

HM CROWN PROSECUTION SERVICE INSPECTORATE
THEMATIC REVIEW OF ATTRITION IN THE PROSECUTION
PROCESS (THE JUSTICE GAP)

EXECUTIVE SUMMARY

Background and purpose of the review

- 1.1 The justice gap is the difference between the number of crimes recorded and the number of crimes where the offender is brought to justice. It was also known as the process of attrition. In this context, an offender is “brought to justice” where there is a conviction, a caution or where an offence is taken into consideration when the defendant is sentenced for other matters.
- 1.2 Recorded offences include all those that can be tried only in the Crown Court and those that can be tried either in the magistrates’ courts or the Crown Court. With one or two exceptions, summary offences (which can only be tried in the magistrates’ courts) are not recorded.
- 1.3 The Government regards the narrowing of the justice gap as a key measure of the success of the criminal justice system (CJS) in reducing crime. It has set a target to bring 1.2 million offences to justice by 2005-06. It is proposed that criminal justice departments and agencies tackle the justice gap in three ways:
 - * to develop strategies to overcome weaknesses in the overall system;
 - * by targeting particular types of offences (e.g. the street crime initiative); and
 - * by targeting particular types of offender (e.g. the persistent offender).
- 1.4 The CJS inspectorates will have an important part to play both in targeted reviews (joint or otherwise) and in reporting on progress and good practice in their inspections. With that in mind, Her Majesty’s Crown Prosecution Service Inspectorate (HMCPPI) here reviews the present position in the Crown Prosecution Service (CPS).
- 1.5 The aim in this review is to ascertain from existing HMCPPI data and fieldwork the extent of the justice gap within the prosecution process; the factors affecting it; the reasons for it and the types and pattern of offences where it occurs most. We hope that our findings will inform the CPS and its criminal justice partners when addressing the issues raised by the narrowing the justice gap initiative.
- 1.6 It is important to note that the measurements of outcomes used by criminal justice agencies differ and that they are therefore not necessarily directly comparable. Thus the justice gap and the Government targets are measured by recorded offences. The CPS outcomes are measured by the number of cases against a defendant which are dropped. Each case may contain a number of recorded offences or a mixture of

recorded and non-recorded offences. The CPS will in future need to distinguish recorded offences if they are to measure progress against the targets set by the Government.

Scope and methodology

- 2.1 We analysed in detail our database created during the course of our Area inspections to date in the first two-year cycle, concentrating on the three main categories of cases that are dropped during the course of a prosecution. These categories are of cases where *all* offences alleged against a defendant on a file are dropped. They are (with the number of files on our database for each category in brackets):
- * Terminated in the magistrates' courts (including s23 Prosecution of Offences Act 1985; withdrawals and cases where no evidence is offered) (4,228 files) (Cases terminated in the Crown Court are known as judge ordered acquittals which are in the adverse case category);
 - * Discharged committals;
 - * Adverse cases:
 - no case to answer in the magistrates' courts (NCA) (206 files);
 - judge ordered acquittals (JOA) (1,229 files); and
 - judge directed acquittals (JDA) (238 files).
- 2.2 In some instances we have compared figures with the total Area inspection database which comprises 11,728 cases.
- 2.3 There are, however, also many cases where some charges are dropped even though the defendant is convicted and "brought to justice" on one or more other offences. The Government's target relates to offences so we have also carried out an investigation of what might be called "charge attrition". For this part of the review, we examined 1,107 recently completed files where charge attrition had occurred.
- 2.4 We conducted a short pilot exercise and then visited nine Areas to read a sample of charge attrition files. Fourteen Areas assisted us in this work. These Areas and offices gave us a representation of the CPS as a whole, giving a balance of character and size.
- 2.5 The section on discharged committals is based on the specific work done in the West Midlands for the Area report. A joint re-inspection of discharged committals has been carried out and was published in October 2002. We have therefore confined our remarks to general lessons from the West Midlands, London and other relevant reports.
- 2.6 Finally, we reviewed all our published reports (both Area and Thematic) in order to bring together the common factors and comments that we have made over the last two years.

