

**Original citation:**

Soubise, Laurène (2017) Prosecuting in the Magistrates' Courts in a time of austerity. *Criminal Law Review*, 11. pp. 847-859.

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# Prosecuting in the magistrates' courts in a time of austerity<sup>1</sup>

**Abstract:** Summary proceedings in the magistrates' courts have always been a quicker and cheaper way to process minor criminal cases, compared to trial by jury at the Crown Court. Research studies have shown how defence lawyers have made those cases routine so that they could be processed rapidly and cost-effectively through the system. However, there has been little research on how the Crown Prosecution Service (CPS) deals with magistrates' court cases. Basing its analysis upon direct observations and interviews with CPS staff, this paper examines the impact of efficiency concerns and recent budget cuts on the way cases are prosecuted by the CPS at the magistrates' court. It shows how, taking advantage of routinised defence practices, most of the CPS magistrates' court advocacy has been delegated to Associate Prosecutors (APs). This delegation to less-qualified personnel reinforces the bureaucratisation of summary justice as it is based on decisions being made in the prosecutor's office, instead of open court. In practice, oversight by Crown Prosecutors is limited as the constraints of court advocacy run against the rules governing APs powers.

## Introduction

Proceedings conducted in the magistrates' courts have always provided a less complex and less expensive method of dealing with more minor criminal cases, compared to Crown Court proceedings.<sup>2</sup> Instead of trial by jury, cases are dealt with by a bench of lay magistrates or a district judge. In 2000, Belloni and Hodgson estimated that "[e]ach contested case heard in Crown Court costs roughly £12,000 more than it would have done if tried by magistrates".<sup>3</sup> There have been longstanding political and judicial

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<sup>1</sup> I would like to express my thanks to the staff at the CPS office who generously welcomed me and gave up their time for this research despite all the considerable pressures on them, and to their managers who gave permission for this. I must also thank the editor and reviewers of this journal, as well as Jacqueline Hodgson for their comments. Any remaining error and inaccuracy are entirely my fault.

<sup>2</sup> Rod Morgan, 'Summary Justice, Fast - but Fair?' (Centre For Crime and Justice Studies 2008) <<https://www.crimeandjustice.org.uk/publications/summary-justice-fast-fair>> accessed 22 April 2017.

<sup>3</sup> Frank Belloni and Jacqueline Hodgson, *Criminal Injustice an Evaluation of the Criminal Justice Process in Britain* (Palgrave, 2000) 115. This £12,000 figure seems to come directly from the report of the 1993 Royal Commission on Criminal Justice which cites estimates calculated by the Home Office Research and Planning Unit. These estimates include 'costs to the Crown Court and magistrates' courts services (excluding capital costs in both cases), criminal legal aid costs, and costs to the Crown Prosecution Service, to the Probation Service by virtue of their work in the courts, and prison escort costs. The Crown Court trial costs include the cost of committal proceedings which have preceded the trial.' Viscount Runciman of Doxford, 'The Royal Commission on Criminal Justice. Report' (1993) Cm 2263 5. The costs of trials are difficult to estimate, but more recent figures suggest the differential remains significant: a 2016 report by the National Audit Office estimates that Crown Court cases 'cost an average of £1,900 per day for staff, judicial and juror costs, compared with £1,150 in a magistrates' court.' (National Audit Office, 'Efficiency in the Criminal Justice System' 10.); the CPS scales of cost for application for costs against convicted defendants provide guidance on the level of costs incurred by the CPS for cases committed to the Crown Court for trial: on average, £3,500 (compared to £965 for an either-way trial at the magistrates' court): see <[http://www.cps.gov.uk/legal/a\\_to\\_c/costs/annex\\_1\\_-\\_scales\\_of\\_cost/](http://www.cps.gov.uk/legal/a_to_c/costs/annex_1_-_scales_of_cost/)> accessed 24 July 2017.

efforts to increase the scope of summary jurisdiction and restrict the right of defendants to choose trial by jury, largely because of concerns around the cost and length of Crown Court proceedings. Cammiss traces legislative reforms increasing summary jurisdiction as far back as 1847, always motivated by the reduction of delay and the saving of resources.<sup>4</sup> More recently, the Criminal Justice Act 1988 reclassified four either-way offences as ‘summary only’ and s. 176 (1) Anti-social Behaviour, Crime and Policing Act 2014 also made low value shoplifting a summary offence.<sup>5</sup> Furthermore, s. 154 Criminal Justice Act 2003 will increase the sentencing powers of magistrates (if and when it comes into force), in an effort to keep cases in the magistrates’ courts. In 1993, the Royal Commission on Criminal Justice (RCCJ) chaired by Lord Runciman recommended that the right to jury trial be removed in cases triable ‘either way’, explicitly justifying the recommendation in terms of cost.<sup>6</sup> Further proposals to remove the right to elect Crown Court trial were made in the Narey report (1997),<sup>7</sup> the Auld review (2001)<sup>8</sup> and the Leveson review (2015).<sup>9</sup>

Criminal justice scholars have long criticised this increase in the magistrates’ caseload as summary proceedings are arguably less testing for the prosecution case than trial by jury. Marsh thus argues that “magistrates’ courts reflect a rapid ‘assembly-line’ approach to the disposals of cases”.<sup>10</sup> This is problematic, particularly in a broadly adversarial system where the truth is supposed to come out from the confrontation of the prosecution case to the defence case. Not testing out the prosecution case more robustly means that convictions are based on a partial account of the facts and could potentially lead to miscarriages of justice. Acquittal rates remain higher in the Crown Court, than in the magistrates’ courts,<sup>11</sup> giving some substance to the belief held by defendants and defence lawyers that there is a bias in favour of the prosecution in magistrates’ courts.<sup>12</sup> This view of magistrates’ courts as merely rubber-stamping decisions made by prosecutors is compounded by ethnographic studies which have shown how defence solicitors fail to build a defence case and therefore to present any

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<sup>4</sup> Steven Cammiss, “‘I Will in a Moment Give You the Full History’: Mode of Trial, Prosecutorial Control and Partial Accounts’ [2006] *Criminal Law Review* 38, 38–39.

