



The Crown Prosecution Service Consultation on the Code for Crown Prosecutors

The Criminal Bar Association is pleased to have the opportunity to comment on the proposed new edition of the Code for Prosecutors. In the response that follows, we have attempted to address the questions posed by the Consultation Paper.

1. Is the role of the Crown Prosecution Service explained clearly enough in sections 1, 2 and 3?

Some consideration might be given to explaining the need for a sixth edition of the code. It is presumably, in part, necessitated by the merger with RCPO. The explanation might help to give some context to the new code.

Paragraph 3.5 might be reworded to clarify that it is the court and not the CPS who decide hitherto keep a suspect in custody after charge. This could be done by adding the words “to apply to a court” after the word “proposed.”

Paragraph 3.6 does not explain fully the process and importance of review. We agree with the observations made by the South Eastern Circuit that the key elements of paragraph 4 of the previous edition of the code dealing with review could usefully be retained.

2. Is the evidential stage of the Full Code test explained clearly enough?

The previous edition of the code addressed the issues of admissibility (whether the evidence can be used) and weight (whether it is reliable) separately. This gave clarity and structure to the section of the code dealing with the evidential test. In our view the proposed draft suffers in comparison. Consideration should be given to re-ordering the factors listed under para 4.4 and to separating out the factors such as (g) which are relevant to considerations of admissibility.

Para 4.4 (a) does not make clear what is meant by evidence that supports the integrity of evidence already obtained. It is presumably aimed at evidence that can be expected rather than speculative evidence that it might be possible to obtain. Is the intention to cover simply evidence that fills in gaps in the case or is it intended to cover evidence that will take the case further?

Para 4.5 deals with the new pre trial interview procedure. The proposed paragraph does not give any guidance as to what cases will be appropriate for such an interview. There should be some guidance or at least a link to a site where the guidance can be found.

3. Are the public interest factors that tend in favour of prosecution explained clearly enough?

Para 4.7 The previous edition of the code spoke of factors “which clearly outweigh” those in favour of prosecution. This version requires the prosecutor to be sure there are factors present and that they outweigh the factors in favour of prosecution. Our view is that the change does not necessarily enhance the clarity of the explanation.

Para 4.10: We understand the Director’s intention to explore the possibility of addressing proportionality in this section of the code. However we agree with the observation of the

South Eastern Circuit that it might appear to a layman that a third stage to the test was being introduced in “very limited situations” without setting out what those situations might be.

We suggest it might be simpler to say that it is not in the public interest to prosecute when to do so would be disproportionate. Many of the public interest factors set out at 4.12 and 4.13 are factors going to the issue of proportionality.

4. Are the public interest factors that tend against prosecution explained clearly enough?

Para 4.13 (I) needs to be clarified. Is the intention to distinguish between a promise not to prosecute and something in the nature of a notice of discontinuance? If so, the distinction should be spelt out.

5. Is the public interest stage of the Full Code Test explained clearly enough?

Para 4.14 would benefit from clearer wording. We suggest the second sentence could be replaced by the following:

“When deciding whether prosecution is in the public interest, prosecutors should take into account the consequences of their decision for the victims and any views expressed by the victims. In appropriate cases, e.g. a case of homicide, they should take into account any views expressed by the victim’s family.”

6. Is the section on out-of-court disposals set out in an understandable way, and does it explain clearly what disposals and alternatives to prosecution are available?

The section on out of court disposals does not explain clearly (for a layman) exactly what the various out of court disposals amount to or how the decision to adopt such a course will be taken.

In the first place there is a need for clarity of definition. “Alternatives to Prosecution” is, we suggest, a simple and readily understood title. The code is unclear as to whether the term is used interchangeably with “out of court disposals” or whether there is another form of action. Definition of the term and the various possible options such as caution and conditional caution would help the layman. The section does not at present include any definition or explanation of Civil Recovery Orders or Serious Crime Prevention Orders. We consider there should be some definitions set out or at least a reference to where definitions may be found.

There should also be some consideration given to setting out how the decision to prosecute or use an alternative to prosecution is arrived at. Para 7.2 appears to introduce a new concept of the decision that “some action” is necessary to deal with the suspect’s behaviour.

7. Is there any other section of the Code for Crown Prosecutors that you think should be expanded, and, if so, what do you think should be included?

We would invite an attempt to define the meaning and purpose of the threshold test. The previous edition of the code included this at para 6.1:

“The Threshold Test requires Crown Prosecutors to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge that suspect.”

We consider the new code would benefit from such a formulation.

Para 5.2 should, in any event, be altered to reflect that it is for the court to decide whether a suspect should be detained in custody: e.g.

“...it may be necessary to apply to a court to detain a suspect in custody when the investigation is incomplete...”

OTHER MATTERS

Selection of Charges:

- Is there scope for some expansion of para 6.5 to clarify the type of change in circumstances that might affect the nature or level of charge being pursued?
- The 'mode of trial' section has been omitted from the new code. It is section 9 of the previous code. The cost of prosecutions is a matter of regular concern in the Crown Court, with judges increasingly asking the question whether the defendants elected jury trial. Including the section on 'mode of trial' will serve as a reminder to Crown Prosecutors of the importance of the decision in the lower court.
- The previous edition of the code included sections on **Accepting Guilty Pleas** (10) and **the Prosecutors' Role in Sentencing** (11). We consider that these are important subjects that it would be appropriate to address in this document which is a statement of principle issued by the Director.

- We have noted that these issues are touched upon in the Core Quality Standards document (“CQS”) recently issued but it seems to us that CQS is a statement of aspiration about the way in which principles will be applied rather than a declaration of principle.

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