

# Decision-making in the Crown Prosecution Service:

How do prosecutors make case decisions?



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## **Declaration**

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or is being concurrently submitted, for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

Ben Widdicombe

30 October 2021

## **Abstract**

### **Decision-making in the Crown Prosecution Service: How do prosecutors make case decisions?**

This thesis aims to develop our understanding of how Crown Prosecution Service prosecutors in England and Wales make case decisions. My main argument is that the official account of how prosecutors make decisions as set out in the Code for Crown Prosecutors provides only a partial and somewhat misleading picture of decision-making, and that other, broader, factors are at play. The research adopts Hawkins's analytic framework of the 'Surround', 'Field; and 'Frame' and develops it by using empirical data to explore, identify and map these wider factors.

Drawing upon analysis of the Code for Crown Prosecutors, official documents, Crown Prosecution Service management data and interviews with Crown Prosecution Service prosecutors, my argument is developed by exploring four key areas: the history of trends in criminal justice and how they are reflected in successive editions of the Code for Crown Prosecutors, an exploration of the principles prosecutors consider when making decisions, the psychology of prosecution decision-making, and a comparison between those factors that show a statistical correlation to outcome and those that prosecutors identify as being important.

The findings from the fieldwork suggest that the Code for Crown Prosecutors contains gaps and ambiguities and is interpreted and applied in a range of ways by prosecutors. Therefore, our understanding of prosecutor decision-making should be broadened and deepened by reconceptualising decision-making as resting upon a far wider set of factors. The analysis suggests that prosecutors reflect in their decisions some broader political trends across the criminal justice system; certain case factors, such as the offence type, defendant age and prior convictions are of particular importance, as are prosecutor views on key prosecution principles. The findings also suggest that prosecutors make use of mental shortcuts to come to quick case decisions when they are under pressure. The analysis suggests that Hawkins's original model of decision-making can be improved by allowing for a greater integration and fluidity between the three analytical levels he proposed.

## **Dedication**

To my mother.

I wish she were here to see this.

## Acknowledgements

My thanks must go first of all to the Crown Prosecution Service. The CPS has been a superb employer and has supported my career and wider ambitions in a myriad of ways. Particular thanks must go to Paul Staff, my long-time line manager, who was always such an enthusiastic and warm supporter to me over the years. He encouraged my application and – critically – put in place the funding without which the PhD would have remained an unfulfilled ambition. I remain hugely grateful to him, and to the Service.

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## **List of abbreviations**

BAME	Black, Asian and minority ethnic
CCRC	Criminal Cases Review Commission
CCU	Complex Casework Unit (of the CPS)
CJS	Criminal Justice System
CMS	Case Management System
CPS	Crown Prosecution Service
CRE	Commission for Racial Equality (abolished 2007)
DV	Domestic Violence
DWP	Department of Work and Pensions
ECHR	European Court of Human Rights
HMCPSI	Her Majesty's Crown Prosecution Service Inspectorate
HR	Human Resources
I-Trent	A human resources and staffing database
LGBT	Lesbian, Gay, Bi- and Transsexual
MG3, MG5	Manual of Guidance (form 3, form 5) – electronic forms used by CPS
MIS	Management Information System
MoJ	Ministry of Justice
NAO	National Audit Office
NDM	Naturalistic Decision-making
RASSO	Rape and Serious Sexual Offences
RSPCA	Royal Society for the Prevention of Cruelty to Animals
UK	United Kingdom
USA	United States of America
VRR	Victims' Right to Review

# Chapter One: Introduction

## Introduction

In 2020 the Crown Prosecution Service (CPS) considered nearly half a million criminal cases, the vast majority referred by the police.<sup>1</sup> Cases coming before the CPS's prosecutors ranged from the most serious and life changing offences such as homicide, child abuse and terrorism through to those cases that are more common such as shoplifting, low-level disorder or minor criminal damage. In each case, CPS prosecutors considered the sufficiency of the available evidence and made a judgement as to whether a prosecution would be in the public interest. In most of these cases, prosecutors decided to prosecute, with 380,230<sup>2</sup> cases resulting in a conviction. Yet in over 100,000<sup>3</sup> cases – around a fifth – CPS prosecutors decided to stop a prosecution either before a suspect was charged or before the case got to trial. The decision taken by a CPS prosecutor in these cases effectively ended the criminal proceedings once and for all.<sup>4</sup> In criminal matters, whether small or large, CPS decisions affect the lives, livelihoods and liberty of many.

One need only look to the press for a demonstration of the importance of CPS decision-making. The decisions made by CPS prosecutors have been making news headlines for years - and very often for the wrong reasons. Whether it was the acquittal after trial of a prominent Member of Parliament,<sup>5</sup> a series of rape cases discontinued before trial due to new evidence

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<sup>1</sup> In 2019-20 the CPS completed the prosecution of 451,046 cases (this figure includes those prosecuted and acquitted after trial and discontinued after charge). In addition, it considered – but discontinued before charge – another 49,827 cases (of which 1,697 were dealt with by way of an Out of Court Disposal). The total is therefore 500,873. See <https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2019-2020>

<sup>2</sup> Ibid.

<sup>3</sup> 49,827 before a prosecution had formally begun and 44,429 after a prosecution had started. Ibid.

<sup>4</sup> 1,930 discontinuations were liable to be reviewed under the Victim's Right to Review scheme. In 2018-19 (latest figures available) only 205 reviews were upheld after appeal, equating to 0.22% of the total appealable decisions.

<https://www.cps.gov.uk/sites/default/files/documents/publications/Victims-Right-to-Review-Data-2018-19.pdf>

<sup>5</sup> The Rt. Hon. Nigel Evans MP was acquitted of rape and sexual assault charges by a jury in April 2014. See <https://www.bbc.co.uk/news/uk-26974585>

emerging at the last minute,<sup>6</sup> questions about whether or not to prosecute cases of assisted suicide<sup>7</sup> or prosecution for immigration offences,<sup>8</sup> confidence and trust in CPS prosecutor decision-making has been repeatedly called into question.<sup>9</sup>

Trust in CPS decision-making and the effective rule of law are inextricably linked.

Confidence in the criminal justice system - and by extension public order and the rule of law - relies upon the CPS being trusted and its decisions being accepted as fair and reliable. For the criminal justice system to maintain the public's confidence and a sense of legitimacy CPS decision-making must in turn hold the same confidence and sense of legitimacy. If the CPS falters, then the criminal justice system falters. The workings of the CPS and the case decisions it makes must and should be studied and understood.

It is surprising, therefore, that the CPS has been so little researched. Consider this basic illustration: a search on the Cambridge University Library catalogue returns 21,993 entries for research for 'police', 2,928 for 'judiciary' and 876 for 'Crown Court'. Entering 'Crown Prosecution Service' results in only 462 items in library catalogues – 2 per cent of those returned for 'police'. The CPS is in comparison little researched and little understood.

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<sup>6</sup> In December 2017 the trial of Liam Allen, who faced 12 counts of rape and sexual assault was halted when evidence emerged that the complainant in the case had been pestering him for 'casual sex'. In the same month, the case of rape against a Tory researcher Samuel Armstrong was dropped following the late disclosure of evidence that undermined the prosecution's case. And in January 2018 the case against Oliver Mears, an Oxford University student had his case for rape dropped on the eve of his trial following the non-disclosure of the complainant's diary that undermined the prosecution case. See <https://www.bbc.co.uk/news/uk-42795058>

<sup>7</sup> Following the ruling of the ECHR (2346/02 para 10-15) the CPS conducted a public consultation on its proposed new policy on prosecution of assisted suicide and later published an updated policy (<https://www.cps.gov.uk/publication/assisted-suicide>). Prosecution decisions in cases of assisted suicide continue to be controversial (see <https://www.bbc.co.uk/news/uk-wales-north-west-wales-44501925>)

<sup>8</sup> [www.independent.co.uk/news/uk/home-news/priti-patel-immigration-cps-migrants-max-hill-b1791407.html](http://www.independent.co.uk/news/uk/home-news/priti-patel-immigration-cps-migrants-max-hill-b1791407.html). And have piqued academic interest and debate, for instance see Daw and Solomon (2010).

<sup>9</sup> For instance, the outgoing chair of the Criminal Cases Review Commission (CCRC) publicly questioned whether the CPS were stopping those cases that should not be taken forward (<https://ccrc.gov.uk/ccrc-chair-richard-fosters-farewell-speech-delivered-10-october-2018-at-university-college-london/>), and a recent report from the Inspectorate of the CPS in 2020 said that CPS prosecutors demonstrate 'a lack of grip on casework...some CPS lawyers do not demonstrate a level of 'trade craft' or a 'thinking approach' that would support effective case management...in 22.2% of cases the CPS added little or no value and in 19.2% of cases there was poor grip' (HMCPSI, 2020, p. 8).

This gap in knowledge about such an important part of the criminal justice system needs to be bridged, and this PhD contributes to that task. I examine the history of the CPS and contextualises its prosecution policy. I analyse CPS data that has been hitherto inaccessible to other researchers. My research gives voice to the prosecutors at the front-line of CPS decision-making and explores how they approach case decisions. I draw together these analyses to present a new perspective on how and why CPS prosecutors make case decisions.

Ultimately, I provide a richer description of prosecutor decision-making than those put forward before, and, in doing so, help build an understanding of CPS activity and practice. My work builds our understanding of one of the most important part of the criminal justice system.

### **The research questions**

#### *Primary research question*

The primary research question was apparently simple:

*How do prosecutors make case decisions?*

This was an empirical question, not a normative one. The question demanded an answer that described how prosecutors *do* in fact decide on a case, rather than one that describes how they *should* decide or even how they *would like to* decide. My research focussed on explaining how prosecutors make decisions ‘in the real world’.

However, this question was both too simple and too broad, so I break it down into three sub-questions. Doing so helped to narrow the research and also to shape the research methodologies.

### *Sub-question 1*

Prosecutor decision-making is most often explained by reference to the Code for Crown Prosecutors ('the Code'). The Code is the CPS's foremost prosecution policy document that sits above a series of offence-specific guidance notes. The first line of the Code says it 'sets out the general principles Crown Prosecutors should follow when they make decisions on cases' (2018 edition, pg. 1). The Code can be seen as the CPS's formal explanation of decision-making – an explanation of how prosecutors *should* make decisions. I set out to explore how CPS decision-making happens in practice rather than in theory, and so the first research sub-question explored whether, and how, in practice, CPS prosecutors make use of the Code:

*Sub-question 1: To what extent do prosecutors use the Code when making decisions?*

The remaining two sub-questions take a wider view of CPS prosecutor decision-making. They widen the research lens to look beyond the Code.

### *Sub-question 2*

Sub-question two aims at broadening our understanding of prosecutor decision-making by understanding better what prosecutors believe influence and shape their decision-making:

*Sub-question 2: What do prosecutors believe is important when considering a case, and why?*

### *Sub-question 3*

The opinions of prosecutors on what is important need to be considered, but such views do not necessarily complete the picture. Other factors not mentioned or not apparent to prosecutors when making a case decision may play a part. Sub-question 3 therefore aimed at understanding better the specific factors within a case (such as prior offence history or offence seriousness) that appear to affect CPS decision-making most strongly. Sub-question 3 was:

*Sub-question 3: Which aspects of a case appear to influence a case outcome?*

The three sub-questions were addressed by reviewing prior academic research, government policy papers and inspection reports as well as interviewing 34 CPS prosecutors (between 2016 and 2017) and (for sub-question 3) analysing CPS data relating to 3,971 cases (drawn from the CPS's 2014-15 business year).

Taken together, the three sub-questions served as the building blocks that were then (as presented in Chapter Seven) reassembled to address the primary research question and so provide a more nuanced description of how, in practice rather than in theory, prosecutors make case decisions<sup>10</sup>.

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<sup>10</sup> The research aims to address prosecutor case decision-making in its broadest terms. It does not, for instance, examine in detail how decision-making in, say, a case of serious sexual assault differs from that in a case of low-level criminal damage, although the overall importance of the offence type as a factor in prosecutor decision making is dealt with.

## **Structure of the dissertation**

This first chapter introduces the research, gives an overview of the research questions, and sets out the structure of the remaining chapters.

Chapter Two examines the Code for Crown Prosecutors, exploring how the Code contains gaps and ambiguities, and that it is underpinned by two implicit assumptions about how prosecutors make decisions: first, that prosecutors are always rational, and second, that the Code contains all the necessary and sufficient information upon which to base a decision. The chapter then shows that the genesis and subsequent development of the Code demonstrates that it was not created, nor has it been maintained, primarily to assist prosecutors to make decisions. Rather, its primary function has been to describe and justify CPS decisions to the wider world. I argue that it is therefore more appropriate to see the Code as presenting a view of how the CPS leadership would ideally have prosecutors make decisions, rather than how they actually do so. The chapter finishes by drawing upon socio-legal theory to help explain why this might be the case.

Chapter Three looks beyond the Code to the wider aspects of CPS prosecutor decision-making. Hawkins's (2002) three-fold model of 'Surround', 'Field' and 'Frame' is used to structure the literature review that examines past research into decision-making, with a particular focus on the wider 'Surround' and the specific 'Frame' that structure CPS prosecutor decision-making. The first section examines some of the broad political changes that have affected criminal justice over the last 30 years and identifies New Public Managerialism, a focus on the victim and populist punitiveness as being particularly influential upon CPS decision-making. The second section focusses on the prosecutor's 'Field' and examines prior research into how prosecutors use the Code in their work. The

third section of Chapter Three explore the prosecutor's 'Frame' in three ways. The psychological research into decision-making is drawn upon to question the underpinning assumption of the rational prosecutor in the Code. Research conducted specifically into prosecution decision-making is then explored and a picture begins to emerge that some factors appear to be much more important than others in shaping prosecutor decision-making. Significantly, a set of wider principles of prosecution, not explicitly mentioned in the Code, emerged as being important to contemporary CPS prosecutors. This chapter locates these principles within the literature and debate at the time of the creation of the CPS and tracks their continued influence upon CPS decision-making.