<sup>5</sup> Although adult defendants can still elect Crown Court trial, in which case the offence is no longer summary.

<sup>6</sup> Runciman of Doxford (n 3) 85, 87–88; for a critique of this proposal, see, for instance, Stewart Field and Philip A Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice’ (1994) 21 *Journal of Law and Society* 1, 9; Lee Bridges, ‘Normalizing Injustice: The Royal Commission on Criminal Justice’ (1994) 21 *Journal of Law and Society* 20; Andrew Ashworth, ‘Plea, Venue and Discontinuance’ [1993] *Criminal Law Review* 830; Belloni and Hodgson (n 3) 116–118.

<sup>7</sup> Martin Narey, *Review of Delay in the Criminal Justice System: A Report* (Home Office 1997).

<sup>8</sup> Robin Auld, *Review of the Criminal Courts of England and Wales: Report* (Stationery Office 2001).

<sup>9</sup> Brian Leveson, ‘Review of Efficiency in Criminal Proceedings’ (Judiciary of England and Wales 2015) 87.

<sup>10</sup> Luke Marsh, ‘Leveson’s Narrow Pursuit of Justice’ (2016) 45 *Common Law World Review* 51, 60.

<sup>11</sup> The latest CPS statistics give an acquittal rate of 14.4 percent in the magistrates’ courts (discontinuances, including bind overs, dismissals no case to answer and dismissals after trial), against 19.6 percent in the Crown Court (judge-ordered acquittals including bind overs, judge-directed acquittals and acquittals after trial): see Crown Prosecution Service, ‘Annual Report and Accounts 2015–16’ (2016) 59–61 <[http://www.cps.gov.uk/publications/docs/annual\\_report\\_2015\\_16.pdf](http://www.cps.gov.uk/publications/docs/annual_report_2015_16.pdf)> accessed 20 June 2017.

<sup>12</sup> Carol Hedderman and David Moxon, ‘Magistrates’ Court or Crown Court? Mode of Trial Decisions and Sentencing’ (Home Office 1992) Home Office Research Study No. 125 20; see also AE Bottoms and JD McClean, *Defendants in the Criminal Process* (Routledge 1976).

opposition to the prosecution case. McConville et al showed how, in order to enable the quick and cost-effective processing of cases through the system, defendants are placed under intense pressure by their own lawyer to plead guilty.<sup>13</sup> A 2013 empirical study by Newman<sup>14</sup> shows that their findings continue to reflect current defence lawyer practices.

Little research has been done on how the CPS prosecutes cases at the magistrates' court, especially in the current context of budget cuts and increased focus on efficiency savings for criminal justice agencies. This paper draws on insights from empirical data collected in 2012 for my PhD, a comparative study of prosecutorial discretion and accountability in France and England and Wales. Data was collected during a 4-month period of direct observation at a CPS office in a large English city (covering the city's magistrates' court, as well as two magistrates' courts in neighbouring towns).<sup>15</sup> I spent a month going to court with CPS staff, observing over 260 hearings at the magistrates' court. I then spent another month observing how reviews in preparation for trial at the magistrates' court were conducted in the office. Despite several attempts, I was only able to attend two full trials as many cases originally listed for trial ended in guilty pleas or were discontinued by the CPS. In addition, I carried out semi-structured interviews with thirty-one CPS staff in total, including five Associate Prosecutors (out of a total of thirteen working in the office), three paralegal officers (out of five), five Crown Prosecutors who worked mainly in the magistrates' court team<sup>16</sup> and the two District Crown Prosecutors who headed the magistrates' court team. It is important not to overstate the findings of this study given its limitations to a single CPS office, as well as constant change in prosecuting practices. Nevertheless, this research provides important insights into the effect of decreasing resources on the allocation of tasks in a CPS office and the impact of this allocation on the wider criminal justice system.

In this paper, I show how most of the CPS' magistrates' court workload has been delegated to Associate Prosecutors (APs), with limited oversight by Crown Prosecutors. After having presented the context in which this delegation is taking place and how these personnel are selected and trained, I argue that this delegation is enabled by, but also reinforces the bureaucratisation of summary justice, pushing all decision-making back to the prosecutor's office, instead of open court. Furthermore, although APs have limited powers in theory and can only exercise them under the supervision of Crown Prosecutors, the limits to their powers are in tension with efficiency objectives. In practice, the rules framing the powers of APs are simply unworkable as concerns over flexibility and speed appear to overcome the need for

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<sup>13</sup> Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) ch 10; see also Aogan Mulcahy, 'The Justification of Justice - Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34 *British Journal of Criminology* 411; *Contra* Max Travers, *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* (Ashgate 1997).

<sup>14</sup> Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013).