- 2.7 This review does not make recommendations as such. Rather, gives empirical evidence to replace anecdote and “gut feeling”. It also draws together the good practice and commendations that we have made in our reports that are relevant to the justice gap, setting out some practical suggestions for improvement.
- 2.8 These examples of good practice and suggestions are too numerous and diverse to summarise. Their detail can be found throughout the report.

The size and creation of the justice gap

- 3.1 The number of defendants not being brought to justice that are affected by the CPS decisions and practices, when set against the picture as a whole, is very small. Most either never reach, or leave, the system before the charges are laid and the CPS is involved.
- 3.2 Overall we found that the CPS is reducing charges appropriately, according to the accepted norm, so that they ultimately reflect the gravity of the offending and the defendant can be sentenced properly. In our charge attrition sample we considered that the final charges after reduction provided the court with adequate sentencing powers in 96.1% of cases. These findings were judged on the present criteria and practices of the criminal justice system. We comment on this at paragraphs 5.1 – 5.6.
- 3.3 Our findings suggest that there is a significant degree of case and charge attrition that is caused by inappropriate police charging, either because there are evidential difficulties in respect of the charge selected or because the charge preferred exceeds the gravity that ought to be attributed to the case. This lends support to plans for initial charging to become the responsibility of the CPS¹.

Key findings about reasons and patterns

Terminated cases

- 4.1 One third of terminated (or discontinued) cases are road traffic offences (often because the defendant attends court and produces driving documents which establish a defence). Most of these are not recorded offences and do not count towards the target for narrowing the justice gap. If these offences were excluded from the CPS’s discontinuance figure, the rate would be 8.7% instead of the present 13.1%.
- 4.2 Other offences which are terminated in significant numbers are theft and fraud (21.8% of the 13.1% terminated cases) and assaults (20% of the terminated cases.)
- 4.3 With cases that were terminated, the main reason (21.8% of these cases) was that an essential legal element was missing. Other significant reasons are victim failure (18.4%) and that a small or nominal penalty is expected (which includes where the defendant is sentenced on another file or is in prison) (12.3%). Conflict of evidence and unreliable witnesses were also prevalent evidential reasons in cases of alleged child abuse that were terminated. Prosecutors may be too ready to drop racially aggravated cases, since inspectors disagree with a significantly greater proportion of

¹ The necessary legislation is now contained in the Criminal Justice Bill, Schedule 2 which is at the committee stage in Parliament.

the prosecutors' decisions to terminate than generally (25.8% compared to 8.7%). This reflects a similar finding in our Thematic Review of Casework Having a Minority Ethnic Dimension (April 2002).

Charge attrition

- 4.4 We found that the final charges (after reduction) provided the court with adequate sentencing powers in almost all cases (96.1%) when judged on the present criteria and practices of the criminal justice system.
- 4.5 Road traffic, assaults and public order cases are particularly susceptible to charge attrition, and cases of dishonesty are problematical for the police and CPS, in terms of identifying and addressing evidential difficulties.
- 4.6 Of the original police charges where there was an identified individual victim, (as opposed to a company or where there is a "victimless" crime), 30.6% were incorrect or inappropriate. The CPS lawyer altered the original police charge in 40.8% of all cases in the charge attrition sample. Of these, 56.9% were altered because of evidential difficulties on the dropped charge. The majority of these were theft and fraud cases.
- 4.7 In 22.9% of charge attrition cases, the dropped charges had a different victim from that affected by the charge on which there had been a conviction.

Adverse cases

- 4.8 Adverse cases comprise three types of outcome:
- * where all charges are dismissed by magistrates on the basis that there is no case to answer at the conclusion of the prosecution case (NCAs: 0.1% of magistrates' court cases);
 - * where a trial judge at the Crown Court orders that an acquittal should be entered following a decision by the prosecution that the case should not proceed and prior to the empanelling of a jury. These are called judge ordered acquittals (JOAs: 13.8% of Crown Court cases);
 - * where a trial judge in Crown Court proceedings rules, following the commencement of the evidence, that it is insufficient for the Crown to proceed and directs the jury to acquit. These are called judge directed acquittals (JDAs: 1.7% of Crown Court Cases).
- 4.9 It is important to recognise that JOAs are also terminated cases in the sense that the charges are dropped as a result of a decision taken by the CPS rather than the court, which is the position with other forms of adverse case.
- 4.10 Of all adverse cases, 49% were dropped on evidential grounds, 13% in the public interest and in 38%, the prosecution was unable to proceed.