Chapter Four describes the mixed research methods used for my fieldwork, considers the limits of the data available, and reflects on the challenges and opportunities that are presented by researching one's own organisation. The chapter concludes with a discussion about whether this research should be categorised as 'insider research' (given that I remain, ultimately, a CPS employee) and concludes that it should not.

Chapter Five presents the results a logistic regression analysis of 3,971 CPS cases drawn from CPS management data, conducted in order to attempt to identify the relationship between certain case factors and case outcome. The results are explored to uncover patterns, consistencies and differences between the effects of the various factors on case outcome; with factors such as offence seriousness, defendant<sup>11</sup> age, ethnicity and previous convictions and differences between CPS Areas are identified as correlating strongly with case decisions and

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<sup>11</sup> A person remains a 'suspect' prior to being charged by the police or CPS, whereupon they become a 'defendant' (and upon conviction they are an 'offender'). Throughout this research the term 'defendant' is used to denote both suspects and defendants. This is done to avoid the constant use of the unwieldy but more accurate term 'suspect or defendant' in order to have the text read more easily.

outcomes. Finally, it is suggested that a number of the results should be considered spurious due (most often) to patchy or missing CPS data.

Chapter Six presents the analysis of my interviews with 34 CPS prosecutors. Four themes emerge from the interviews. First, CPS prosecutors reveal the extent to which they often make limited use of the Code (or supporting guidance documents) in their day-to-day work. Secondly, a set of broad principles of prosecution not directly reflected in the Code emerge as being important considerations for CPS prosecutors. Thirdly, prosecutors discuss the place and importance of non-rational, intuitive decision-making. They explain how gut feel and intuition plays an important role, and some evidence is found to suggest that prosecutors make use of the most common forms of heuristic decision-making (mental short cut). Finally, prosecutors identify and discuss why particular specific factors that are present in cases are important to their decision-making, and they suggest why.

Chapter Seven presents a nuanced description of the reality of prosecutor decision-making, much richer than that presented in the Code. Continuing to make use of Hawkins's (2002) model of the 'Surround', 'Field' and 'Frame', I argue that there are five critical components drawn from a prosecutor's 'Surround', 'Field' and 'Frame' that need to be considered. These five components are: (a) a set of wider political changes that have affected criminal justice and prosecution decision-making and are important in shaping the prosecutor's view of what is important in a case; (b) the use of mental shortcuts by prosecutors when making a case decision; (c) the factors that are particularly important to prosecutors when considering a case; (d) the web of wider principles that prosecutors report as being important to their decision-making; and finally (e) their need to ensure that their decisions are compliant with the Code tests. Bringing the five components together offers a richer picture of how CPS

prosecutors decide to prosecute or discontinue a case. The last section of Chapter seven offers some tentative suggestions relating to the implications of the research findings for current CPS practice and suggests some areas for further research.

## Chapter Two: Examining the Code: ambiguities and uncertainties

This chapter identifies the ambiguities and uncertainties within the Code for Crown Prosecutors. It first explores two assumptions about prosecutor decision-making that underpin the Code. It also examines the circumstances surrounding the creation of the Code, which reveals what - I argue - is in fact the true purpose of the Code: a means to explain the work of the CPS to the public and to Parliament, and not primarily as a tool for prosecutors to use in their daily work.

### The Code for Crown Prosecutors

The Code for Crown Prosecutors was first published in 1986, soon after the CPS came into being.<sup>12</sup> The Code's *prima facie* purpose was to explain the principles and practice against which prosecutors were expected to exercise their powers. The Code is the only CPS policy document that by law must be published and any alterations to the Code must be laid before Parliament as part of the CPS's Annual Report.<sup>13</sup> The Code stands as the foremost statement of prosecution policy in England and Wales.

Whilst the Code is the single document setting out the prosecution policy in England and Wales, it is supported by a series of subject specific guidance notes produced by the CPS.<sup>14</sup> Initially covering only a few subjects, their scope has grown to cover a wide range of issues. For instance, ancillary guidance exists for biotech offences, LBGT issues, disability crime, prosecution of young persons, vulnerable victims, DNA and cautioning, as well as dedicated guidance on categories of offences, such as assisted suicide, domestic violence, racist and

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<sup>12</sup> The CPS was created by the Prosecution of Offences Act 1985 and began operations on 1st April 1986.

<sup>13</sup> See section 10(3) Prosecution of Offences Act 1985. See <https://www.legislation.gov.uk/ukpga/1985/23/section/10>

<sup>14</sup>

religious crime, deaths in custody, bad driving, media/phone hacking and joint enterprise.

The guidance notes provide further details on particular aspects of law connected to certain issues or offences and point to relevant case law or other special considerations for those offences and are published on the CPS website. Nonetheless, the Code remains the pinnacle of the prosecution policy pyramid and all other policies are considered subordinate to it.

The importance of the Code seemingly increased over the years as other prosecuting bodies began to emulate it or make use of it directly. Initially it was intended solely for use by the CPS dealing with cases across England and Wales but has since become an important policy document for many other prosecution agencies in England and Wales, such as the RSPCA and DWP<sup>15</sup> (who have increasingly aligned their decision-making policies and procedures to the Code) and also the police. The Code appears to have been used as a template for prosecution policy in many Commonwealth countries, too. Canada,<sup>16</sup> Australia,<sup>17</sup> New Zealand,<sup>18</sup> and Scotland<sup>19</sup> have all since published prosecution policies that bear a strong resemblance to the CPS Code for Crown Prosecutors.

## **The Code Test**

There have been eight editions of the Code. Following the initial 1986 Code further editions were published in 1992, 1994, 2000, 2004, 2010, 2013 and 2018. The Code exhibits both consistency and change: consistency, in that the core of the Code – the Code Test – has remained unchanged in its essentials from the first edition to the current one; and change, in

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<sup>15</sup> The other prosecution agencies in England and Wales are: the Department of Work and Pensions; Department of Business, Innovation and Skills; the Department for Environment, Food and Rural Affairs; the Department of Health (responsibility for prosecutions in these last four were taken on by the CPS in 2011); the Serious Fraud Office; the (Military) Service Prosecuting Agency; the Health and Safety Executive; the Civil Aviation Authority; the Maritime and Coastguard Agency; the Financial Services Authority; the Driver and Vehicle Licensing Authority (DVLA); the Office of Fair Trading and the Royal Society for the Prevention of Cruelty to Animals (RSPCA), though at the time of writing it appears that the RSPCA intend to pass their prosecutions to the CPS. Police forces continue to charge and prosecute many minor offences, such as retail theft and low-level criminal damage.

<sup>16</sup> [http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch03.html#section\\_3\\_2](http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch03.html#section_3_2)

<sup>17</sup> <http://www.cdp.gov.au/prosecution-process/prosecution-policy/>

<sup>18</sup> [http://www.crownlaw.govt.nz/artman/docs/cat\\_index\\_13.asp](http://www.crownlaw.govt.nz/artman/docs/cat_index_13.asp)

<sup>19</sup> <http://www.copfs.gov.uk/publications/prosecution-policy-and-guidance#GAP>

that some of the wider changes that are observable across criminal justice are seen finding expression in various editions.

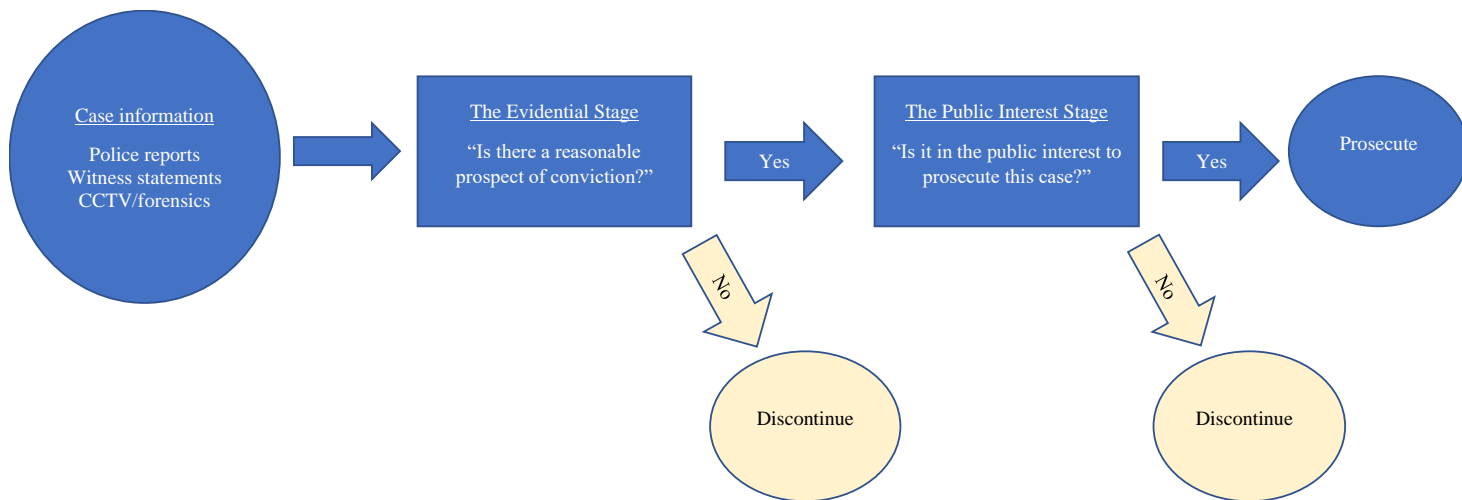
Each edition is worded slightly differently, of course. The early editions of the Code, for instance, were written in more formal legal-technical language, whereas later editions use simpler language more readily understood by the public. Some editions give prominence to issues that were important at the time but were subsequently removed; for instance, the 1992 edition had a section solely relating to decisions to charge Conspiracy to Defraud, following the enactment of s.12 of the Criminal Justice Act 1987. Chapter Three discusses how the wider changes across criminal justice have been reflected in the Code over time.

This chapter will consider what has remained consistent in the Code between editions. What has been consistently at the heart of the Code across all editions is the ‘Code Test’: a two-stage consideration that prosecutors should use when deciding on whether to charge a suspect or not, or to continue or discontinue a prosecution after a defendant has been charged.<sup>20</sup> The decision-making process as described in the Code is illustrated below.

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<sup>20</sup> Rogers (2006) draws attention to the fact that the Code has retained this two-stage Test since the first edition, and questions whether in fact the Code might benefit from being structured into three stages: the evidential stage as currently operating would be retained, but the public interest stage split into two – the first part in which a prosecutor decides whether the aims of punishment justify the cost and the second whether the defendant can be expected to forbear the harm of a prosecution (p. 793).

Diagram 1: The Code Test



The first stage of the Code Test is the evidential stage. Here the prosecutor must determine whether there is a ‘sufficient evidence to provide a realistic prospect of conviction’ (s. 4.6, 2018 edition). Prosecutors are asked to consider whether the evidence is reliable, credible, and sufficient (s. 4.8).

This ‘realistic prospect of conviction’ test lies at the heart of the evidential stage. Here we encounter the first problem with the Code’s account of how prosecutors make decisions: the Code fails to provide prosecutors with a sufficient amount of information or an account of what amounts to a ‘realistic prospect of conviction’. The term is uncertain and ambiguous.

The extent of the explanation in the latest (2018) edition is as follows:

*The finding that there is a realistic prospect of conviction is based on the prosecutor’s objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law,*

*is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty. (s.4.7, 2018)*

The Code implies that an objective assessment can be made but is not clear about how a prosecutor is to make this objective assessment. The requirement that prosecutors only prosecute cases that have ‘a realistic prospect of conviction’ forces the prosecutor in practice to weigh up what the magistrate or jury are likely to decide (that is, guess what someone else might think) rather than any objective assessment of evidence. Juries and magistrates’ views vary over time, and by areas and by courthouse. The Code does not make clear whether prosecutors should alter their assessment of ‘a realistic prospect of conviction’ based on what they know of particular benches’ habits and tendencies. As will be shown, prosecutors interpret this test in various ways and some prosecutors alter their assessment of a ‘realistic prospect of conviction’ based on the expected behaviours of a jury or a judge rather than as an objective assessment of the facts of the case. The Code text is loose enough to allow alternative interpretations ranging from targeting local bench or judiciary variation at one end through to a strictly equal treatment and ‘bench blind’ view on the other. Where a prosecutor places themselves on this spectrum appears to be left as a matter for them; they must use their discretion.

Ashworth (1987) made a similar observation at the outset of the CPS’s life:

*‘the Code leaves prosecutors to resolve a number of conflicts, e.g., in relation to charging practice and plea negotiation, conflicts between law enforcement and resource management, and trade-offs within the notion of law enforcement itself.*

*Some of these conflicts are tackled further in the Service's own internal Manuals, but others are left for decision at local level or even by individual Crown Prosecutors. Thus, in practice there is scope for expedients which are not in the public interest (such as misuse of the bind-over, or overcharging defendants in order to 'leave it to counsel'), and it will be a test of the Service's professionalism and its accountability whether it gains public acceptance' (p.606).*

The mention here of plea bargaining (or 'pleas negotiation' as Ashworth refers to it) brings us to another important area of ambiguity for prosecutor decision-making, and is a subject that will be returned to at various points throughout the rest of this research. Section 9 of the Code (2018) says:

*9.1 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime.*

*9.2 Prosecutors should only accept the defendant's plea if:*

- a. the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features;*
- b. it enables the court to make a confiscation order in appropriate cases, where a defendant has benefitted from criminal conduct;*
- c. it provides the court with adequate powers to impose other ancillary orders, bearing in mind that these can be made with some offences but not with others.*

*[...]*

*9.4 Prosecutors must never accept a guilty plea just because it is convenient.*

*9.5 In considering whether the pleas offered are acceptable, prosecutors should ensure that the interests and, where possible, the views of the victim, or in appropriate cases the views of the victim's family, are taken into account when*

*deciding whether it is in the public interest to accept the plea. However, the decision rests with the prosecutor.*

Crown Prosecutors have wide discretionary scope to engage in plea bargaining with defendants. Welsh, Skinns and Sanders (2021) note that ‘[t]he law places little constraint on the ability of prosecutors to charge bargain’ (p. 371). Crown Prosecutors are able to add charges, amend existing charges both up and down the scale of seriousness and, of course, to drop charges entirely. Often this is seen as desirable when a defendant or their representative suggest that a guilty plea will be entered to a lesser charge than the one currently entered, and the prospect of a quicker and more certain resolution of the case is presented that is still deemed appropriate to the offending behaviour. The implications for CPS performance data and resource allocation, as well as for victim interests, will be discussed much more in the following chapter. For now, it is enough to point out that the Code addresses the prosecutor’s role in plea bargaining but does not do so at length and thus represents a further area in which the Code leaves prosecutors with wide discretionary power to make important determinations within a case without straying outside of the high-level guidance set out in the Code.