<sup>15</sup> The majority of my observations were conducted in the city's magistrates' court

<sup>16</sup> Crown Prosecutors rotated between different teams (charging team, magistrates' court team, Crown Court team). During my fieldwork however, the same Crown Prosecutors tended to be attached to the magistrates' court team and I therefore chose five of them for interviews.

accountability. Crown Prosecutors only have limited oversight, due to the constraints of court advocacy and efficiency concerns.

## Context

Efficiency concerns are nothing new at the CPS, which began operating in 1987. Around the same time, the managerialist agenda started its ascendancy in the administration of public agencies, although the arrival of managerialism in criminal justice was slower than in other parts of the UK public sector.<sup>17</sup> Introducing the private sector's managerial methods to the public sector, 'New Public Management' – as it is often referred to – places performance at the heart of the criminal justice system, usually at the expense of professionals' discretion.<sup>18</sup> Introduced by the Conservative government in 1979, the managerialist strategy was fully supported and taken up further by New Labour. Tellingly, official reviews of the criminal justice system have all focused on efficiency in recent years.<sup>19</sup> From 2010, the austerity policy pursued by the incoming Conservative government increased the pressure on criminal justice agencies, CPS included, to become more efficient following budget cuts. The CPS saw its budget cut by 26 percent between 2009-10 and 2015-16.<sup>20</sup> Although its workload has decreased – due, in part, to some transfers of prosecution powers in the magistrates' courts to the police –,<sup>21</sup> the CPS has still had to find substantial efficiency savings in recent years.

In order 'to improve the efficiency and effectiveness of the magistrates' courts systems and processes',<sup>22</sup> the CPS introduced the Optimum Business Model in 2008<sup>23</sup> which

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<sup>17</sup> Carol Jones, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187; Nicola Lacey, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *The Modern Law Review* 534; John W Raine and Michael J Willson, 'Beyond Managerialism in Criminal Justice' (1997) 36 *The Howard Journal of Criminal Justice* 80; Ian Brownlee, 'New Labour - New Penology - Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy' (1998) 25 *Journal of Law and Society* 313; Eugene McLaughlin and John Muncie, 'The Criminal Justice System: New Labour's New Partnerships' in John Clarke, Sharon Gewirtz and Eugene McLaughlin (eds), *New managerialism, new welfare?* (SAGE 2000); Lee Bridges, 'Toward a Culture of Complacency – Criminal Justice under New Labour' (2010) 79 *Criminal Justice Matters* 22; Ed Cape, 'Adversarialism "Lite": Developments in Criminal Procedure and Evidence under New Labour' (2010) 79 *Criminal Justice Matters* 25; Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.

<sup>18</sup> Raine and Willson (n 16) 82-83; McEwan (n 16) 522.

<sup>19</sup> Runciman of Doxford (n 3) paras 16-19; Narey (n 6); Auld (n 7); Leveson (n 8).

<sup>20</sup> Crown Prosecution Service, 'Annual Report and Accounts 2014-15', p. 74 <[http://www.cps.gov.uk/publications/docs/annual\\_report\\_2014\\_15.pdf](http://www.cps.gov.uk/publications/docs/annual_report_2014_15.pdf)> and Crown Prosecution Service, 'Annual Report and Accounts 2015-16', p. 65 <[http://www.cps.gov.uk/publications/docs/annual\\_report\\_2015\\_16.pdf](http://www.cps.gov.uk/publications/docs/annual_report_2015_16.pdf)> accessed 1 May 2017.

<sup>21</sup> Whilst in 2005-06, the CPS prosecuted over a million cases in the magistrates' courts, their caseload fell to just over 538,000 cases in 2015-16: Crown Prosecution Service, 'Annual Report and Resource Accounts', p. 86 <<http://www.cps.gov.uk/publications/docs/annualreport08.pdf>>; Crown Prosecution Service, 'Annual Report and Accounts 2015-16', p. 57 <[http://www.cps.gov.uk/publications/docs/annual\\_report\\_2015\\_16.pdf](http://www.cps.gov.uk/publications/docs/annual_report_2015_16.pdf)> accessed 1 May 2017.

<sup>22</sup> Crown Prosecution Service, 'Annual Report and Accounts 2010-11' (2011) HC 1000 14 <<http://www.cps.gov.uk/publications/reports/2010/>> accessed 26 June 2017.

resulted in the fragmentation of the prosecution process, as cases are no longer allocated to individual Crown Prosecutors, but to teams. Somewhat reminiscent of an assembly line, the prosecution process was divided into a number of micro-decisions and I observed CPS staff carry out the same narrowly defined routine tasks on files that entered the system, without an overview of the whole process. Interestingly, the lack of ownership of cases by a named lawyer was criticised by Leveson in his 2015 review of the criminal justice system as an obstacle to efficient case management,<sup>24</sup> suggesting that efficiency for one agency does not necessarily align with efficiency for the whole system.

This organisation of the CPS is enabled by the division of the criminal justice process into several stages: charge, pre-trial hearings, trial, and sentencing. Following the police investigation and the charge, all cases start with a first hearing at the magistrates' court. The majority of cases are finalised there, but the most serious ones are sent to the Crown Court for trial and/or sentence. Files can enter the CPS process prior to the suspect being charged if the police seek CPS charging advice<sup>25</sup> or just before the first hearing at the magistrates' court.<sup>26</sup> Pre-charge advice, advocacy at various court hearings, and preparation for trial are distinct stages in the process and each is completed by a different member of staff, except in cases of rape, serious sexual assaults or child abuse cases, or in cases that are too complex or where the evidence is too voluminous to be dealt with in a short period of time. The division of the prosecution process into individual tasks results in a compartmentalisation of work, which has in turn facilitated the delegation of part of the prosecution workload to less qualified personnel.