- 4.11 Our figures suggest that cases of assault, sexual offences and theft/fraud are more likely to result in an adverse outcome than other types of offence. Whilst this conclusion might have been anticipated for assaults and sexual offences, it is less obvious for thefts and fraud (the highest category). There may be a greater proportion of these offences because they are more susceptible to being dropped when there is sufficient sentencing power on other files. However, performance in review and action taken in theft and burglary cases is below the average for all adverse cases in every respect. When considering the measures that could be taken, Areas might consider concentrating their efforts on these categories of offence.
- 4.12 As in terminated cases, the most common reasons for cases failing are because an essential legal element is missing (17.3%) and victims refuse to give evidence (16.5%). Victim and witness issues generally account for 49.6% of cases being dropped or otherwise failing.
- 4.13 The absence of an essential legal element was particularly a problem in theft and fraud cases and affray. Victims refusing to give evidence were particularly a problem in domestic violence and sexual cases. Victims failing to attend were notably common in racially aggravated cases.
- 4.14 Where the adverse outcome was reasonably foreseeable, the CPS should have done more to avoid it, or dropped the case earlier, in 24.4% of the adverse cases overall. The percentage is significantly higher in burglary and theft cases. Performance is better in domestic violence cases.
- 4.15 The majority of Areas needed to be more realistic and robust in their own assessments of cases where acquittal is foreseeable but where no remedial action was taken.

Changing the culture

- 5.1 We mention in this report the importance of good evidence and the early selection of the correct charges. We go on to discuss the advantages of establishing a culture within the criminal justice system under which it is widely understood that all charges, once established, supported by sufficient evidence and in the public interest to proceed, will ordinarily be pursued.
- 5.2 We have said that we found that the court has adequate sentencing powers in a high proportion of cases, but qualify this with the phrase “judged on the present criteria and practices of the criminal justice system”.
- 5.3 In those cases where there has been an acceptance, or partial acceptance, of pleas, charges are dropped in over 50% on public interest grounds because of other sentences. It is commonly said that some charges are not pursued “because it would make no difference to the final sentence”.
- 5.4 Whilst this approach is pragmatic and well established in the courts, it does, in numerous respects, detract from the overall quality of justice and is a substantial source of contribution to the justice gap. Charges properly brought and supported by evidence, which are not pursued to their proper conclusion, widen the justice gap. From the CPS perspective, it is difficult to challenge the position and, in the short

term at least, it could be costly to do so. The judiciary and the magistracy would be likely to criticise cases or charges being pursued when the outcome, in terms of a different sentence, is likely to be minimal or none. But these considerations have to be weighed against some qualitative factors such as the impact on the victim when a crime is not pursued, and the incomplete basis upon which any sentencing for any subsequent criminality may take place.

5.5 There would be a number of advantages to a new approach where there would be less compromise:

- * given the importance of a “better deal” for victims and witnesses, their confidence would be raised as their expectations are more likely to be realised and more would see their case brought to justice;
- * it would be clear to guilty defendants that there is nothing to be gained from entering inappropriate not guilty pleas in the hope of compromise and playing the system leading to greater delay and expense;
- * the possibility of more trials while the new approach bedded in (and thus greater cost) because compromises will not normally be accepted, should be balanced in the longer term by the savings by all CJS agencies, as many cases will not be adjourned and dragged out only to be compromised at the last minute;
- * the defendants’ records will better reflect the true extent of their offending;
- * prosecutors would gain confidence that their early decisions were right and that it is accepted that they had taken the public interest factors into consideration.

5.6 It would be important to have the commitment of all agencies and tribunals to encourage this new approach. We think it right to flag up these considerations whilst recognising that striking a balance is a policy matter for the judgment of others. These considerations have a bearing on both the prospect of meeting the targets for narrowing the justice gap and the Government objective of increasing public confidence in the criminal justice system, including through putting the victim at the heart of the system.

