider range of staff in CTL monitoring responsibilities has been achieved (paragraph 7.14).

- 7 CPS Headquarters and CPS areas should consider how case progression fits into the role of CTL expiry monitoring (paragraph 8.8).
- 8 CPS Headquarters should provide clearer guidance about the handling of CTL cases in relation to the optimum business model which ensures that there is clear and workable ownership of responsibility for CTL actions (paragraph 8.13).
- 9 Consideration should be given to adding to the national standard the action to be taken when a decision is taken not to apply for an extension (paragraph 9.8).
- 10 CPS Headquarters may wish to consider guidance to areas advising that in particular types of case, written applications for an extension should be made at the appropriate point, even if it seems that there is no reason for the case not to be dealt with within the expiry date (paragraph 9.13).
- 11 Consideration should be given to offering interagency training on an area or family group basis with the courts' staff and with counsels' chambers (paragraph 11.9).

#### **Compliance points**

- 1 Where an area has referred to the national standard or area minimum standard, the local system should fully comply with both (paragraph 4.9).
- 2 Expiry dates should be confirmed at subsequent hearings and this should be endorsed on the file (paragraph 5.8).
- 3 Written CTL systems should contain the instructions on the file endorsements as noted in the national standard (paragraph 5.9).
- 4 The standard of endorsements should be given effective quality assurance by managers and improvement sought if necessary (paragraph 5.10).
- 5 The start date from which the CTL applies and the current CTL expiry date that applies (56, 70, 112, 182 days) should be noted on the front of the file (paragraph 5.16).
- 6 Areas should assess and further promote the involvement of the courts in calculating and agreeing expiry dates (paragraph 6.5).
- 7 Counsel should be instructed to ensure that CTL expiry dates are agreed at the first hearing in the Crown Court, confirmed at subsequent hearings and that strenuous efforts should be made to list cases for trial within the time limit (paragraph 6.6).
- 8 Areas should ensure that all initial calculations are checked. If a lawyer has not calculated the expiry date in court the calculation carried out in the CPS office should be checked by a lawyer to ensure it is correct and that responsibility for the initial calculation does not fall to administrative staff (paragraph 6.8).
- 9 The role of prosecutors and paralegal officers in checking expiry dates on cases they handle should be reinforced (paragraph 6.9).

- 10 Incorrect expiry dates should be referred back to assist staff in understanding any errors they make (paragraph 6.10).
- 11 Areas should ensure that systems to notify originating areas quickly of breach of bail hearings are in place and operated expediently (paragraph 6.17).
- 12 Areas should carry out regular internal audits of the operation of the CTL system to ensure full compliance with the written area system (paragraph 7.6).
- 13 Expiry and review dates entered into the monitoring system should be checked by someone other than the person who had entered the information (paragraph 7.8).
- 14 CTL files should be returned to the person responsible for CTL monitoring after each court appearance to check that necessary updates have been made in the CTL monitoring system (paragraph 7.10).
- 15 Areas should ensure that all staff are aware of the extended definition of a failure and of the action required should this situation occur (paragraph 7.12).
- 16 Areas should continue to liaise with local courts to ensure effective exchange of CTL information (paragraph 7.18).
- 17 All CPS areas should fix review dates at two weeks prior to the expiry in the magistrates' courts and four weeks in Crown Court cases in accordance with the national standard (paragraph 8.6).
- 18 Area systems should include instructions to inform the police of the CTL expiry date and to set target dates for outstanding work (paragraph 8.9).
- 19 Areas should ensure that action taken at review dates should be recorded in the monitoring system and on the file (paragraph 8.17).
- 20 Areas should have in place that a system to ensure action is taken at review dates within 24 hours (paragraph 8.19).
- 21 Areas must ensure that procedures are in place to check with the court to make certain that extension hearings have been listed (paragraph 9.15).
- 22 Checks should be in place in the system to ensure that applications listed for an extension have been made (paragraph 9.19).
- 23 Lawyers should consider whether an appeal should be made should the court refuse to extend the expiry date and clear instructions should be recorded on the file for the prosecutor in court (paragraph 9.22).
- 24 Training should be logged to ensure that all staff are included in the training (paragraph 11.3).

### **Good practice**

- 1 One area system covered the action to be taken when a charge is discontinued and the defendant is in custody. The discontinuance of proceedings means that the defendant should then be released as soon as the decision to discontinue is taken unless there are other charges on which he remains remanded; or a

sentence is being served. As this affects the liberty of an unconvicted person, it is an important aspect and it is suggested that all CTL systems should contain guidance on this point and that the national standard be updated to ensure this (paragraph 4.14).

- 2 A few area systems had instructions on staff cover to ensure that the monitoring of CTL cases continued in the absence of key staff. This is essential to the effective operation of the CTL system and it is suggested that the national standard be amended to include this as a compulsory part of area CTL systems (paragraph 4.14).
- 3 In two areas visited administrative staff were asked to check the first date of hearing endorsed on the file against the date noted on the police papers and check with the court if there was an anomaly (paragraph 5.4).
- 4 The use of a separate folder within the CPS file where all information about reviews and correspondence relating to CTLs could be found quickly (paragraph 5.17).
- 5 The use of management controls in some areas to ensure that errors are not made in altering the expiry date that has been calculated in CMS (paragraph 6.11).

The full text of the report may be obtained from the Corporate and Operations Support Group at HMCPS Inspectorate (telephone 020 7210 1197) and is also available on line at [www.hmcpai.gov.uk](http://www.hmcpai.gov.uk).