In a 1999 article, Kritzer describes what happened to skilled craftspeople during the Industrial Revolution and draws a parallel with what is happening to the legal profession in modern societies:

The rationalization of the production process, combined with the invention of machines, eventually led to the development of the factory. Industrialists were able to isolate the individual tasks needed for production and then hire workers each with just enough skill to carry out one or several of those tasks. The result was cheaper production of goods, a shift from human capital in the form of skilled craftspeople to industrial capital, and the

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<sup>23</sup> Crown Prosecution Service, 'Annual Report and Resource Accounts 2007-08' (2008) HC 538 16 <<https://www.gov.uk/government/publications/crown-prosecution-service-annual-report-and-resource-accounts-for-the-period-2007-to-2008>> accessed 5 July 2017.

<sup>24</sup> Leveson (n 8) 9.

<sup>25</sup> The Criminal Justice Act 2003 gave the DPP the power to issue guidance on charging which police officers and prosecutors must comply with. The DPP's guidance lists the offences that can be charged by the police alone and those where they must seek the advice of Crown prosecutors. See DPP's charging guidance <[http://www.cps.gov.uk/publications/directors\\_guidance/dpp\\_guidance\\_5.html](http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html)> accessed 1 May 2017.

<sup>26</sup> See below for the proportion of cases where advice is sought and those that enter just before the first hearing (n 44).

effective end of many crafts except for highly specialized or artistic applications.<sup>27</sup>

Having ‘rationalised’ the prosecution process as described above, some of the tasks previously carried out by Crown Prosecutors have been reallocated to ‘cheaper’ CPS personnel, i.e. APs. Thus, in the magistrates’ court team, APs prosecuted cases at court.

The obvious benefit for the CPS in allocating staff to specific stages in the process rather than to cases and in diverting some prosecutorial tasks away from Crown Prosecutors is the prospect of processing more cases with the same or even fewer staff. This is particularly attractive in a context of budget cuts. One of the ways the CPS profess to save money is by ‘maximising the use of paralegal staff.’<sup>28</sup> Employing APs, rather than qualified solicitors or barristers to prosecute in court, is cheaper and also frees up qualified lawyers to do other work.<sup>29</sup> Thus, the National Audit Office noted in a 2006 report that ‘[i]n 2004-05, magistrates’ courts scheduled only enough cases to occupy designated case workers<sup>30</sup> for 60 per cent of their time; increasing this to 80 per cent would release the equivalent of 33 lawyers for other work and achieve savings of £2.3 million.’<sup>31</sup> Thus, to increase the number of magistrates’ courts hearings covered by APs was a CPS performance target in 2008.<sup>32</sup>

### Selection and Training

The delegation of advocacy in the magistrates’ courts to APs stems from the expectation that legal issues are not resolved at court and that Crown Prosecutors are therefore not needed there, because major legal decisions can be made in the office. If the defendant pleads guilty to the offence s/he is charged with in the first hearing and the case is suitable for sentence in the magistrates’ court, the role of the CPS representative is limited to reading the police summary before mitigation by the defence, so that the magistrates or the district judge can pass sentence. In those straightforward cases, no legal decision is made at court by the prosecution and it is perhaps understandable that the CPS has sought to save resources by redeploying Crown Prosecutors to review cases in the office, rather than in court and using APs to

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<sup>27</sup> Herbert M Kritzer, ‘The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World’ (1999) 33 *Law & Society Review* 713, 723–724.

<sup>28</sup> ‘The responsibility for continuous improvement in the coming year lies primarily with the 13 Areas, which will be looking to further increase efficiency by reducing the number of administrative tasks that need to be undertaken and maximising the use of paralegal staff to support our prosecutions’, ‘Optimum Business Model and Paralegal Career Family Structure’, in ‘CPS Annual Report and Resource Accounts 2010-2011’ <[http://www.cps.gov.uk/publications/reports/2010/optimum\\_business\\_model.html](http://www.cps.gov.uk/publications/reports/2010/optimum_business_model.html)> accessed 1 May 2017.

<sup>29</sup> Another advantage is that it provides new career progression opportunities for non-legal staff at the CPS.

<sup>30</sup> Associate Prosecutors used to be called ‘designated case workers’ prior to the Criminal Justice and Immigration Act 2008.

<sup>31</sup> National Audit Office, *Crown Prosecution Service: Effective Use of Magistrates’ Courts Hearings* (Stationery Office 2006) 4 <<http://www.nao.org.uk/wp-content/uploads/2006/02/0506798.pdf>> accessed 1 May 2017.

<sup>32</sup> Crown Prosecution Service, ‘Annual Report and Resource Accounts 2007-08’ (n 22) 12.

carry out relatively routine and predictable work. In this section, I will examine how APs are selected and trained by the CPS.

APs are empowered to represent the CPS at most hearings in the magistrates' courts. The Crime and Disorder Act 1998<sup>33</sup> increased their powers beyond the presentation of bail applications to the conduct of certain criminal proceedings in magistrates' courts. They present the prosecution case to magistrates and make representations on mode of trial, bail, and sentencing. APs also prosecute cases in the youth court where they can present 'grave crime' arguments,<sup>34</sup> so that the case is committed to the Crown Court. Specially trained APs, known as Level 2 Associate Prosecutors (AP2s), are permitted to prosecute trials in summary only, non-imprisonable offences, such as road traffic offences. The work delegated to APs therefore includes almost all advocacy work at the magistrates' court, with Crown Prosecutors being confined to the (rare) trials for imprisonable offences.