Another ambiguity within the evidential stage concerns the instructions to prosecutors on how they should treat changes to the facts of the case over time as the case develops. The Code says little about how to consider the changing nature of cases as the police investigation develops post-charge. For instance, section 3.6 of the 2018 Code says:

*Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops. This includes what becomes known of the defence case, any further reasonable lines of inquiry that should be pursued, and receipt of any unused material that may undermine the prosecution case or assist the*

*defence case, to the extent that charges should be altered or discontinued or the prosecution should not proceed.*

The strength or weaknesses of a case may change over time as further evidence is collected by the police or provided by the defence. It is not clear, therefore, at what point a prosecutor should decide on evidential sufficiency; one could always wait a little longer in case something turned up. For instance, should a prosecutor discontinue a case at the first moment there appears to be a lack of sufficient evidence? Or should they delay that discontinuation and continue the prosecution in the hope of further evidence arising as the police investigation continues? The Code is ambiguous on how a prosecutor should approach the changing circumstances of a case beyond that they should keep it under continual review, for an unspecified period as the case develops.

So much for the evidential stage. Let us now move on to the second stage of the test. If the evidential stage is passed, the public interest stage is then considered, and further, ambiguity is now encountered. The Code says:

*It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour...When deciding the public interest, prosecutors should consider each of the questions set out below...so as to identify and determine the relevant public interest factors tending for and against prosecution. (s.4.10, 2018)*

Different factors are then listed: the seriousness of the offence committed, the level of culpability of the suspect, the circumstances of and the harm caused to the victim, the suspect's age and maturity at the time of the offence, the impact on the community, whether prosecution is a proportionate response and finally whether sources of information require protecting. Each of these factors has attached a series of associated sub-factors.

Here is the second problem with the Code's account of how prosecutors make decisions: uncertainty. There is no single and definitive statement of the public interest, only a list of factors for and against prosecution in the public interest (in the last two editions of the Code the 'for and against' structure was collapsed down into a series of more general questions<sup>21</sup>). Rogers (2006) pinpointed this issue, noting that

*the main problem [with the Code Test] lies within the 'public interest' test where prosecutors have to consider a whole variety of 'pro-prosecution' and 'anti-prosecution' factors with very little guidance, other than the somewhat bureaucratic notion of 'seriousness' of the alleged offence. (p. 802)*

One area of uncertainty that well illustrates the point is the role of costs in public interest considerations. The current edition of the Code says that prosecutors will consider the impact on the public purse as part of the public interest stage but is ambiguous on how prosecutors are meant to go about doing so:

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<sup>21</sup> For instance, instead of listing factors for and against prosecution in separate sections, the Public Interest Test now lists out questions such as 'How serious is the offence committed?' and 'What was the suspect's age and maturity at the time of the offence?', with some further explanatory bullet points comprising a mix of points, some increasing likelihood of prosecution in the public interest and some decreasing it.

*Is prosecution a proportionate response? In considering whether prosecution is proportionate to the likely outcome, the following may be relevant:*

- i. The cost to the CPS and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty. Prosecutors should not decide the public interest on the basis of this factor alone. It is essential that regard is also given to the public interest factors identified when considering the other questions in paragraphs 4.14 a) to g), but cost can be a relevant factor when making an overall assessment of the public interest.*
- ii. Cases should be prosecuted in accordance with principles of effective case management. For example, in a case involving multiple suspects, prosecution might be reserved for the main participants in order to avoid excessively long and complex proceedings (s. 4.14(f)).*

This suggests cost could render a prosecution disproportionate, yet prosecutors are not to decide on this factor alone; it must be weighed up with others, although a different approach can be taken in large cases with multiple suspects. This leaves prosecutors with wide scope of interpretation to weigh up cases as they see fit, and again relies upon each prosecutor making their own interpretation of the Code and coming to their own view of the relative balance between the factors, in light of the uncertainty that exists within the Code text, to arrive at their own decision.

The difficulties with the lack of prioritisation is taken up by Sanders (2018) in which he discusses this issue in respect of prosecutor decisions upon cases of Assisted Dying. He wrote:

*'[t]he interim policy 'weighted' some [public interest] factors as more important than others...But the decision was taken not to continue this weighting into the final policy on the bizarre ground that not weighting 'makes the final policy clearer and more accessible' even though 'the particular facts of the case may mean that one factor alone may outweigh a number of other factors which tend in the opposite direction'. contained a weighting of the public interest factors but this weighting was dropped for the final draft. This means that although the policy allows for one factor to be weighted more heavily than another, it is claimed that the policy will be clearer and more accessible if no indication is given of which factors will be so weighted, to what extent, and in what circumstances. But this is not self-evident' (p. 139).*

Formulating a definition of the public interest that can be operationalised by prosecutors is not easy. The concept of the public interest is a slippery one and hard to pin down. Attempts to do so tend to lead to very broad accounts, such as that of Lewis (2006), a political science professor interested in the ethics of public administration, who reviewed the academic discussion of what the public interest might mean for public administrators. Her suggestion is that public administrators – prosecutors in our context – should consider such notions as 'democracy, mutuality, sustainability and legacy' (p. 694) when weighing up public interest factors, and argues that the public interest should be considered not only in terms of its effect upon the present but also in terms of its effect upon future generations. Her conception of the

public interest goes far beyond the sense of the public interest implied by the Code, which seems more directed at taking account of the general current community interest, rather than casting into the future. Her work does, however, prompt us to wonder how prosecutorial decisions would change if the public interest was conceived as encompassing the interest of future generations – would such a conception lead to a greater number of prosecutions of, say, environmental crime, as this crime type often affects future generations due to the longer-term damage caused than the effect of contemporary street crime? Lewis's work is introduced here only to point to how it is possible to conceive of the public interest in far wider and rather different terms than the manner adopted by the authors of the Code. The point is a simple one: it is possible to conceive of the public interest in a very different way to the way in which the authors of the Code did and have done over the successive editions.

Recognising the difficulty of formulating a single definition of the public interest does not remove the problem that there is no clear definition of the public interest in the Code. The Code leaves prosecutors to formulate and determine their own interpretation of the public interest from an incomplete and general set of suggestions listed in the Code.

Young and Sanders (2004) identified these multiple, conflicting and contradictory principles when discussing whether it is possible to identify a set of 'prosecutor ethics'. They noted that that:

*'the criminal process involves many conflicting values, aims and interest, such as: convicting the guilty; protecting the innocent from wrongful conviction; protecting human rights by guarding against arbitrary or oppressive treatment; protecting victims; maintaining order; securing public confidence in, and cooperation with,*

*policing and prosecution; and achieve these goals without disproportionate cost and consequent harm to other public services. Whilst politicians like to pretend that these goals are all equally achievable, the reality is that choices have to be made over which are to have priority and such choices inevitably express a particular ethical or philosophical standpoint' (p. 191).*

In summary, both the evidential stage and the public interest stage of the Code Test have uncertainties and ambiguities. If a prosecutor were to try to follow the Code rigorously in order to make a decision, they would be faced with these gaps and the ensuing uncertainty and ambiguity. Such freedom of decision-making can be seen as being essential to the exercise of legitimate prosecutorial discretion (as will be discussed more in the next chapter). But, if one wants to understand how, in reality, prosecutors make decisions to prosecute, it must be conceded that the Code does not carry all the information necessary for a prosecutor to make a decision. Prosecutors must address the uncertainties themselves and interpret the ambiguities as they see fit. Thus, to understand prosecutor decision-making, one must look beyond the Code.

### **False assumptions that underpin the Code**

The Code is a poor guide to CPS prosecutor decision-making not only because of what it lacks – the uncertainties and ambiguities of the Code Test - but also because of what it includes. There are two assumptions about prosecutor decision-making that can be identified in the Code which do not match the reality of prosecutor decision-making.

The first false assumption is that the prosecutor only considers facts presented in the case file and only applies principles set out in the Code or wider statute or guidance. For instance, the current edition of the Code says:

*[Prosecutors] make their decisions in accordance with this Code, the DPP's Guidance on Charging and any relevant legal guidance or policy. (s. 3.1)*

If a prosecutor feels they have insufficient information in the case file to make a decision, the Code says that the prosecutor should simply wait until sufficient information has arrived:

*Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should continue, and a decision taken later in accordance with the Full Code Test set out in this section. (s. 4.5)*

The Code implies that the prosecutor needs nothing other than the questions set out in the Code, together with any public interest factors set out in the relevant guidance to make a full and correct assessment of the public interest:

*When deciding the public interest, prosecutors should consider each of the questions set out below...so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the DPP, should enable prosecutors to form an overall assessment of the public interest. (s. 4.11)*

Thus, the Code text presents a formulaic and largely self-contained process that it says prosecutors should follow. Each prosecutor is meant to work within a defined nexus of facts as set out in the case file plus the principles set out in the Code (and guidance documents, plus any other relevant statute) and that should be sufficient, according to the Code, to determine a case outcome. The reality is different, as later chapters show.

The second false assumption in the Code about prosecutor decision-making is that prosecutors necessarily act rationally and objectively when making a decision. There is an underlying assumption of consistent and unerring rational and objective decision-making. For instance, section two of the 2018 Code says:

*When making decisions, prosecutors must be fair and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity of the suspect, defendant, victim or any witness influence their decisions. (s. 2.7)...Prosecutors must be even-handed in their approach to every case and have a duty to protect the rights of suspects and defendants, while providing the best possible service to victims. (s. 2.8)*

The Code suggests that it is only a rational assessment by prosecutors that determines a case decision:

*The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any*

*other information that the suspect has put forward or on which they might rely. (s. 4.7)*

The Code also expects prosecutors to be able to sequence their considerations of the facts:

*In most cases prosecutors should only consider whether a prosecution is in the public interest after considering whether there is sufficient evidence to prosecute (s. 4.4)*

However, what is known about decision-making in other fields suggests that operational decision-making may be much messier in reality . For instance, as will be seen in the next chapter, psychologists studying decision-making have long since pointed to the use of irrational mental shortcuts in professional decision-making. Researchers suggest that decision-makers make assumptions where facts are missing, apply previously observed patterns to new cases and make use of instinct and ‘gut feel’ when determining outcomes. There is no reason to expect CPS prosecutors to be any different. The Code thus demands of prosecutors something that psychology suggests is not likely to happen. The Code does not describe reality.

### **Explaining the Code: clues from its unintended birth**

That the Code does not describe the reality of decision-making should not be a surprise. I argue that contrary to how the Code is often described, it was not intended to be a technical manual for prosecutors but was intended to perform other functions for the CPS. This becomes clear when the origins of the Code are examined.

There was nothing inevitable about publishing a prosecution policy. The Royal Commission on Criminal Procedure (1981) proposed the creation of the CPS. It did not propose publishing a Code, nor did the Government's White Paper response to the Royal Commission's report. The creation of the Code was somewhat accidental. It was not the intention of the Government to have one and the first Code was created quickly and with little consultation or involvement from frontline prosecutors.

The Code's genesis can be traced back to the second reading in the House of Lords of the Prosecution of Offences Bill.<sup>22</sup> Lord Elton, then a Conservative Home Office Minister, in presenting the Bill to the Lords, discussed the degree of centralisation that the new prosecution authority would have (the Government had proposed a more centralised national structure than the Royal Commission). He stated that the Attorney General would provide guidance to prosecutors working locally to ensure consistency of decision-making. Lord Elwyn-Jones (Labour) asked if the guidance was to be published. Lord Elton did not immediately respond, but a little while later in his closing remarks, 'in a late addition'<sup>23</sup> (i.e., following receipt of a rushed note from officials passed from the officials' box to the parliamentary private secretary to the Minister), committed to publish the Attorney's guidance as part of the CPS's Annual Report. A few months later, by the time of the second reading of the Bill in the Commons, the government had committed to publishing a 'code of guidance'.<sup>24</sup>

The commitment to produce a Code was thus a surprise to officials. No work had begun within the Office of the Director of Public Prosecutions (the forerunner to the CPS) to

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<sup>22</sup> Hansard, HL Deb 184, vol. 457, p. 1063

<sup>23</sup> Hansard, HC Deb 16 April 1985 vol. 77, col 151

<sup>24</sup> Hansard, HC Deb 16 April 1985 vol. 77, col 151

produce such a Code prior this commitment in the Lords. The first edition of the Code was drafted by a member of the DPP's Office, who was given only six weeks' notice to produce the draft, and the first edition was drafted over a weekend in Putney Library.<sup>25</sup>

The key conclusion is this: the first Code was, therefore, produced by (what was to become) CPS Headquarters with the intention of explaining to others outside the organisation (Parliament in the immediate instance) how it would make decisions. It aimed at providing the transparency and accountability required by Parliament, not primarily as an aide to prosecutors or an accurate description of their work. This may explain why the Code contains the ambiguities and uncertainties that make it such a partial description of how and why prosecutors make case decisions.

