Who should Lay Down Prosecution Guidelines?

Francis Bennion

WHEN in 1978 Sir Harold Wilson announced the setting up of the Royal Commission "^n Criminal Procedure he said the inquiry would be concerned essentially with matters of principle. This article discusses one of these matters of principle, namely who should lay down the guidelines governing the decision to prosecute. The Royal Commission (Cmnd 8092 of 1981, summarised at p 44 ante) say they should be laid down by the Director of Public Prosecutions. In my respectful submission (communicated in evidence to the Royal Commission) they should be laid down by Parliament itself.

Grey area

The state provides the laws which specify which actions and omissions constitute criminal offences. The state also provides the machinery which, when set in motion, determines whether a person has committed one of these offences and if so what his punishment shall be. Both these matters are the subject of elaborate and precise regulation, but the grey area in between is not.

The grey area exists for two reasons. First, it is impractical to investigate and prosecute more than a small proportion of the offences officially known or suspected to have been committed. Secondly in certain cases it is inexpedient to launch a prosecution. Some procedure is therefore required to deter-mine which offences shall be singled out for attention. One would expect to find the state devoting as much elaboration and precision to regulating this procedure as it does to the description of offences and the trial of offenders. In fact it leaves the matter virtually without legislative guidance.

Yet surely the function of law is to deal as precisely as possible with This grey area. It is inappropriate to leave the matter to administration. Just as statutes frequently specify the factors to be borne in mind by a minister in reaching a decision on other matters, so in modern conditions Parliament should specify the factors applicable to the decision whether or not to prosecute and, if so, which charge to select. The grey area should now be converted to black and white.

Factors

What are the relevant factors? Ex hypothesi, they have not been authoritatively specified. First let us set the stage.

As the Royal Commission report says, the decision whether or not to prosecute-

> 'is in fact not one but a long series of decisions which more often than not begin with a decision by a member of the public to report an incident to the police' (para 7. 10).

At each stage, the responsible official must decide whether the process should continue to the next stage or terminate. He will be guided by three considerations: whether a crime has been committed, whether there is likely to be sufficient evidence to convict the suspect, and whether, if so, it is expedient to prosecute him.

Let us suppose the first two questions are at all stages answered in the affirmative. There remains the question of expediency. Despite the evidence they received, the Royal

Commission make no attempt to formulate the applicable factors in a detailed and systematic way. What follows is based on my own researches.

The factors can be roughly divided into two categories: those relevant to the offence and those relevant to the offender.

Factors relevant to offence

A prosecution may be contra indicated if the offence is technical, or the statute creating it is obsolescent. Although the law of limitations does not apply to crimes, a stale offence is less likely to be prosecuted than one recently committed. If a prosecution is likely to have undesirable repercussions, say on national security or labour relations, it may not be brought. Similarly where there is an international dimension (eg the wish to exchange a willing prisoner for hostages). Another factor may be the risk of harm to an essential witness (eg a young child in a sex case). Less praiseworthy is a government's wish to stifle an unpopular prosecution where votes are at stake. Policy requirements of a more legitimate kind concern the occurrence factor. Where a certain offence is on the increase, either nationally or in the locality, it may be desirable to prosecute instances of it which might otherwise be passed over.

Factors relevant to offender

Advanced age or failing health may render a trial a cruel imposition. High social status may bring disproportionate punishment for a minor offence. Relationship to the victim can be a compelling factor. A wife assaulted by her husband may have to go on living with him. The prospects for the marriage will not be improved by the rigours of a trial. There may be legal factors. Perhaps the offender is already undergoing punishment for a much more serious offence, or has agreed to turn Queen's Evidence, or is to be lured from abroad in order to testify in another case.

This is not an exhaustive list. There must always be a residual discretion on the part of the prosecuting authority, if only because the scale of the investigation and prosecution of crime depends ultimately on the resources the state chooses to devote to it. But prosecuting authorities need specific guidance on what reasons for non prosecution are legitimate. This needs to be worked out in as much detail as possible and then promulgated. The question is, who should carry out this task?

Who should provide the guidelines?

The Royal Commission express anxiety that, subject to justifiable local variations, prosecution policy over the whole country should be uniform. In effect this means that decisions taken by the police on social and policy grounds should derive from consistent criteria. Witnesses to the Royal Commission expressed concern about the disparity of policy between prosecuting agencies, giving as an example

> 'the zeal with which social security frauds are prosecuted . . . contrasted with the relatively limited extent to which income tax defaulters are prosecuted' (para 7. 43).

Elsewhere the Royal Commission record that police forces have not found it easy to achieve consistency in the treatment of shoplifters, and that such consistency is desirable (para 7. 46).

So the Royal Commission agree that there should be formal guidelines. But they do not seem to recognise the fundamental importance of the content of these. After all it is accepted now that only Parliament can create a new criminal offence, which it does after a great deal of publicity and debate. Yet the creation of an offence is a mere *brutum fulmen* if no one enforces it. The efficacy of Parliament's action in deciding to create the offence is in direct ratio to the proportion of provable infringements that are prosecuted. If, as a result of prosecution policy, only $^{1}/_{20}$th are prosecuted the effectiveness, of Parliament's action in creating the offence is very much less than if $^{1}/_{3}$rd are prosecuted. This surely establishes that, in outline at least, the prosecution policy should be decided by Parliament (though always

leaving a necessary discretion). The power to do this is an adjunct to Parliament's offence creating powers.

The Royal Commission do not examine the rival arguments, but rely on mere assertion. What they say is that

> 'an attempt must be made under the auspices of the Director of Public Prosecutions to develop and promulgate throughout the police and prosecution services criteria for the exercise of the discretion to prosecute' (para 8. 10).

Yet statutory guidelines would be of great value. Having been enacted after full consultation and debate, they would satisfy the test that justice must be seen to be done. Complaints that an offence had not been prosecuted, and such complaints are very frequent, would be tested in the light of the statutory guidelines. In 1968 Mr Raymond Blackburn brought an action to compel the Metropolitan Police to abandon their policy of not prosecuting offences by gaming clubs.

The Court of Appeal regarded it as objectionable that the Commissioner had, as a matter of policy, issued a direction to this effect (*R v Commissioner of Police for the Metropolis, ex parte Blackburn* [1968] 2 QB 118). With statutory guidelines the courts would have an authoritative yardstick. They would be useful also in helping a court to decide whether, to give costs to or against the prosecution, and whether to criticise the bringing of a prosecution. They would establish the basis for the granting or withholding of consent to a prosecution in the cases where, by statute, such consent is required. They could also embody court rulings as to choice of offences to be charged (for an example see *R v Canterbury Justices* [1981] 2 All ER 129, 139.

When in the Thorpe case Mr Peter Bessell was given immunity from prosecution there was a row. There was another row when Sir Peter Hayman was not prosecuted for sending obscene material to a willing recipient. It is not for the Director of Public Prosecutions, a paid official, to bear the brunt of such rows. It is high time Parliament itself assumed responsibility.

FRANCIS BENNION