Some of the APs I observed were qualified solicitors or barristers who had not been able to secure posts as Crown Prosecutor or Crown Advocate, although being a solicitor or a barrister is not a requirement to become an AP. Instead, APs are selected amongst CPS staff who have 'experience of casework within the criminal justice system or of lay presentation'<sup>35</sup> and 'a working knowledge of criminal law and its application, magistrates' courts procedure and the criminal justice system'.<sup>36</sup> In the CPS office I observed, several APs had been working for the CPS for over 25 years as administrative and/or paralegal staff, and none of them had less than seven years' experience at the CPS. Once selected, APs undertake a two-week training programme: the first week is a foundation course in legal principles and the second week is an advocacy course. They have to pass an independent assessment of competence before being authorised to practice as an AP. They also undertake further training for bail applications, youth courts, and domestic violence. APs are accredited and regulated through the Chartered Institute of Legal Executives.

Although many APs I interviewed described the training course as 'intense' (EW-8, EW-5),<sup>37</sup> some were conscious that it could not compare to a law degree: 'a week worth of law, it skims over everything very quickly' (EW-10). Theoretical training is complemented by shadowing more experienced colleagues at court for several weeks (both prior and during the completion of the initial training course).<sup>38</sup> All the APs I

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<sup>33</sup> Section 53.

<sup>34</sup> Exceptionally, cases involving grave crimes (defined in section 91(1) Powers of Criminal Courts (Sentencing) Act 2000) can be tried at the Crown Court, rather than a youth court, if magistrates consider that a custodial sentence exceeding two years is likely to be imposed following conviction. Prosecutors should assist the court in determining the appropriate venue, in particular by informing the court of the aggravating and mitigating features of the offence.

<sup>35</sup> Crown Prosecution Service, 'Annex D – Associate Prosecutors Training and Selection', in 'CPS Annual Report and Resource Accounts 2010-2011' <[http://www.cps.gov.uk/publications/reports/2010/annex\\_d.html](http://www.cps.gov.uk/publications/reports/2010/annex_d.html)> accessed 2 May 2017.

<sup>36</sup> Ibid.

<sup>37</sup> Participants and cases are coded by the letters EW (for England and Wales) and a number (i.e. EW-126).

<sup>38</sup> See the 'Associate Prosecutor Rights of Audience and Litigation Certification Rules' on ILEX website at <[http://www.cilexregulation.org.uk/~media/pdf\\_documents/cilex-regulation/rules/associate-prosecutor-rights-of-audience-and-litigation-certification-rules.pdf?la=en](http://www.cilexregulation.org.uk/~media/pdf_documents/cilex-regulation/rules/associate-prosecutor-rights-of-audience-and-litigation-certification-rules.pdf?la=en)> accessed 22 May 2017.

interviewed were confident they could prosecute cases in the magistrates' court as a result of the initial training and their experience at court. This might be true of the more routine and predictable work they are trained to carry out, but it becomes more difficult when the defence unexpectedly opposes the prosecution case as I will show below.

### The bureaucratisation of magistrates' court's hearings

The assumption that magistrates' court work is routine and predictable is backed up by statistics which show that the vast majority of defendants (76 per cent in 2015-16)<sup>39</sup> plead guilty. Furthermore, McConville et al and showed that, contrary to expectations in an adversarial system, applications by the prosecution often go unopposed.<sup>40</sup> Newman's 2013 empirical study echoed the findings of McConville et al, underlining the continuing prevalence of passive defence, in contradiction with the active role presented by defence lawyers in formal interviews.<sup>41</sup> The ability of APs to represent the prosecution at magistrates' court hearings, without challenge or having facts or evidence issues contested, is contingent on defence lawyers behaving in non-adversarial ways, processing their clients towards a guilty plea and not opposing applications by the prosecution. However, the absence of Crown Prosecutors at the magistrates' court also reinforces the bureaucratisation of summary proceedings, given that legal issues cannot be resolved at court should the defence wish to act in a more adversarial manner.

The extent to which defence lawyers facilitate the routinised nature of the prosecution function, as it necessarily is when carried out by APs, becomes evident when defendants are not represented, which is increasingly the case given cuts to legal aid. For instance, in case EW-262, the defendant was charged with harassment, but he was not represented in court and was determined to contest the prosecution case. After he entered not guilty pleas, the AP decided to apply for special measures for the complainants, to stop the defendant from cross-examining them himself if he was not represented at trial. Asked why she wanted to make this application, she justified it by the nature of the allegations, but the district judge pressed her for more details. She read the charges, but the judge was not satisfied this was a proper application for special measures. The court's legal adviser tried to come to her rescue by telling her the criteria for such application. The judge asked the AP to provide specific reasons in support of her application to forbid the defendant to cross-examine the complainants and, when she was unable to provide them, requested that a Crown Prosecutor review the matter.

Discussing this deeply embarrassing moment with the AP after the hearing, she told me that she had never before had to make a formal application to the court as it was always granted without further questions. Although unusual,<sup>42</sup> this case illustrates how the presence of defence lawyers normally ensures that applications are granted

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<sup>39</sup> Crown Prosecution Service, 'Annual Report and Accounts 2015-16' (n 10).

<sup>40</sup> McConville and others (n 12).

<sup>41</sup> Newman (n 13).