The role that the Code continues to play in explaining prosecution decisions to those external to the CPS can be seen by tracking the changes to the tone of the Code editions over time. For instance, the early editions of the Codes read as rather dry legal-technical documents containing many legal references and notes on specific statutes. For instance, a section on mode of trial reads:

*Juveniles charged alone: Where the juvenile has attained the age of 14 and is charged with certain grave offences (as defined by Section 53(2) of the Children and Young Persons Act 1933) other than homicide, it is the Court's duty, having heard representations, to consider whether it ought to be possible to sentence the juvenile up to the maximum adult sentence (Section 24(1)(a) Magistrates' Courts Act 1980).*

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<sup>25</sup> Personal communication (former CPS Policy Director), Jan 2013.

*Accordingly, the Crown Prosecutor should put the relevant facts dispassionately before the Court and generally assist as required by the Court. (s. 19(1), 1986)*

The style changed over the editions, becoming more explanatory and, eventually, simpler. The 1994 Code sought to explain decision-making to its fullest. Not only is the 1994 Code one of the longest editions (including, for instance, lists of 28 carefully worded public interest factors both for and against prosecution), but it was published with two appendices that provided further explanation on prosecution principles such as the evidential and public interest stages.

The current 2018 edition uses the clearest and simplest language of all the editions, shorn of many technical and legal terms and written in more accessible language with more contextual information than prosecutors would need, explaining, for instance, that the DPP is head of the CPS (s. 1.2) and giving a definition of ‘offender’ and ‘victim’ (s. 1.4). It proudly displays the Crystal Mark awarded from the Plain English Campaign<sup>26</sup>. The 1994 Code can, therefore, be seen as a midway point in the overall evolution from 1986 (legal, technical) to the latest 2018 edition (plain English) .

In summary, by examining the circumstances of the Code’s birth and the changes in tone and style thereafter, it becomes apparent that the Code was created in order to explain prosecution decisions to the outside world; first to Parliament, but now more to the general public. The Code, rather than being a realistic account of decision-making, was created and has continued to be a means of communicating the CPS’s work to the public. The description set out in the

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<sup>26</sup> [Crystal Mark \(plainenglish.co.uk\)](http://plainenglish.co.uk)

Code of how CPS prosecutors make decisions is therefore not an accurate depiction of the reality of CPS decision-making and has never intended to be.

### **Why we should not be surprised: Law in books vs law in action**

The presentation of an idealistic description of legal decision-making in this way is not unique to CPS, and perhaps should come as no surprise that the Code was produced to fulfil the wider explanatory function that it does. The presentation of legal codes and processes as complete, self-contained and rational is drawn from the perspective of legal-positivism and is a common to legal thinking in liberal societies. The Code is simply part of this tradition.

A number of key legal theorists describe and critique the tradition of legal texts presenting a tidier picture of legal decision-making than the messy picture of real-world decision-making. Lacey (1992), a legal academic, makes a useful distinction between ‘law in books’ and ‘law in action’. She argues that the positivistic emphasis on standards, guidelines and rules lead to a preoccupation with formal ideas of fairness and justice rather than with the substance of the decisions that are made. She suggests that ‘the liberal account of crime as a means of holding individuals to account for wrongful conduct has come to prevail as the dominant model of criminal law (2017, p. 71) but that ‘we need to integrate empirical, interpretive, and normative questions in an attempt both to understand discretion and, ultimately, to ensure the legitimacy and effectiveness of the exercise of social power in particular contexts’ (1992, p. 388). She argues, in short, that researchers need to move beyond the ‘surface’ level of law as it appears on legal rules and guidance - the Code - and go beyond to understand more fully how decisions are really made.

The work of Carl Schmitt (2004, trans.1934), the inter-war German legal theorist<sup>27</sup> who died in 1985, put forward similar arguments prior to Lacey. He argued that in liberal democratic societies the legal system must be seen as legitimate to maintain public support and consent. This, he argued, is generally achieved through creating an ideal or ‘classic’ idea of how law works in liberal societies; a model that held law to be fair and equal to all members of society. Schmitt held that the classical ideal of law that is fair and equal to all members, is not how law works in practice, and, echoing Lacey, he drew a dichotomy between the theory and practice of law. He contrasts, for instance, the law in books position that legal norms exist and those legal officials employ reasoned and principled decision-making, with the alternative view that the law in action perspective describes social reality as merely subjected to legal regulation and that in practice law involves pragmatic and instrumental forms of utilitarianism focused mainly upon the practical implications of different possible decisions. (Schmitt, 1934, trans. 2004, p. 4-97).

Hawkins (2002), a legal academic at Oxford University and a theorist of legal decision-making - whose work will feature heavily in what is to come - adds his voice to this call to move beyond the positivist legal perspective: ‘to see legal decisions as guided and constrained solely by existing legal rules...is to ignore the social, political, and economic contexts in which those decisions are made and the richness, subtlety, and complexity of all the processes involved’ (p. 29-30).

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<sup>27</sup> Schmitt and his work cause controversy. Schmitt was a committed supporter of the Nazi regime, and in some of his work makes statements that are clearly anti-Semitic. There have been calls within academic circles to ‘cancel’ Schmitt (for instance, see [Cancelling Carl Schmitt? – EJIL: Talk!](#)). The work of Schmitt’s the I read as part of this research (Schmitt 1934, trans. 2004) did not contain antisemitic arguments, but were limited to a (academically useful) critique of liberal democratic legal practices. (I learned of the extent of Schmitt’s anti-Semitism late on in my PhD studies. Had I learned of them earlier I believe I would still have used the non-anti-Semitic parts of his work as I did).

Finally, Salter and Twist (2007) argue that a prominent feature of legal systems in liberal societies is the attempt to ‘dismiss the interjection of every allegedly ‘non-legal’ or ‘extra-juristic’ consideration as ideological, economic, sociological, moralistic, or political’ and instead represent legal systems as ‘comparatively abstract and legalistic interpretation of doctrine (i.e. law in books)’, in other words, pure and value-free, ‘carried out in isolation from those so-called ‘contextual factors’ that other ‘non-legal’ disciplines...drawn upon to explain specific processes and events with the legal and constitutional systems (‘law in action’)’ (p. 4) unaffected by political or ideological influences.

The Code, then, is not unusual in presenting a normative description of an overly rational, objective and, to a degree simplistic, account of decision-making. In many ways, given the positivistic legal tradition these authors have identified, it would have been remarkable had the Code not be expressed in these terms.

Thus, a clear and readily understandable Code – and one that promises rational and objective decisions by prosecutors based on the clearly articulated procedures set out in the Code Test - can be used by those unfamiliar with the criminal justice system in order to increase citizens’ understanding and acceptance of the prosecution process, and thus secure for the CPS the benefits of a sense of legitimacy and acceptance.

One thread that runs through these academic accounts is the notion of legitimacy. When factors encouraging compliance with criminal law are considered, of paramount importance is the perception of how much legitimacy the agencies enjoy. It is the perceived trustworthiness of the agency’s staff and the perception of the procedural fairness that is most important to the efficiency and effectiveness of the criminal justice agencies (Tyler 2013) and

to lessening reoffending (Paternoster et al., 1997). Anthony Giddens' (1990) sociological analysis can be used to explain why the Code is so important to securing legitimacy for the CPS. He suggests that greater societal complexity in the late modern era, speedier communications and global connectedness have led to many of the most critical systems that affect citizens' lives seeming abstract in relation to them (p. 21). The prosecution system is certainly a clear example – with 'expert' technical/legal decisions being taken that affect citizens lives very directly, but without the affected citizens being able to see those decisions being made or coming into contact with the decision maker (at least until a later court hearing, in some instances). The prosecution process thus becomes 'disembedded' (p. 21) for the citizen from the local context of the particular crime. In simpler terms, the prosecutorial decisions are taken behind closed doors. There is no visible 'justice in action' as there is with a courtroom trial or a uniformed policeman on his beat. Thus, the CPS need to explain and present a view of their work that develops and maintains trust in its decisions. It is difficult for citizens to maintain trust in such an abstract system without regular 're-appropriation' (p. 140) or re-engagement by the between citizen and expert. Publishing the Code can be seen as a substitute for personal re-engagement in that it attempts to uncover or reveal the workings of the abstract system and hidden prosecution decision-making process; in publishing it the public can have trust in the process and thus it re-appropriates the prosecution process for the citizen and build trust.

To summarise this chapter, I argue that the primary purpose of the Code is to explain decision-making to the outside world to secure a sense of legitimacy to prosecutor decision-making. Parliament and the public want and need to know that prosecution decisions are being taken fairly and consistently. The Code is 'law in books'; abstract and legalistic. The Code presents a picture of the ideal or classical prosecution decision-making process (that

doesn't in fact exist in reality), in which objective lawyers make decisions according to clear and logical processes set out fully and publicly in the published Code. The purity of prosecution decision-making as set out by the Code may be an illusion. But it is an illusion that was felt necessary to maintain the belief that the system is legitimate.

## **Chapter Three: Building on previous research on decision-making**

This chapter begins to build a picture of ‘law in action’ for CPS prosecutor decision-making by putting aside the analysis of the Code and looks to the existing research on decision-making. It draws upon academic literature concerning the CPS, other prosecutorial decision-making and wider forms of non-prosecutorial decision-making too. The research discussed in this chapter provides the building blocks upon which my fieldwork is set. It contributes to the richer picture of CPS prosecutor decision-making that is put forward in Chapter Seven.

The chapter begins by discussing the work of Hawkins (1992 and 2002). Hawkins is one of the leading theorists of decision-making in the criminal justice system. His work is central to this research and provides much of the theoretical framework used later on, in particular his three-tiered model of the ‘Surround’, ‘Field’ and ‘Frame’.

The second section in this chapter looks at the wider context of CPS prosecutor decision-making (Hawkins’s ‘Surround’). It explores how the broad political changes to criminal justice have affected the work of CPS prosecutors.

The third section explores the prior research into the workings of the Code (Hawkins’s ‘Field’). It shows that prior research suggests that prosecutors interpret the Code in a variety of ways and that there are differences between individual prosecutors in how they apply the Code – a position my fieldwork goes on to confirm in later chapters.

The fourth section explores the prior literature on the specifics of case decision-making (Hawkins’s ‘Frame’), namely through: (a) an exploration of what (little) prior research has

been conducted into the factors in a case that appear to be particularly important to prosecutors (despite the scarcity of the available research, some themes do emerge, such as the factors that are consistently identified as being important, such as previous convictions, age and gender of the defendant and aspects connected to the victim and age); (b) an exploration of the psychological research into decision-making in other (non-criminal justice) fields, suggesting that decision-makers do not act in the fully rational and objective manner set out in the Code; and (c) an identification of some of the core ‘principles of prosecution’ that, as I argue in the later fieldwork chapters, are of great importance to prosecutors as they try to navigate the gaps and ambiguities of the Code and that inform how they interpret and understand what a ‘correct’ prosecutorial decision might be.

The fifth and final section reflects upon why there may be a relative paucity of research directly relevant to CPS decision-making.

### **Hawkins’s three-part framework for understanding prosecutorial discretion**

CPS prosecutors must use their judgement to decide whether or not to prosecute a case; they must exercise their discretion. How CPS prosecutors exercise their discretion, and what determines or constrains how they exercise their discretion, has a large part to play in more accurately describing CPS prosecutor decision-making. Here follows a brief discussion of some of the major studies into discretionary decision-making, before coming back to explore Hawkins’s (1992, 2002) work in more depth.

Research into discretionary decision-making in criminal justice has a long history. Skolnick (1966), an American sociologist, produced one of the first major studies on discretion when he looked at police practice and decision-making at street level (in the US), and described the

police officer as a craftsman, interpreting and making judgements about situations they encountered, rather than simply applying the rules. This idea that criminal justice decision-makers find ‘space’ to interpret and shape their actions was further developed by Dworkin (1977), the American philosopher and jurist. He described discretion as a doughnut: the laws, rules and operational procedures form the ring around the centre, and the centre of the doughnut as the space within which actors can exercise their discretion.<sup>28</sup>

Discretion thus conceived is the space left by an absence of rules. Dworkin’s concept of discretion being used to fill the gaps left by the rules is useful and important because, as the last chapter showed, the Code has such gaps and ambiguities that require prosecutors to use their discretion to fill in order to come to a case decision. The Code, guidance and other relevant statute form Dworkin’s doughnut, with a space in the middle left by gaps and ambiguities within which CPS prosecutors must exercise their discretion in order to arrive at a case decision. Gaining a richer understanding of how they go about filling ‘the gap in the doughnut’ is a core task of my work.

One of the most compelling articulations of how decision-makers go about filling the gap left over by the rules is Hawkins’s (2002) model. Hawkins’s work on the exercise of discretion is a major contribution to understanding decision-making in the criminal justice system. His

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<sup>28</sup> Discretionary decision-making is not uncontroversial. Right from the start of academic thinking on the use of discretion in criminal justice questions were asked about whether discretion may be an entry point to worse outcomes. Davis (1969), an American legal scholar, was one of the first authors to focus on the use of discretion. He wrote about USA police practices and was pessimistic about the use of discretion (by police officers), arguing that decision-making should be more constrained and that if only use of police discretion can be constrained then (adapting John Locke), ‘where law ends, tyranny will not begin’ (p. 3). This pessimistic view of the role of discretion in criminal justice is not held by other academics. Gelsthorpe and Padfield (2003) describe discretion as being a potentially positive phenomena which provides flexibility within the criminal justice system to ensure that rules are not mechanistically and unbendingly applied. They make the distinction between procedural justice (a mechanistic application) and substantive justice in which discretion is used to select and apply the rules to ensure the outcome of a decision is fair in substance, not just formally. More simply put, discretion can be seen as the means to ensure that the rules don’t inadvertently lead to unfair outcomes and like cases are dealt with as like. In this view discretion plays a positive role in criminal justice decision-making. Gelsthorpe and Padfield (2003) plot a spectrum of decision-making that has the positive and beneficial use of discretion at one end, but recognises the risk of wide discretionary powers leading to an unjust disparity between decisions and, in the final and most extreme case, seeing unfettered discretion resulting in outright discriminatory decision-making (p. 4).

book *The Uses of Discretion* (1992) further develops the concept of discretionary decision-making. But it is his later (2002) work *Law as a Last Resort* on the discretionary decision-making in health and safety enforcement decisions that provides the major contribution. Hawkins puts forward a three-part model of the ‘Surround’, ‘Field’ and ‘Frame’, with each part affecting discretionary decision-making and therefore needing to be considered in any description of how decision-makers arrive at a particular decision.