The quality of police files

6.1 Crucial to the successful outcome of a case is that the CPS receives from the police a good quality file, which fully sets out the evidence available for the offence charged, in good time. The CPS and the police have agreed nationally a system of joint performance management (JPM). The most recent national data available continues to show an unsatisfactory number of “perfect” full files (those which are both fully satisfactory and in time). Only 42% of adult files and 43% of youth files are perfect.

- 6.2 Variable performance in the effective use of JPM continues to be a dominant theme in our reports both in achieving perfect files and in identifying with the police and other agencies opportunities for improvement. When police and CPS staff are routinely working together and in close proximity in the new criminal justice units and the trial units, the problems caused by poor file quality and timeliness should be minimised. It will still be necessary to monitor performance by the most effective means.

The importance of continuing review, file responsibility and good endorsement

- 7.1 Review is a continuous process. Often the evidence available at the outset of a case is incomplete. It is after the initial review that the judgement of the lawyers and the action that they take are crucial to the success of trials and of cases that are committed to the Crown Court.
- 7.2 In some CPS Areas, we found that some lawyers were failing to take a robust and proactive approach throughout the case with the effect that inappropriate charging was not being addressed at the earliest stage. Late and poor-quality continuing review can lead to hasty decisions being made at court, where the pressure to accept a partial plea or drop the case is greater.
- 7.3 Lack of case control and delays can result in compromised acceptance of pleas or the unnecessary failure of a case. File responsibility is an important factor in control. For various reasons there can be a number of different lawyers handling a case throughout the prosecution process. It is important to reduce these changes to a minimum and ensure that responsibility for a case is clear. This is particularly important as the configuration of units change under the implementation of arrangements recommended by Sir Ian Glidewell in his Review of the Crown Prosecution Service.
- 7.4 Evidence that charge or evidential deficiency issues had been considered after the initial review was generally disappointing. Whilst we accept that the issue may be one of recording the assessments made at further review, rather than carrying it out, the effect is frequently the same. Several lawyers can be involved in most cases and the lawyer at court is rarely the reviewing lawyer. Work not recorded is frequently work wasted.
- 7.5 We frequently mention in our reports that the quality of file endorsement is unsatisfactory. We found the same disappointing standards in all types of cases that we analysed for this review. The file endorsement should set out the justification for reducing the gravity of the case or dropping it. These decisions are likely to be subject to greater scrutiny, as the CPS is now responsible for explaining its decisions directly to victims and other interested parties in certain cases where a charge has been dropped or substantially reduced. The quality of such endorsements should, therefore, be high.

The impact of the justice gap on victims

- 8.1 It has long been recognised that the proper treatment of victims and witnesses is a crucial factor for all criminal justice agencies, both to ensure the successful conclusion of cases and to increase the public confidence in the criminal justice system.

- 8.2 The treatment of witnesses (which includes victims and other witnesses) at court not only affects their willingness and ability to give evidence but also influences the way they regard the criminal justice system as a whole. Their messages are returned to the community and influence the public's confidence in the system.
- 8.3 We comment throughout our reports on the level of care given to witnesses and effectiveness of CPS staff and agents. We have seen some excellent work but more could be done. Areas need to reinforce the National Standards for the Care and Treatment of Victims and Witnesses (1996-7).
- 8.4 Charge attrition can have a damaging impact on victims of crime. Almost half of the cases in our charge attrition sample had an identifiable individual victim with an interest in the outcome of the proceedings. In a significant proportion of these (22.9%), the dropped charges had different victims from the convicted offences. Therefore, whilst we found that the sentence was adequate on present thinking, (because the final charges provided the court with adequate sentencing powers overall), there would still have been a considerable number of victims who did not see an offender brought to justice for their offence.
- 8.5 If, however, there is insufficient evidence for the charge or it is set at an incorrect level at the outset, the expectations of victims may be raised unnecessarily. Later reduction can create a negative impression about the way in which the case has been handled and in respect of the criminal justice system generally. It also increases the need for the CPS to explain its actions to victims under procedures for direct communication.
- 8.6 We make a number of practical suggestions for actions to improve the service to victims and witnesses, based on the initiatives and good practice that we have found throughout the country.

Further reports

The full text of this report may be obtained from: HMCPSI, Corporate Services Group, 26/28 Old Queen Street, London SW1H 9HP (telephone 020 7210 1197). The report is also published on our website: www.hmcpai.gov.uk.

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