<sup>42</sup> I only witnessed one such incident, but the vast majority of defendants were represented at the time of my fieldwork.

without further probing, the judge presumably assuming that the defence lawyer would raise an objection if they wished to oppose the application. Defence lawyers therefore do not simply facilitate the delegation of prosecutorial tasks to less qualified CPS staff, but also legitimate the passive role of the bench in proceedings by their mere presence.

The absence of Crown Prosecutors from court reinforces the bureaucratisation of summary proceedings as legal issues cannot be resolved at court in the cases where defence lawyers – or defendants themselves – take a more adversarial stance. They are often only in contact with APs who – officially – do not have the powers to make decisions on legal issues.<sup>43</sup> This means that defence lawyers have to write to the CPS to query legal aspects of a case. Crown Prosecutors are not allocated to specific cases, but are given a list of tasks across several files to deal with. The defence query will therefore be dealt with by someone unfamiliar with the case or the issues involved in it. Despite their lack of knowledge of the case in its entirety, these lawyers are asked to answer legal queries from the defence. This could lead to further inefficiencies, with Crown Prosecutors reviewing cases which have already been reviewed by other colleagues, or to mistakes with decisions made without all relevant information.

The CPS is not directly responsible for the bureaucratisation of magistrates' court proceedings, but it contributes to it, by preventing the resolution of some cases at court. As a result, the magistrates' court merely rubber stamps decisions made outside of court, often in the CPS office. The examples above show that the absence of Crown Prosecutors from court and their replacement by APs can lead to inefficiencies too, as cases which require legal decisions have to be adjourned to a later date, so that they can be reviewed by a Crown Prosecutor. Tensions arise between efficiency objectives and concerns that all major legal decisions, in particular the amendment of charges or the acceptance of pleas, are made by fully qualified Crown Prosecutors. The rules limiting the powers of APs prove to be unworkable in practice: the oversight exercised by Crown Prosecutors over APs' decisions is weak and I observed APs breach those rules on a daily basis, with the full knowledge of their superiors, due to a lack of resources to deal with the heavy caseload.

### Weak oversight by Crown Prosecutors

Even in cases where the defence does not oppose all of the prosecution case, it might be necessary for the prosecution to make legal decisions, i.e. accept a guilty plea to a lower charge or discontinue some of the charges in exchange for guilty pleas to others. APs are not permitted to do so, unless they seek instructions from a Crown Prosecutor. Although authorising APs to engage in plea negotiations would be consistent with efficiency, this is theoretically outweighed by concerns to ensure that major legal decisions and those around case disposal are taken only by Crown Prosecutors. Section 7A of the Prosecution of Offences Act 1985 states that APs have 'the powers and rights of audience of a Crown Prosecutor in relation to (...) the conduct of criminal proceedings in magistrates' courts other than trials'. The law specifies that APs 'shall exercise any such powers subject to instructions given to

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<sup>43</sup> See below for an analysis of how APs routinely breach the rules in practice.

[them] by the [DPP]'. According to paragraph 3.5 of the DPP's instructions to APs, 'APs exercise these powers and rights of audience *on the instructions of a Crown Prosecutor (...)*'<sup>44</sup> (emphasis added). In reviewing magistrates' court cases, Schedule 4 of the DPP's instructions states that APs have the power to make only minor amendments to the charge or summons.

Employing less-qualified staff to prosecute at court is not necessarily detrimental if cases are pre-determined by Crown Prosecutors in the office, although it can result in a lack of reactivity in court. If there is no authority on file to indicate which pleas would be acceptable, APs must seek authorisation prior to accepting a plea. In practice, however, Crown Prosecutors have only weak oversight over the work of APs at court. This is due to the reality of court advocacy – which does not always allow APs to interrupt proceedings in order to ring the office for instructions – and the overreliance by CPS management on APs seeking guidance, rather than a clear structure of supervision. Importantly, although I have used the word 'delegation', in fact cases are not reviewed by a Crown Prosecutor to decide whether it is suitable to pass on to an AP. Instead, they are divided up by administrators according to set criteria. This distribution of tasks relies on APs identifying cases that they believe should be brought to the attention of a Crown Prosecutor because of legal issues. Even in these cases, Crown Prosecutors often do not review the case file themselves due to time constraints, instead relying on the AP's account of the case.

Paragraph 3.6 of the Code for Crown Prosecutors insists that '[p]rosecutors review every case they receive from the police or other investigators'. However, the CPS only provides charging advice in a minority of cases, mostly in more serious or complex cases. In the vast majority of summary cases, the police can charge the defendant without reference to the CPS.<sup>45</sup> APs can therefore be the first CPS staff to review the charge when the case comes before the magistrates' court for the first hearing. If the defendant pleads guilty and is sentenced at that hearing, the case will not be reviewed further, unless the AP refers it to a Crown Prosecutor. Thus, in many instances, a case will be dealt with entirely by an AP – from pre-trial review to court presentation. Cases at the magistrates' court are prosecuted in the name of the CPS, but no Crown Prosecutor will have read the case, or made any decision concerning its treatment and disposal. This is particularly significant given that CPS review of cases charged by the police was a major reason for establishing the CPS in the first place.<sup>46</sup>

If the case has benefited from CPS advice prior to charging, a Crown Prosecutor will have reviewed the case at this stage. CPS charging lawyers should then endorse the file

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<sup>44</sup> These instructions are available on the CPS website <[http://www.cps.gov.uk/publications/directors\\_guidance/dpp\\_instructions.html](http://www.cps.gov.uk/publications/directors_guidance/dpp_instructions.html)> accessed 26 July 2017.