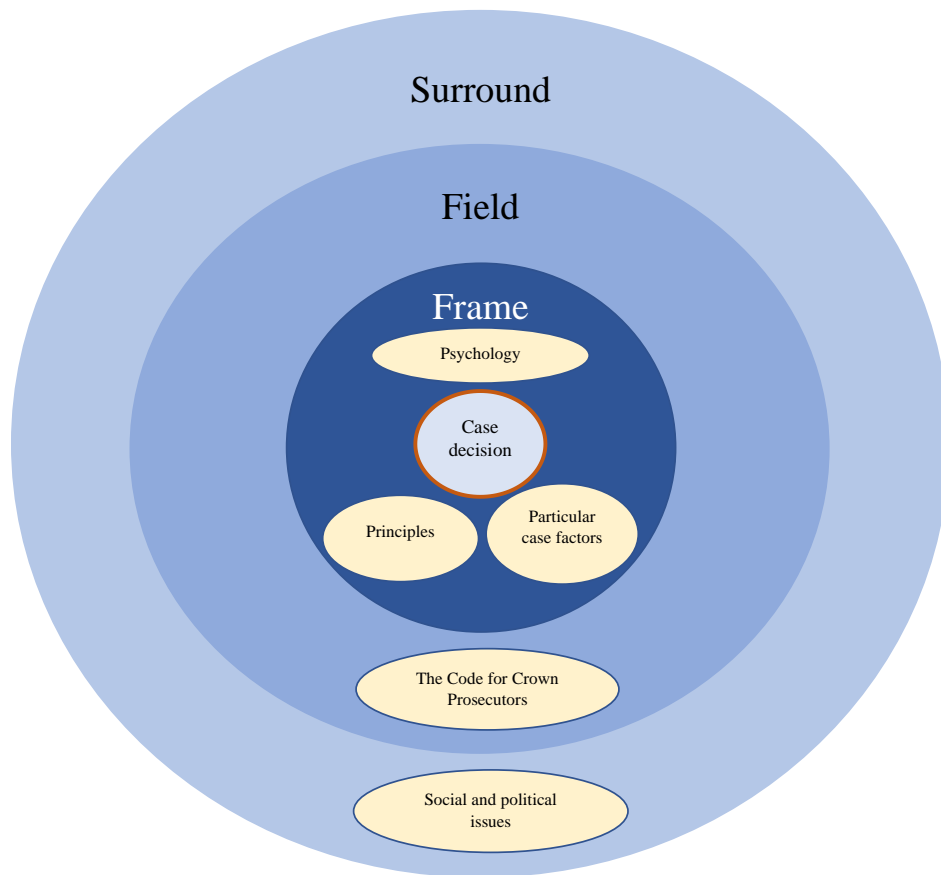
Hawkins (2002) describes the ‘Surround’ as ‘the broad setting in which regulatory (or other) decision-making takes place’ (p. 48), and that ‘The ‘Surround’ serves as an environment not only for individual decision-making, but also for the activities of the legal bureaucracies in which such decision-making takes place, for they, like other legal organisations, are actors in social, political and economic space’ (p. 48). The ‘Surround’, then, captures some of the broad socio-economic, political and philosophical considerations within which the decision-maker operates. The ‘Field’ is described by Hawkins as ‘a defined setting in which decisions are made. The ‘Field’ contains sets of ideas about how its ends are to be pursued. These may exist at a formal level in the form of policies, expectations, and the like about the organisation’s mandate and how it should be attained’ (p. 50). The ‘Field’ concerns organizational practice and specific policies; for the CPS this can be seen as the level at which the Code and supporting policies sit, as well as aspects that affect decision-making such as training, organizational structure and physical layout of offices. The ‘Frame’ is described by Hawkins as speaking to the interpretive behaviour involved in the decision-making about a specific matter. The ‘Frame’ describes how features in a particular problem or case are understood, placed and accorded relevance’ (p. 52). The ‘Frame’ contains, therefore, individual set of values, experiences and knowledge employed by decision-makers that are brought into individual decision (either knowingly or sub-consciously) and, for my

purposes, relate to the views on the important of particular factors, mental shortcuts and includes the wider principles of prosecution.

Hawkins's work helped draw attention to the types of things that matter as his three-fold model pointed to the need to look not only at the Code ('Field') but to look more widely to the social and politics environment that affects decision-making ('Surround') and more narrowly to the immediate considerations and mechanisms of prosecutor decision-making and how prosecutors interpret and understand what they are doing ('Frame'). It is in large part Hawkins's work that led to me to draw out of the principles of prosecution and the psychology of decision-making as being so important to CPS decision-making.

Applying Hawkins's analysis to the CPS, this three-part structure can be represented as follows:

Diagram 2 – Hawkins’s ‘Surround’- ‘Field’- ‘Frame’ applied to the CPS



Hawkins’s approach has proven to be useful to others researching CPS decision-making. Fairclough (2018) interviewed CPS prosecutors about their use of special measures in court (screens or video links for vulnerable witnesses). She applied Hawkins’s (2002) framework of ‘Surround’, ‘Field’, and ‘Frame’ to contemporary CPS practice. Fairclough concludes that in order to understand CPS prosecutor decision-making fully, the experience of CPS prosecutors must be ‘situated within [the] wider context...decision-making is intrinsically bound up with the socio-political ‘Surround’ and organisational ‘Field’ in which it is set’ (p. 483). She claims to show ‘the value of Hawkins’s framework in unpacking the complexity of decision-making within the criminal justice system.... [enabling] a fuller appreciation of the entanglement of issues at play’ (p. 485).

## **Prosecutors as Political Animals: the ‘Surround’**

Hawkins’s (2002) model points to the importance of the ‘Surround’, encouraging an analysis of the broader social and political environment within which prosecutor decision-making is conducted. Through understanding the wider political context and changes, it is possible to understand why prosecutors put particular emphasis on certain aspects of a case as being important.

Three changes to criminal justice policy over the last 30 years have particular relevance to CPS prosecutor decision-making: a growing focus on victims, the rise of managerialism and an increasingly punitive approach to justice issues. Their influence will be seen in two ways: their reflection in the Code (and how this has changed over time), and in the views of prosecutors reported during the interviews. Chapter Six will present the ways in which these important changes are represented in prosecutor views. This chapter, as a prelude and contextualization of that, will look at how these changes have been reflected in the Code. In this sense, the Code can be seen as acting like a barometer of wider changes across the criminal justice system; those of sufficient importance are reflected in the Code. This fits with the discussion in Chapter Two that highlights the communicative function the Code plays as it reassures Parliament and the wider public that the CPS is responding and reflecting wider trains of thought. Understanding the impact of the political changes on the Code is important as it helps describe the wider environment within which contemporary CPS prosecutors decide whether to prosecute or discontinue a case.

### *The rise of the victim*

Victims have become increasingly prominent in the language and rhetoric of criminal justice over the last thirty years (see Garland (2001); and Hoyle and Zedner (2007)), and the Code reflects this trend. The early editions of the Code had little to say about the rights of victims

and were instead focused upon the protection of defendant rights as befits an organisation whose genesis was driven by miscarriages of justice (discussed in more detail later in this chapter). The 1986 Code does not mention the victim at all; the only related point is about giving due regard to a complainant who later withdraws an accusation (presumably in the context of domestic violence or sexual offences).

This changed in the 1994 edition, which introduced new public interest factors that favoured a prosecution. Four of these new factors were connected to the position of the victim: (a) the victim was ‘serving the public’ (police/prison officer for instance.), (b) the victim was vulnerable, (c) an element of discrimination against the victim or a (d) ‘marked difference in actual or mental ages of the defendant and the victim’ (1994, s.6.4 c, h, i, j). One factor against prosecution related to victims: a provision to save the victim from undue physical or mental anguish (1994, s.6.5 e).

The 1994 Code went further, including a new and separate section on ‘The relationship between the victim and the public interest’ which said ‘The Crown Prosecution Service acts in the public interest, not just in the interests of anyone individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.’ (1994 Code, s.6.7).

The importance of the victim in CPS decision-making continued to grow. A series of what Hoyle (2012) calls ‘service rights’ (p. 407) for victims have been introduced across the Service. She describes these as ‘services which do not affect procedure, such as information provided about case progress’ (p. 407). Three particular CPS initiatives illustrate this. The first is the Direct Communication with Victims scheme (launched in 2001) requires

prosecutors to write to victims (in certain cases) to explain why a case was discontinued. The second was the ‘No Witness, No Justice’ initiative, launched in 2004, set up joint Police and CPS units to support victims and witnesses attend court, and Hall (2018) describes how prosecutors in the magistrates’ courts (and to a lesser degree barristers in the Crown Court) engage with victims pre-trial in order to help put them at ease (p. 122). The third was the ‘Prosecutor’s Pledge’, launched in 2005 sets out the standards of service a victim can expect from the CPS when dealing with a case.

Victims have also been afforded a measure of ‘procedural rights’ (ibid. 2012, p. 411). The 2013 Code says that ‘In deciding whether a prosecution is required in the public interest, prosecutors should take into account the *views expressed by the victim about the impact that the offence has had*. In appropriate cases, this may also include the views of the victim’s family.’ (2013, s. 4.12c, emphasis added).

The latest, and perhaps most far-reaching example of the increasing prioritisation of the role of the victim in the work of the CPS was the introduction of the ‘Victim’s Right to Review’. Following a High Court case in 2011 (*R v Christopher Killick* [2011] EWCA Crim 1608), in which consideration was given to whether a victim had a right to seek a review of a CPS decision not to prosecute, victims in England and Wales were given the right to challenge a CPS decision to discontinue a case. To put this right into effect, the CPS introduced, in 2013, (and mentioned in the 2018 edition at s. 3.6) the Victim’s Right to Review (VRR) scheme. Under the VRR, victims who are unhappy with a CPS decision can, in certain circumstances, formally request a review by another lawyer.<sup>29</sup>

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<sup>29</sup> <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme> (s.5)

The creation of this scheme is one of the clearest reflections of the growing importance and centrality of the victim in the criminal justice system. Commentators have acknowledged some of the benefits of the VRR to victims. For instance, Iliadis and Flynn (2018) say that the VRR scheme ‘addresses some of the foremost limitations of [the] process for victims whose cases do not proceed to trial. For example, by allowing for decisions to be reviewed and potentially overturned, it ensures victims not only receive information on this decision, but an explanation is provided as to why this decision was made, which may reduce feelings of alienation and disempowerment’, and conclude that the VRR ‘presents major benefits for victims’ (p. 566). Iliadis and Flynn also point out, however, that limitations to the scheme ‘pertaining to accessibility and accountability suggest that the way the VRR operates in practice may undermine its capacity to achieve its stated transparency and victim satisfaction-based outcomes’ (p. 566). Nonetheless, the VRR scheme is one of the major ways in which the CPS has attempted to improve notions of procedural fairness and so increase legitimacy (Paternoster et. al. (1997) and Tyler (2013)).

These changes to the Code suggest how the place of victims has become more prominent in prosecutorial thinking, at least in the CPS policy documents and discourse. The interviews in Chapter Six will demonstrate that the victim is a prominent consideration in practice for prosecutors.

### *Prosecutors as managers*

The second broad political and social trend to affect the CPS and find expression in the Code is managerialism. The roots of managerialism can be traced back to the ‘New Public Management’ trends across wider government in the late 1980s and early 1990s (Clarke, Gewirtz and McLaughlin, 2000). Following the publication of the *Next Steps* report (1988), the UK Government began to introduce executive agencies and purchaser/provider splits

(‘quasi-markets’) across the public sector, most notably in health, but more recently in job-seeking support and education, in order to drive greater ‘value for money’ from the public sector. New public management began to be introduced into criminal justice in the mid- to late 1990s. Much of this was driven by the New Right political ideology of the Thatcher and Major eras but continued under the early New Labour administrations of the late 1990s. For Bottoms (1995), the main strands to managerialism in criminal justice were, first, the adoption of an ‘holistic’ view of the criminal justice system as a single, integrated system with shared goals and aims; second, a growing consumerist perspective, with victims and even defendants being re-conceptualised as ‘customers’ to whom a ‘service’ must be provided (showing an interrelationship with the greater role of the victim); and third, the greater use of actuarial approaches, in which cases are evaluated and dealt with as a class of cases rather than as a series of individual instances.

These strands clearly emerged in the Government White Paper – *Modernising Government* (1999) that set out a range of initiatives and an agenda for reform that sat squarely within a New Public Management perspective, including: a focus on users rather than providers with an ambition for 24 hour access to services, all services moving online by 2008(!); cutting regulation; taking a ‘creative approach to financial and other incentives to public sector staff’ (p. 6); and introducing ‘a new focus on delivery - asking every Permanent Secretary to ensure that their Department has the capacity to drive through achievement of the key government targets and to take a personal responsibility for ensuring that this happens’ (p. 6).<sup>30</sup>

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<sup>30</sup> The latest example of New Public Management theory in action within criminal justice concerns the probation reforms made as part of the Rehabilitation Revolution agenda (captured in *Breaking the Cycle* a Green Paper published in 2010 and brought to fruition in the Offender Rehabilitation Act). These changes saw Probation Trusts dissolved, and elements of probation supervision privatized via the creation of 21 Community Rehabilitation Companies (CRCs) through a tendering process in which consortia of private, public and third sector organisations were contracted to provide supervision and support to low and medium level offenders in the community. Alongside the new CRCs, a new public sector National Probation Service (NPS) was set up to manage high risk offenders and conduct in court activity (pre-sentence reports and breach proceedings largely). The reforms have not gone smoothly, and Government has announced what is partial reversal of the reforms. ([Justice Secretary announces new model for probation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/justice-secretary-announces-new-model-for-probation)). Unveiling the news measures in the House of Commons on June 11, 2020, Robert Buckland, Justice Secretary, said: ‘This will give us a critical measure of control, resilience and flexibility with the services that we would not have had were they delivered under 12 contracts with a number of

The expression of managerialist perspectives in the Code showed itself most clearly in consideration of cost. Cost as a legitimate consideration in prosecution decisions has moved in and out of the Code over the various editions; explicit in some (for instance, the 1986 and 1992 editions), implicit in others (covered under consideration about not taking forward a case likely to result in a nominal penalty). The 2013 Code deals with cost directly as a public interest factor under proportionality, asking whether a prosecution is required on grounds of cost and ‘effective case management’. Little further information is provided in the Code as to what is meant by ‘effective case management’, the only indication being that ‘in a case involving multiple suspects, prosecution might be reserved for the main participants in order to avoid excessively long and complex proceedings’ (2013, s. f.) which, again, is an acknowledgement in the Code of managerialist resource considerations.