<sup>45</sup> In 2013, the CPS estimated that 'the police are responsible for approximately 71.5% of all charging decisions, with the CPS responsible for the remaining 28.5%.' Crown Prosecution Service, 'Annual Report and Accounts 2012-13' (2013) HC 31 7 <<https://www.gov.uk/government/publications/crown-prosecution-service-annual-report-and-accounts-2012-to-2013>> accessed 26 June 2017.

The latest edition of the Director's Guidance on Charging released in May 2013 limited the CPS remit on charging further, for instance returning charging powers to the police in cases of theft (shoplifting) without reference to the CPS where a not guilty plea is anticipated and the case is suitable to be dealt with in the magistrates' court (the police could already charge these offences where a guilty plea is anticipated).

<sup>46</sup> Andrew Sanders, 'The CPS - 30 Years On' [2016] Criminal Law Review 82, 87.

to give instructions to the prosecuting advocate with regards to acceptable pleas. If a not guilty plea is anticipated, charging lawyers should also prepare the case management form to advise what evidence will be needed at trial to support the prosecution case, i.e. which witnesses should be called to give evidence and/or whether hearsay, bad character, special measures applications/notices are necessary. The form must be filled out by both the defence and the prosecution to establish the legal issues in the case at the magistrates' court hearing. Importantly, the form is later used in the CPS by paralegal officers to process the necessary applications/notices prior to trial. Case management decisions should therefore have the input of a Crown Prosecutor, at least in certain cases. However, APs told me that they rarely received the completed form, either because charging lawyers failed to fill it out or because administrative staff did not attach it to the court bundle. In any case, one AP told me that he preferred to fill it out himself as he needed to sign it and did not think that charging lawyers filled it out correctly.

The practical reality of magistrates' courts' listings drives APs to breach procedure by accepting pleas without the prior authorisation of a Crown Prosecutor. Where an offer to plead guilty to a lesser offence than charged is made by the defence but there is no authority on file for APs to accept it, it is not practical for them to ask the court for time to consult with a superior by phone. Even when a District Crown Prosecutor was on duty to answer queries from APs at court – which was every day in the area I observed – APs confirmed in interviews that practical constraints meant they had to bend the rules.

We're not meant to accept any basis of plea. (...) That's a technicality. The thing is you've got to use your common sense over there because, to a certain degree, you just have to, otherwise you'd be stopping every two minutes to make a phone call to the office. [Interview respondent EW10]

Several APs told me in interviews that, with experience, they knew which pleas were acceptable. They were confident that their managers would back them up when they returned to the office.

We're quite lucky that our management back us up completely. Basically, you can make decisions at court, even though you're probably not supposed to make decisions at court, but you can in the knowledge that you're going to be backed up on it.<sup>47</sup> Because clearly, we're all stretched, there's not enough staff, you can't always get hold of somebody. They might be talking to someone else and you might only be allowed to stand the case down for five minutes.(...) I think when you've been in the job long enough you know what would rock the boat and what wouldn't. [Interview respondent EW6]

As can be seen clearly in this last comment, resource constraints limiting the availability of CPS lawyers are part of the reason why APs make decisions at court instead of asking for prior authorisation from a lawyer as they are legally required to. That pressure is exacerbated by the practical reality of court listings which preclude APs being given the time to ring the office. Importantly, this is done with the full knowledge of managers. I attended a team meeting during which the manager, whilst

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<sup>47</sup> Similar views were expressed by interview respondent EW7.

acknowledging that APs were not supposed to make the decisions to accept pleas or not, said that he was 'grateful' that they did as it avoided files being brought back to the office for a review to take place, thus further underlining the unworkable nature of the procedure in place for APs. Whilst Crown Prosecutors reviewing cases in the office often see their decisions reviewed, it is more difficult to review decisions to accept pleas as they are taken at court, in the heat of the moment, and will not be reviewed by others later in the process, since the case is finalised.

Further contradicting the notion that decisions are taken in CPS offices by Crown Prosecutors, I witnessed APs make pivotal decisions in court, fundamentally altering the fate of cases. APs often requested amendments to charges or the complete redrafting of them, sometimes in complete contradiction with the charging advice given to the police by a Crown Prosecutor. In case EW-230 where the charging lawyer had only authorised two charges of common assault, the AP added a charge of kidnapping. This was despite the fact that the charging lawyer had considered a kidnapping charge, but had expressly rejected it, as the AP admitted to me. Since kidnapping is an indictable-only offence, a case which originally involved two summary charges and should have been tried at the magistrates' court was sent to the Crown Court for trial.

The amendment of charges was particularly prevalent in cases of assaults where the charging lawyer had opted for a common assault charge, but where the AP favoured a more serious charge of assault occasioning actual bodily harm (ABH) or even grievous bodily harm (GBH), because the defendant was alleged to have used a weapon:

In case EW-329, a defendant was charged with an assault on a doctor who refused to give him medication. He was alleged to have grabbed a chair, lifted it in the air and brought it back down towards the doctor's head. The doctor had put his arms up to protect himself and the chair hit his hand, causing a cut. At first, the doctor thought it might need stitches, but it was treated with steri-strips. The police had proposed to charge the defendant with ABH, but the charging lawyer only authorised a charge for common assault. She properly applied the Charging Standards on offences against the person,<sup>48</sup> which require prosecutors to base their decisions on the level of injury and the likely sentence, rather than the circumstances of the assault. She had specifically addressed the issue of the chair used as a weapon in her charging advice – 'a weapon was used, the chair, but it was instantaneous and the level of injury was a cut that bled requiring steri-strips' –, but had concluded that the magistrates' sentencing powers were sufficient in this case. Nonetheless, the charge was changed back to ABH by the AP prosecuting at court who made representations to the magistrates that the case was not suitable for summary trial. The defendant pleaded guilty to it and was sent to Crown Court for sentence.

These examples are complete reversals of decisions made by Crown Prosecutors in blatant disregard of the limits of the AP's role. Although these changes can be 'authorised' by Crown Prosecutors, these authorisations come from people who have not reviewed the file to the extent the charging lawyer has, but are simply asked for their opinion before the AP leaves for court. Further insight into why APs amend

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<sup>48</sup> See <[http://www.cps.gov.uk/legal/l\\_to\\_o/offences\\_against\\_the\\_person/](http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/)> accessed 10 July 2017.

charges was given by the response of one AP I interviewed, when asked for his view on CPS policies and guidance:

I suppose, from our point of view, we would look at that [guidance] but some of it is, sort of, gut reaction from being in court day-in, day-out. Somebody who's at home or in their office making a decision on an assault case would say "oh well, hit somebody over the head with a hammer, still not serious injury, so section 39"<sup>49</sup> and sort of looking at the Charging Guidelines it talks about level of injury and everything like that... But, we would say in the office "well, that clearly makes it more serious, it's aggravated (...)" and so we would sometimes go against the Charging Standards because... because of the court's view on that type of case which would mean that the sentence is going to be greater than what a section 39 would allow.

The amendment of charges by APs thus runs against efforts by the CPS to make decision-making more consistent and principled through the implementation of policies, such as the Charging Standards for offences against the person.

### Conclusion

The Criminal Procedure Rules provide that dealing with a case justly includes dealing with the case efficiently and expeditiously. As Sanders argues, 'justice and democracy in criminal justice cannot be pursued unconditionally, for resources are not unlimited and other public services have equally legitimate demands on the same resource-pool.'<sup>50</sup> However, efficiency concerns should not override defence rights. Summary proceedings must strike a balance between dealing with minor criminal cases expeditiously, but also fairly. This paper has examined the way the CPS prosecute cases in the magistrates' courts. Given that previous studies have shown that defence lawyers often do not meet adversarial expectations, particularly at the magistrates' court, it argues that the CPS has taken advantage of this state of affairs in a context of economic austerity.

The prosecution process at the CPS was rationalised through the introduction of the Optimum Business Model which allocates narrowly defined tasks to CPS staff. This segmentation of the process enables the delegation of some of these tasks from Crown Prosecutors to less qualified personnel. Thus, in the CPS office observed in 2012, advocacy at the magistrates' court was undertaken by APs for most hearings. The introduction of these resource-saving measures is facilitated by the lack of opposition to the prosecution case and thus the absence of any legal issue on guilt to be adjudicated in the majority of cases. The presence of defence lawyers merely serves to preserve the legitimacy of the process by providing the appearance of checks on the prosecution case.

Given the limits to the powers of APs, these measures also reinforce the bureaucratisation of summary proceedings by preventing the resolution of legal issues

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<sup>49</sup> Common assault and battery are charged under section 39 of the Criminal Justice Act 1988.

<sup>50</sup> Sanders (n 45) 83.

at court and thus conflict with efficiency objectives. In this paper, I have shown how APs apparently routinely breach the rules framing their powers by accepting pleas offered by defence lawyers without authorisation from Crown Prosecutors, but with the full knowledge of CPS managers. Concerns over flexibility and speed appear to overcome the need for accountability. My research also reveals how APs amend charges in contradiction with the decision made by the CPS at the charging stage, strongly affecting the outcome of cases.

A larger scale empirical research project would be necessary to determine whether or not data collected in this study are representative of the reality in all CPS offices, rather than specific to the local site observed. APs are accredited and regulated by ILEX, with legal executives being described as the third branch of the legal profession.<sup>51</sup> They cannot therefore be described as unqualified or non-legal personnel. However, the profession remains subordinate to that of solicitors. It is questionable whether APs have the capacity to deal with complex laws of evidence on without guidance from qualified lawyers. If they do, it seems difficult to explain why they have a lower status – and lower remuneration – than Crown Prosecutors. Cuts to legal aid and the increase in the number of unrepresented defendants<sup>52</sup> mean that many magistrates’ court hearings take place without qualified solicitors or barristers representing either party. This gives credibility to fears of ‘de-lawyerisation’ of the magistrates’ court<sup>53</sup> and concerns for the quality of justice in summary proceedings.

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<sup>51</sup> Andrew M Francis, ‘Legal Executives and the Phantom of Legal Professionalism: The Rise and Rise of the Third Branch of the Legal Profession?’ (2002) 9 *International Journal of the Legal Profession* 5.

<sup>52</sup> There are no official figures for unrepresented defendants in the magistrates’ court, but a recent report by the charity Transform Justice suggests an increase: Penelope Gibbs, ‘Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts’ (Transform Justice 2016) <[http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL\\_Singles.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf)> accessed 11 July 2017.

<sup>53</sup> Catherine Baksi, ‘Solicitors Alarmed by Associate Prosecutor Proposals’ [2010] *Law Society Gazette* <<https://www.lawgazette.co.uk/news/solicitors-alarmed-by-associate-prosecutor-proposals/54633.article>> accessed 7 April 2017.