Managerialism has made itself felt across the CPS more widely than just in the Code. This can be seen in the introduction to the CPS of Activity Based Costings<sup>31</sup> to track better the cost and benefit of prosecutor and administrative staff activity, the move to digital working<sup>32</sup> to enable greater efficiency (i.e. cost cutting through use of fewer administrative staff), the introduction of ‘Optimum Business Models’.<sup>33</sup> The spread of managerial practices can also be seen in the increased use of more lightly trained but lower paid ‘Associate Prosecutors’ (formerly ‘Designated Case Workers’) for conducting low-level, routine court work<sup>34</sup>.

Soubise (2017) highlights this trend, noting that “[t]he absence of Crown Prosecutors from court reinforces the bureaucratisation of summary proceedings as legal issues cannot be

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organisations.’ The partial reversal will take place on June 26<sup>th</sup> 2021. See <https://www.independent.co.uk/news/uk/politics/probation-re-nationalised-chris-grayling-unpaid-work-rehabilitation-a9561291.html>

<sup>31</sup>[https://www.cimaglobal.com/Documents/ImportedDocuments/tech\\_ressum\\_the\\_use\\_of\\_activity\\_based\\_planning\\_in\\_the\\_uk\\_crown\\_prosecution\\_service\\_2006.pdf](https://www.cimaglobal.com/Documents/ImportedDocuments/tech_ressum_the_use_of_activity_based_planning_in_the_uk_crown_prosecution_service_2006.pdf)

<sup>32</sup> <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/delivering-justice-in-a-digital-age.pdf>

<sup>33</sup> [https://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/OBM\\_thm\\_July12\\_rpt.pdf](https://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/OBM_thm_July12_rpt.pdf)

<sup>34</sup> <https://publications.parliament.uk/pa/ld200304/ldlwa/40429wa1.pdf>

resolved at court in the cases where defence lawyers – or defendants themselves – take a more adversarial stance” with Associate Prosecutors having to refer back to the office to have a Crown Prosecutor make a decision. Hodgson (2020) agrees, concluding that

*‘we are seeing the reshaping of the prosecution function – not to strengthen the fairness or reliability of the criminal process for those who become its subjects, but to shift power away from the independent judiciary and the trial, to respond to more cases, faster, and to save money. This is presented as a more efficient and effective approach but seems only to move the focus on criminalisation to more minor offenses that can be dealt with easily. This in turn depends on a degree of routinization and systematic delegation of work to a variety of associates and paralegals’ (p. 169).*

Plea bargain was touched upon briefly in the previous chapter but needs now to be considered against the backdrop of growing managerialism within the CPS. Commentators have pointed out that the drive across the criminal justice system, and in the Crown Prosecution Service more specifically, has put pressure on Crown Prosecutors to engage more in plea bargaining as a way of dealing with cases in a more cost-efficient manner. Welsh, Skinns and Sanders (2021) for instance, note that in regard to bargaining over the charge the CPS may make, that ‘[t]he courts recognise that charge bargains are commonplace and that the integrity of criminal proceedings require that they be adhered to’ but at the same time ‘there are elements within legal culture that remain decisively in favour of charge bargaining and other methods of cost-cutting achieved by ‘defining deviance down’ (p. 371). They go on to quote unpublished research in which ‘one prosecutor said that victims’ needs tend to go on the ‘backburner’ in relation to pleas negotiations because they are ‘a great way of carving a case up, getting it finalised at the first hearing, which is all anyone wants because that’s what the

statistics say we have to do' (p. 371-2). Soubise (2017), of course, notes the connection between managerialism and plea bargaining above when she points out that one of the implications of greater use of Associate Prosecutors (who do not have the power, unlike Crown Prosecutors, to alter charges and therefore cannot (or at least, should not) engage in plea bargaining. Victim issues are thus seen to be 'trumped' by managerialism when a lesser charge – and one that is less likely to leave the victim feeling satisfied with the treatment of their case – is chosen in order to quickly resolve what might otherwise be a difficult case. A clear example of the trend of managerialism conflicting with the trend toward victim-centered decision-making.

One further expression of Managerialism within the CPS is the increased focus upon use of management data to deliver efficiencies to the prosecution process, and the methods section will describe in more detail the three separate databases of management information that the CPS collect (on the MIS, CMS and I-Trent databases) that I drew upon to conduct my statistical analysis for this research.

The arguments about whether costs are an appropriate inclusion in a prosecution policy mirror wider debates about managerialism across government. Critics of managerialism (such as McLaughlin 2002, p. 144-8) claim that there is no place for social justice in a managerialist approach (and by extension that there is no place for cost considerations in a Code that seeks 'just' prosecutions). Counter to this would be the argument that a managerialist approach delivers transparency (without an ability to explicitly cite costs for dropping cases, prosecutors are left to justify discontinuance due to 'likely nominal penalty' or some other, slightly inaccurate device), gives citizens a clearer idea of performance of the

CPS, and, in direct response to the social justice point, it is perverse to argue that the notion that justice is somehow delivered better through inefficiency. .

*Vox populi, vox dei?*

Finally, populist punitiveness is the third major socio-economic trend to have affected the CPS and that finds expression in the Code. Matthews (2005) describes the processes involved in populist punitiveness as a perception by politicians of ‘a growing sense of insecurity and anxiety among different sections of the population [in which] populist sentiments are seen to veer toward the more punitive end of the spectrum, resulting in a public and political shift to the right. In addition, the growth of the mass media is seen as critical in fueling public sentiments (i.e., an increase fear of crime and definition of criminals as ‘the other’) and creating the conditions in which retribution and vengeance can more readily be expressed’ (p. 182). The most well-known rhetorical examples that are held to demonstrate this populist punitive turn are the (now infamous) remark from Michael Howard that ‘prison works’, Margaret Thatcher insisting that ‘A crime is a crime is a crime’<sup>35</sup> and Tony Blair pledging to be ‘Tough on crime, tough on the causes of crime’.<sup>36</sup> The recent rapid growth in the use of imprisonment, with the prison population rising from 20,000 in 1956 to 47,000 in 1986, and to 78,180 in December 2020,<sup>37</sup> should be seen against this backdrop.

The Code reflects notions of populist punitiveness, both in the evidential and public interest stages. The emphasis on defendant rights has been reduced in the text of the evidential stage of the Code and the language on the evidential stage in the early editions that suggested a scepticism toward police practices has similarly been reduced. One of the organisation’s primary responsibilities following the Royal Commission on Criminal Procedure (1981) was

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<sup>35</sup> Margaret Thatcher, News conference in Saudi Arabia, 1981, rejecting any view that there could be political reasons for IRA terrorism.

<sup>36</sup> Tony Blair, Leader’s speech, Labour Party Conference, Brighton 1995.

<sup>37</sup> <https://data.justice.gov.uk/prisons>

to check and stop poor (and possibly corrupt or illegal) prosecutorial decision-making. Section 5.1 of the 1986 Code, for example, tells prosecutors to: '*consider whether evidence has been secured through 'oppressive' means*'. This is to be seen in the context of the creation of the CPS, spurred on as it was by a concern over police malpractice and the need, therefore, for a separation of investigation and prosecution.<sup>38</sup> This hard language in reference to police evidence has softened over the various editions of the Code, with section 4.8 of the 2013 edition, now simply saying:

*Prosecutors should consider whether there is any question over the admissibility of certain evidence. In doing so, prosecutors should assess:*

- *the likelihood of that evidence being held as inadmissible by the court; and*
- *the importance of that evidence in relation to the evidence as a whole*

Notions of understanding and responding to public opinion on criminal justice issues are central to the idea of populist punitiveness. Embryonic considerations of public opinion as a factor for prosecution in the public interest stage can be seen from the 1994 edition onwards, with changes to this edition illustrating the move toward a more pro-prosecution position. The 1994 Code saw a rebalancing of the public interest stage. Prior to 1994, the Code stated that, for a prosecution not to proceed, the public interest factors against must 'outweigh' those in favour to prosecute, but the 1994 edition stated that the factors against must 'clearly outweigh' those in favour if a prosecution is to be discontinued thus tipping the balance in favour of prosecution in finely balanced cases. The CPS thus shifted its position to a more

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<sup>38</sup> The Confait Case. Report by the Hon. Sir Henry Fisher (December 1977), London HMSO HC 90

pro-prosecution stance – it altered its view of what is in the public interest, suggesting that a more pro-prosecution policy better reflects the victim’s interests.<sup>39</sup>

This is not the only such change that can be observed. The 1994 edition explained that CPS prosecutors would consider whether ‘The offence, though not serious, was widespread in the area in which it was committed’. The stress on the ‘widespread’ nature of a crime should be seen to relate back to citizen perceptions of an (ever?) growing crime problem with a government is unable to fully control crime and deliver justice and security for its citizens.

This new factor, and the more general rebalancing of the Code’s description of the public interest, encourage prosecutions for crimes with a suggestion (or reaffirmation) that government, through effective targeting of prosecutions, is able to deal with these types of crime and so reassert its sovereignty and power over crime. These considerations (embryonic as they were in 1994) became more explicit in 2004, when a new factor was included in addition to considerations about community impact: that a prosecution should be brought if it ‘would have a significant positive impact on maintaining community confidence’ (2004, s.5.19 p). Community confidence can be directly related to public opinion and related notions of populist punitivism.

The effect of populist punitive trends within the CPS are not confined to the Code text but can be seen in wider organisational changes too. As the language in the Code changed over time to become more pro-prosecution and less (implicitly) critical of the police organisational

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<sup>39</sup> This change may be explained by the general perception that the CPS were over-willing to exercise its independence from the police to reach its own view of the fairness of a prosecution (in short, they were being too lenient toward suspects; the CPS was jokingly said by some (<https://www.economist.com/taxonomy/term/115/13983688?page=284>) to be the ‘Criminal Protection Service’ and should take a firmer line in prosecuting cases. The feeling amongst CPS senior management at the time was that the Home Office rather shared this view and that if the CPS did not take a firmer line Government would fundamentally review or even abolish the CPS (personal communications, CPS ex-Policy Director, January 2014).

changes were occurring at the same time. The CPS moved from intentionally (geographically) distancing itself from the police – through a separation of offices – to a position in the mid-2000s where many CPS prosecutors worked from within police stations; a move that underlined the shift in CPS attitudes from one that was focussed on holding the police to account to one that held the police to be partners in crime control.<sup>40</sup>

These three wider political changes - the rise of victim-awareness, managerialism and populist punitiveness – can be said to be drawn from a common source. Each is arguably a strand encompassed with a neo-liberal and New Right political ideology that has continued to affect criminal justice (as well as other spheres of state action) since its emergence in the 1990s.

Garland (2001) narrates the emergence of neo-liberal punitive regimes as stemming from the collapse of penal-welfarist models during the 1970 and the contemporaneous societal changes observed across labour markets with the end of Fordism, changes to the structure of the family and the household (with greater levels of female employment and increased male unemployment), demographic changes and changes to the traditional structure of the city, and the rise of mass media increasing portrayals of violence but also demystifying politicians and those in power. Giddens (1991) and Beck (1992) would add to this list an increased sense of

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<sup>40</sup> The growing influence of populist punitive notions in the Code was not uniform or unidirectional, however. For instance, the 1986 Code noted how the mental health of a defendant should be given ‘anxious consideration’ and a prosecutor should ‘not hesitate’ to drop a case if a prosecution would cause further ill-health. Yet it also counterbalances this by stating: ‘This is a difficult field because in some instances the accused may have become mentally disturbed or depressed by the *mere fact* that his misconduct has been discovered and the *Crown Prosecutor may be dubious about a prognosis* that criminal proceedings will adversely affect his condition to a significant extent. (emphasis added) (1986, (v)(a)). A Home Office Circular (66/1990) produced in conjunction with the Department of Health, indicated that the presumption against prosecution should be strengthened in cases where mental health was a particular factor (1990, para. 25). This led to changes to the 1992 Code text. The relevant section then began: ‘The Crown Prosecution Service endorses the spirit and objectives of the Home Office Circular on Provision for Mentally Disordered Offenders’ (1992, s. (v)(a)). This suggests a reduction in use of punitive criminal sanctions for mentally disordered defendants, rather than the toughening effect of punitiveness. It does not, however, suggest that mentally disordered defendants were not controlled through other means, perhaps, through an increased degree of medicalisation rather than criminalisation (Clark, Fitzgerald, Greenwood and Young (1980, p. 150)).

risk awareness in modern society, culminating in the colourful yet unsettling description of modern society put forward by Baumann (2000):

*Our time is auspicious for scapegoats – be they the politicians making a mess of their private lives, criminals creeping out of the mean streets and rough districts, or ‘foreigners in our midst’. Ours is the time of patented locks, burglar alarms, barbed wire fences, neighbourhood watch and vigilantes; as well as of investigative tabloid journalists fishing for conspiracies to populate with phantoms the public space ominously empty of actors, and, for plausible new causes of ‘moral panics’ ferocious enough to release a good chunk of pent-up fear and anger. (p. 38-9)*

At the same time as these wider societal changes were occurring, the field of penology was taking account of seemingly inexorable rises in crime rates and finding the boundaries of criminal justice intervention in tackling this. Garland (2001) points to the two types of responses from the state that attempted to protect the ‘myth of the sovereign state’ (p. 109) – the adaptive responses and the non-adaptive responses.

Managerialism and the focus on the victim are adaptive responses. Garland (2001) notes the increased professionalisation and commercialization of justice, in which ‘practitioners of crime control and criminal justice are required to talk the economic language of ‘cost-benefits, ‘best value’ and ‘fiscal responsibility’ (p. 188). He also points to the ‘the emergence of victim policy’ (p. 121) and tracking the move from an aloofness toward victims in the 1970 to one that in the 1980s began to become concerned with keeping victim informed, offered support and given compensation for their injuries. He notes that ‘[t]he sanctified persona of the suffering victim has become a valued commodity in the circuits of political

and media exchange' (p. 143). Both of these adaptations are exhibited in the Code. His other 'adaptions' to the new penological terrain are an increase in the use of street-level justice and out of court disposals ('defining down crime') and a greater focus on internal performance measures as a measure of success rather than measuring any contribution to wider societal improvements ('redefining success').

Populist punitiveness is an example of a non-adaptive 'denial' and 'acting out' responses to new crime trends. Garland (2001) claims that populist calls for increased punishment and longer sentences hark back to earlier times when the state was seen to have more power over crime in society. He says that

*criminal justice actors and agencies are now less capable of directing their own fate and shaping their own policies and decisions [after an increase in politicization of politics and a rejection of specialist and expert advice in criminal justice matters] ...A new relationship between politicians, the public and penal experts has emerged in which politicians are more directive, penal experts are less influential, and public opinion becomes a key referenced point for evaluating options (p. 172).*

The public opinion is interpreted by politicians as needing more punishment. Punitiveness is seen by Garland:

*primarily in political terms – as forms of acting out, or retaliatory legislation, or symbolic gestures of sovereign might, or politically orchestrated rituals of mechanical solidarity. Harsh punishments – and the old rhetoric of 'law and order' are deployed by the state as a commanding gesture of lordship and popular reassurance (p. 172).*

The key argument throughout this section is that these neo-liberal political changes have played an important part in shaping criminal justice responses in the late-modern age. The CPS is not apart from these changes, quite the reverse. The impact of New Right politics in criminal justice thinking can be seen in the changing editions of the Code. The Code is an indicator of the wider issues that the CPS considers important and wishes to show it is taking account of and so the Code reflects the broad changes in new penological thinking as well as many of the ambiguities and contradictions in criminal justice policy which underlie the role and function of the CPS. More importantly, as will be seen from the interviews with prosecutors discussed in Chapter Six, these wider political considerations are clearly a component to prosecutor decision-making in practice. My fieldwork shows that prosecutors are very aware of the wider political environment within which they work and that they take account of this component of the wider ‘Surround’ when making case decisions.

### **The hollow ‘Field’**

Using Hawkins’s terms, the Code sits within the prosecutors’ ‘Field’ as the main policy document for prosecutions in England and Wales. Three interview-based pieces of prior research into CPS decision-making reveal how CPS prosecutors use (and don’t use) the Code.

The first two studies relate to the prosecutor’s ‘Field’ and hold particular importance to my work. Hoyano et. al. (1997) and Baldwin (1997) are two studies that draw on interviews with CPS prosecutors to examine their relationship to the Code. They underline the arguments put forward in Chapter Two that the Code contains gaps and ambiguities and that the underlying assumption of prosecutor rationality is false.

Hoyano et. al (1997) were commissioned by the CPS to examine whether Code tests were being implemented in line with the guidance contained in the 1994 revision of the Code. They interviewed 80 prosecutors and found that prosecutors made little use of the Code in day-to-day decision-making. They made four conclusions, all highly relevant to my work, and for the most part reflected in very similar terms by the prosecutors in my interviews.

First, they concluded that '[t]he impact [of the Code] upon case decisions has been very limited' (p. 556), few prosecutors believed that the [then] new edition of the Code had impacted their decision-making more than marginally and that '[m]ost prosecutors seldom consulted the Code...they saw no need to refer [to it] on a regular or even occasional basis as they felt that the Code's general principles had been absorbed into their bloodstream' (p. 558). Second, prosecutors reported that rather than rely on the Code text they felt that the only way to acquire prosecution skills was 'through experience, or through consulting colleagues' (p. 559). The third relevant finding from Hoyano et. al.'s work was that prosecutors differed in the way that they interpreted the meaning and intended mechanism of the Code Test. Regarding the evidential stage, for instance, Hoyano et. al. showed that prosecutors consider the Code text relating to the evidential stage open to interpretation. They concluded that the Code text left '[p]otential for confusion, with some prosecutors appearing to believe that 'getting past half time' and 'more likely than not to convict' stipulate essentially the same standard. Others seemed to equate 'more likely than not' with the ultimate burden of proof in civil cases, 'proof on a balance of probabilities', a false analogy since the former is merely a predictor of whether the trier of fact will find guilt proved beyond a reasonable doubt' (p. 560). Their final conclusion of relevance was that in regard to the sequencing of the evidential and public interest stages, Hoyano et. al. found that prosecutors do not always follow the 'correct' sequence of conducting the evidential stage

first only then followed by the public interest stage that is set out in the Code (p. 563). In reality the thought process was more fluid. A study by Griffiths and Sanders (2013) supported this point. They used statistical analysis, review of case files and interviews with prosecutors to explore the reasons for a Gross Medical Negligence. One of their findings was that “in many or most cases the public interest test was being applied under the guise of the evidential test; and/or that in cases such as these the two tests merge” (p. 144).

My research findings build on those of Hoyano et al. Their work shows that prosecutors use the Code far more loosely than the Code itself would imply and that prosecutors in 1997 found the need to interpret what the Code says and fall back to some extent on wider philosophies and principles in order to arrive at their case decision, with wide variation between prosecutors resulting. My research examines similar issues to them and in doing so test the continuing relevance of their work and brings their findings up to date. Throughout Chapter Six, where the interviews are reported, it will be seen that, even when accounting for differences reflecting the 20-year gap between Hoyano and my research, prosecutors appear to hold very similar views now as they did when Hoyano et al. conducted their research.

Baldwin (1997) also examined the practical use of the Code by prosecutors. He interviewed 18 CPS prosecutors and 15 barristers as part of his CPS commissioned investigation into judge ordered and judge directed acquittals. Baldwin concluded, in the same vein as Hoyano et al. (1997), that the Code text had only a limited effect on prosecutor decision-making. He reported that the Code was being used by some prosecutors but that the responses ‘had more than a hint of textbook accounts about them. Some sounded almost as if they had been learnt off by heart from the Code for Crown Prosecutors or from a training manual’ and that when pressed for specific examples ‘descriptions became more pragmatic and more

individual’, with about a third of interviewee adopting ‘crude rules of thumb’ (p. 550).

Ultimately, he concluded that to understand prosecutor decision-making one must look beyond the Code:

*Case review needs to be examined in its social, organizational and psychological context. Prosecution decision-making emerged from this study as a human and individual process, in which the personal attitudes and approach of the reviewing lawyer are of great significance. They [the prosecutors] conceded that case review is sometimes a hurried, even a perfunctory, exercise. This is in marked contrast to the official aim of review as a painstaking, almost academic, process based upon nationally accepted criteria set out in the Code of Crown Prosecutors (p. 555).*

Baldwin was writing over twenty years ago and so at a very different point in the CPS’s development to today. Baldwin is markedly more critical of prosecutors in his study than might be justified by my fieldwork. For instance, he describes the prosecutors as a ‘rather querulous group who relished the prospect of airing their grievances to an academic researcher’ (p. 548) about lack of time, administrative burdens, constant re-organisations and such like. He was not impressed, saying ‘[w]hilst sympathetic to these *cris de coeur*, the writer was nevertheless skeptical about how far these factors could explain why case reviews are carried out in a superficial manner’ (p. 548) and noting that academic life is no different (he claims) in that academics also suffer from a lack of time, administrative burdens and so forth. This criticism of prosecutors as ‘moaners’ might be explained by the fact that Baldwin, commissioned as he was by the CPS to do this work, was providing the organisation with a more palatable explanation of why such cases fail – those individual prosecutors lack character rather than anything more systemic being at fault.

Nonetheless, Baldwin's work, like Hawkins' and Hoyano et al.'s shaped my thinking about where best to focus my research attention. Not only did Baldwin conduct direct research with CPS prosecutors into case decision-making but he also asked questions closely aligned to my own primary research questions. Baldwin's stress on the need to put greater attention needs on the 'human and individual process' of decision-making influenced my decision to explore the psychology literature and his work overall further underlined the need to view the law in books and the law in practice as separate.

One further study into the use of the Code by CPS prosecutors is worth particular mention. Gelsthorpe and Giller (1990) looked at prosecutor decision-making in cases involving juvenile defendants. They asked: '[h]ow do [prosecutors] make sense of their Code and translate its formal directives into operation?' (p. 153). They found that the Code was insufficient in itself to fully understand prosecutor decision-making as whilst it 'does provide a general statement of intent with respect to the diversion of juveniles from court, it does not provide specific objectives'. The age of the research – being thirty years old – made it no less relevant today. It prompted me to question more closely the role the Code played in practical prosecutor decision-making and whether it did, in fact, provide the necessary specific objectives or indeed the general statement of intent. Even from its earliest editions the Code did not function as a tool that prosecutors used in their day-to-day work.

These three studies of the prosecutors' 'Field' (Hoyano, Baldwin and Gelsthorpe and Giller) suggest that the Code is not, in itself, a good guide to understanding what is important to prosecutors when making case decisions. A wider view is needed; one that looks beyond the 'Field' to incorporate a broader set of components in prosecutor decision-making than just

what is set out in the Code. These pieces of research on the exercise of discretion, and combined with the previously discussed Hawkins's (2002) framework for understanding better prosecutor decision-making, are therefore important to developing a richer understanding of prosecutor decision-making.

### **The crowded 'Frame': Important factors, psychology and principles**

It will be recalled that Hawkins described the 'Frame' as being the place where 'features in a particular problem or case are understood, placed and accorded relevance' (p. 53). There is much to be said about what exists in the 'Frame' for prosecutors; it is a crowded place. This section will look at the components of the CPS prosecutor's 'Frame' that have been suggested as important within prior research and literature assessing prosecution decision-making, first the particularly important factors, then the psychology of decision-making and the principles that appear important to CPS prosecutors.

#### *Case Factors*

A review of the relevant prior research into prosecutor decision-making (albeit all from non-UK jurisdictions) suggests that there are four important factors that, above others, correlate with case outcomes and therefore, it can be reasonably assumed, play a particularly important role in prosecutor decision-making. The factors are previous convictions, aspects connected to the victim, and age and gender of the defendant. What follows is a review of the main prior research into how these (and other) specific case factors affect prosecutor decision-making.

Previous convictions is the clearest case factor to emerge from the prior research. Forst and Brosi (1977) a researcher/lawyer team, used econometric modelling to examine USA prosecutorial decision-making in felony cases. Their study took a sample of 6,000 felony

cases brought to the prosecutor in Washington D.C. in 1973. They predicted that prosecutors ‘conduct operations with an eye to the future’ (p. 190) and that therefore prosecutors would target their time and attention on those with previous convictions as an indicator of likely future criminality and more readily discontinue other cases. They found a ‘generally small and positive correlation’ (p. 188) between the number of defendant convictions and likelihood of conviction but go on to conclude that the evidence is too weak to conclude for sure that prosecutors pay particular attention to previous convictions, saying that ‘the findings, on the other hand, provide no empirical support to the hypothesis that the prosecutor attempts to give more attention to cases involving defendants with extensive arrest records’ (p. 191). Their study does, however, carry an important limitation. The authors used the number of days the prosecutor ‘carried the case’ as a proxy measure for prosecutor effort, which the authors use once more as a proxy for cases that the prosecutors felt to be most important. This approach is questionable as cases with a strong evidential basis for prosecution and relating to serious matters can often lead to quick guilty pleas and therefore not result in the prosecutor ‘carrying’ the case for long.

Albonetti (1986) conducted a probit analysis on 4,238 felony cases taken from the same Washington D.C. prosecution data set as Forst and Brosi (1977). She focussed on cases that were discontinued by the prosecution and sought to identify what was particular about those cases and found previous convictions to have a stronger effect on prosecutor decision-making than was the case in the Forst and Brosi study. She found that ‘having a prior record increases by 6% the probability of continued prosecution’ (p. 636). Albonetti followed up this work a decade later, this time working with John Hepburn. Albonetti and Hepburn (1996) examined 5,554 prosecutions for drug possession in Mariopa County, Arizona, using logistic regression. They identified the factors of a case that made it more likely that a defendant’s

case was discontinued or otherwise diverted, rather than prosecuted. They found that ‘the likelihood of diversion is significantly decreased if the defendant has a record of prior arrests’ (p. 71).

Weenink (2009) also found evidence to support the importance of previous convictions in prosecutor decision-making in Holland. Using a sample of 409 cases from two separate Dutch towns and logistic regression to examine ethnic inequalities in the Dutch juvenile justice system, he found that one of the strongest factors correlating with the decision to prosecute is ‘the total number of delinquent acts in the case file...each additional delinquent act results in a 2.49 times greater chances to be subpoenaed’ (2009, p. 232). Potential weaknesses are apparent in Weenink’s work. He is not clear on how he selected the two sites beyond one having a high proportion of defendants from an ethnic minority background and the other not and no further information is given about other factors that may be different between the two areas that might have an effect on prosecutorial decision-making. Weenink also does not include in his sample dropped or withdrawn cases, which is of course a focus of my research and so narrowed any scope for making comparisons between Weenink’s work and mine.

The second case factor that correlates with case outcome concerns the importance of the victim in prosecutorial decision-making. Albonetti (1986) found that by far the most significant indicator of prosecution was harm to the victim as opposed to cases involving damage to property. Myers and Hagan (1979) looked at 980 prosecution decisions in Marion County, Indianapolis, in the US, and found that cases were seen to possess ‘more prosecutorial merit’ when victims are ‘older, white, male, and employed’ (p. 448). LaFree (1980) found that offences against poor blacks seemed to strike prosecutors as lesser threats

to social order and were accordingly prosecuted less vigorously. Stanko (1981) observed over 1,000 felony screenings and examined over 100 in detail and found that ‘prosecutors, like police officers, treat offenses against respectable victims as more serious, and do so for all sorts of crime’ (p. 226). More recently, Griffiths and Sanders (2013), when examining cases of medical negligence, suggested that “[w]e can make tentative links between [the cases examined] and the uneven application of police discretion and case construction by prosecutors. For example, the victim in two of these cases [in which a prosecution for negligence were not taken forward] were drug and alcohol users, and in the other three they were elderly patients. There appeared to be no family involvement in these cases. In other words, there was no pressure to conduct full investigations and police (and perhaps CPS) evaluations could have been that the cases concerned the opposite of the ‘ideal victims’” (p. 137).

The third set of important factors to emerge was the importance of age and gender of the defendant in prosecutor decision-making. Albonetti and Hepburn (1996) found that age was a particularly significant factor affecting diversion (p. 77), whilst Weenink (2009) found that age and gender matters ‘[g]irls have nearly twice as much chance of being taken to court as boys’ (p. 232) and that ‘[u]rban district prosecutors are more likely to summon the juvenile’ (p. 233).

The limitations of the research need to be held in mind. First, and perhaps most importantly, when the studies are taken together, a wide range of factors are shown to be relevant to some degree: the evidence, previous convictions, age, ethnicity, gender, aspects connected to the victim and the witness. It is hard to determine what is *not* important to prosecutor decision-making; the field is crowded. Further, it is not possible from the statistics presented in these

pieces of research to determine for certain a hierarchy of importance amongst the factors, beyond concluding that previous convictions and aspects connected to the victim appear in general terms to be important to prosecutor decision-making. (Both factors have been identified in several studies. Other factors, such as defendant gender or ethnicity, appear to have a far narrower evidence base – sometimes just one study – and this is insufficient to take confidence in their effect on prosecutor decision-making).

Secondly, the studies cited above are in places contradictory - not all the available studies draw the same conclusion. For instance, Hirschel and Hutchison (2001), two USA domestic violence researchers, dispute the importance of the victim in the mind of the prosecutor. They investigated the relative effects of offence, defendant, and victim variables on the decision to prosecute domestic violence cases in the USA. They used Charlotte Police Department data to identify 686 cases of domestic violence and conducted a bivariate analysis of the effects of victim and defendant characteristics on the decision to prosecute. They found that when considering the relationship between victims and defendant characteristics and the decision to prosecute 'none of the demographic victim or defendant characteristics, including 'age' and 'prior arrest', are statistically significant at the .05 level.' (p. 51). Overall, the study found that little correlated across the factors examined. Where correlations existed, they were weak.

Different conclusions can be drawn in relation to the role of defendant ethnicity, too.

LaFree's finding, mentioned above, suggests that race might be a factor in prosecutor decision-making, whereas more recent research findings from the UK presented as part of the Lammy Review (2017), an independent review into the treatment and outcomes of minority individuals in the criminal justice system, supported this finding only in part. It presented a

more nuanced set of conclusions (based on a mixture of analysis of Ministry of Justice statistics, review of prior research and case studies) when it found that in relation to the CPS:

*in most cases, defendants' ethnicity does not affect the likelihood that they will be charged by the CPS. Other institutions in the CJS should look carefully at the factors that have driven this, from internal and external oversight, to a workforce that reflects the society it serves. There are some areas that the CPS should address. These include worrying disparities for the specific offences of rape and domestic abuse, and the role of the CPS (alongside other CJS institutions) in tackling gang crime effectively and proportionately (p. 23).*

For instance, as noted above, Weenink (2009) found that age and gender matters '[g]irls have nearly twice as much chance of being taken to court as boys' (p. 232) and yet Albonetti (1986) found that women were less likely to be less likely to be prosecuted (p. 636). There was also contradictory evidence as to whether links between factors and prosecutor decision-making could be found at all. The work of Hirschel and Hutchinson (2001), discussed above, is a case in point. This is just one study, and when set against the range of other studies is not enough, on its own, to conclude that the other studies are somehow spurious in their findings. But it is a valuable reminder that we must not take the positive correlations and effects shown in the other studies at face value and certainly not use them to justify mechanistic applications of the findings to CPS prosecutor decision-making.

Finally, and most importantly, the studies are dated and from other jurisdictions. The prosecutorial decision-making that they describe is drawn from different times and different places. Apart from Weenink (2009), the studies are over twenty years old. The criminal

justice landscape has changed a lot in that time as the earlier discussion of the broad social and political changes showed. Police, prosecutor and court structures and relationships differ in other jurisdictions as does the content and nature of the law. The studies therefore describe an environment culturally distinct from that within which the modern-day CPS prosecutor works. Their relevance is therefore limited when applied to contemporary CPS decision-making.

On a final point, a useful methodological point emerged from the review of research into factors. Albonetti and Hepburn (1996) and Weenink (2009) both used logistic regression to conduct their analysis, and Albonetti (1986) used probit (a close relation of logistic regression). I chose logistic regression for the analysis in this research (presented in Chapter Five) independently of these studies (for the reasons set out in the methodology chapter (Chapter Four)) but nonetheless it is reassuring to see comparable methodological approaches to the one I used being used in the past to address similar research questions.

Whilst the date and non-UK jurisdiction limit the relevance of the prior research studies, they do not obviate it. The factors identified are not in themselves counter-intuitive – many could have been guessed at as being important. Yet these studies enrich research into contemporary CPS decision-making by acting as indicators of what might still be important, and clues to likely areas of useful focus. They provide a strand – albeit a limited one – to the wider tapestry of prosecutor decision-making that is drawn together in my final chapter. The statistical analysis and prosecutor interviews presented in Chapters Five and Six show that despite the decades and miles that separate us from these studies, their broad overall findings hold true for the CPS prosecutor of today.

### *Intuitive decision-making and mental shortcuts*

The second key theme to emerge from the literature is the importance of incorporating a psychological perspective into prosecutor decision-making. The research field of decision-making theory is vast, and I can only make use of a few of the great number of relevant studies. Nonetheless even a summary exploration is enough to suggest strongly that psychological research has a part to play in helping to describe the reality of CPS prosecutor decision-making.

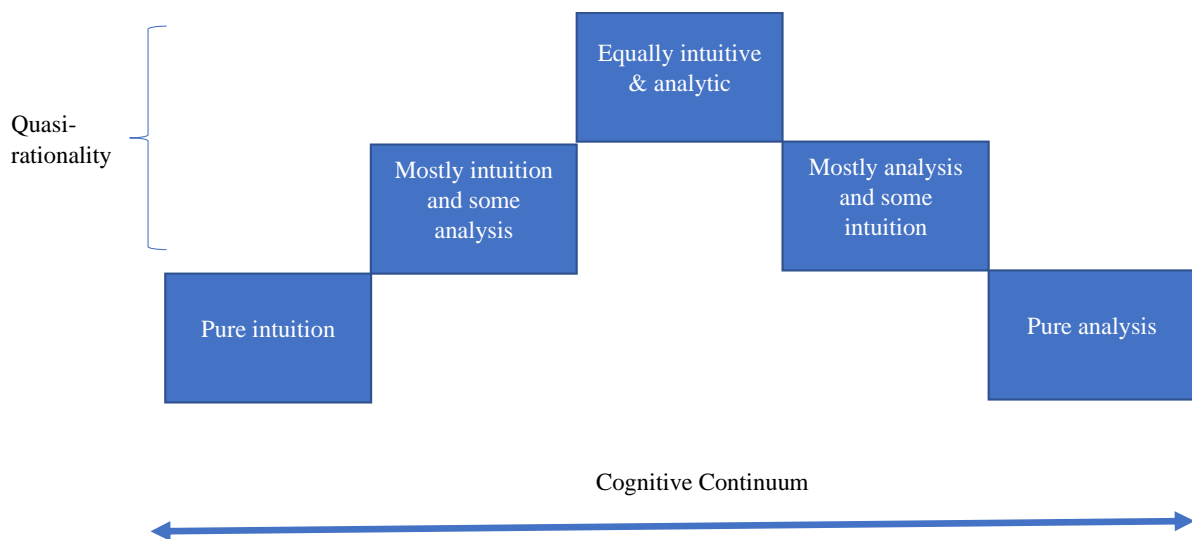
Decision-making research draws a clear distinction between different types of decision-making; logical decision-making is only one of a number of different decision-making mechanisms that could be employed. For instance, Gigerenzer and Gaissmaier (2011), two German psychologists, reviewed the landscape of research into decision-making techniques and pointed to there being three decision-making techniques available: ‘logic, statistics or heuristics’, but group logic and statistics together, saying that ‘rules of logic and statistics have been linked to rational reasoning, and heuristics linked to error-prone intuition or even irrationality’ (p. 452). They describe how in terms of academic debate, decision-making research has entrenched since the 1970s into a two-sided model, with rational theories on one side and heuristic theories on the other. Kahneman, the Nobel prize winning Princeton psychologist, draws the same distinction arguing that there are two systems of thought, one intuitive, one rational, which he labelled ‘System 1’ and ‘System 2’ respectively in his book *Thinking, Fast and Slow* (2011).

This duality of decision-making technique is an important distinction for my argument: the assumption of logical reasoning by prosecutors in given in the Code is linked to a notion of

prosecution decisions being rational (and therefore somehow more legitimate, as per Schmitt 1934, trans. 2004, Giddens 1990 and Tyler 2013), but that there is another side to decision-making – the error-prone intuition that the Code does not address. The psychological research into decision-making strongly suggests that any description of decision-making – including, therefore, CPS prosecutor decision-making - must take account of intuitive decision-making as well as strictly rational decision-making.

Psychologists Dhimi and Thompson (2012) describe the distinction between an ‘economic’ approach and an ‘intuitive’ approach but argue that these should not be seen as exclusive of one another, but rather that they exist on a continuum. They call this the Cognitive Continuum Theory, and later ‘quasi-rationality’. Their model presents a spectrum in which both types of thinking – rational and intuitive – are apparent:

*Diagram 3: Modes of cognition along the cognitive continuum*



They explain that a decision-maker may move back and forth along this spectrum as the task at hand changes, or indeed within the same task as the circumstances of that task change. The

model can be applied to CPS prosecutor decision-making. It allows a view to be put forward of prosecutor decision-making that does not suffer from placing itself wholly in one camp or another. Prosecutors need neither be wholly rational nor wholly intuitive. The Code's authors assume that prosecutors work continuously at the right-hand end of this spectrum. I argue that prosecutors tend to work in the middle (or even on occasion towards the left), and later chapters will offer evidence of this drawn from the fieldwork.

The concepts of cognitive load, time pressure and uncertainty are arguably key to understanding heuristic decision-making, and to the arguments put forward in Chapter Seven for a mixed economy of quasi-rational CPS prosecutor decision-making. USA psychologists Gilbert and Gill (2000, p. 10), conducted a laboratory-based study of decision-making under pressure and concluded that 'the mode of information processing is selected on the basis of factors such as cognitive load or time pressure; System 1 thinking (use of mental shortcuts) is selected when cognitive load is high or time is short.' Gigerenzer and Gaissmaier (2011, p. 456-457) discuss the 'accuracy-effort trade off' and point to the importance of 'ecological rationality' (largely, taking into account the demands of the environment, in this case the demands of the prosecutor's job). Beresford and Sloper (2008), Professors of social policy and children's healthcare (respectively), say that 'time pressure (that is, a decision must be made by a certain point in time) has been shown to be one of the most important decision task variables', and that 'individual differences in values will define what constitutes an accurate or high quality decision...it is also likely that we adjust our 'quality standards' as a function of task demands (such as time pressure, complexity of the decision' (p. 7)).

Thus, a patchwork of different mental shortcuts can be drawn from a range of empirical studies. The following table gives a non-exhaustive summary of those shortcuts that are

commonly described in the psychology literature and are likely, I argue, to be applicable to prosecutorial decision-making.

*Table 1: Summary of most common mental shortcuts*

<b>Name of heuristic (and study)</b>	<b>Description</b>
<b>Take the best</b> <i>Dhmi (2003)</i>	Looking up cues with highest validity first and ‘tallying’ until threshold reached, then stop.
<b>Satisficing</b> <i>Simon (1967)</i>	Being satisfied despite falling short of the maximum goal satisfaction
<b>Representativeness</b> <i>Pachur and Hertwig (2006)</i>	Assessing probability of A causing B by the similarity between A and B.
<b>Anchoring</b> <i>Kahneman (2011)</i>	Forming a view based on the first piece of information, resisting change in the face of subsequent contradictory data
<b>Affect</b> <i>Kahneman (2011)</i>	Decisions guided directly by feelings of liking or disliking, with little deliberation or reasoning
<b>Halo effect</b> <i>Greenwald and Banaji (1995)</i>	Positive characteristics are associated with other positive characteristics more than they should be

The argument that prosecutors use heuristic mental shortcuts is not an argument that they use them exclusively in their decision-making. It is not an either/or choice. Whilst rational decision-making and heuristic decision-making are identified as different and alternate forms of decision-making, it is not the case that decision-making is wholly binary or that the two modes of decision-making cannot work in tandem. For instance, Gigerenzer and Gaissmaier (2011) describe heuristics as a ‘subset of strategies’ and say that the two types should be seen ‘as an axis, rather than as separate categories’ (p. 455).

The existence and effect of heuristics, cognitive load and intuition on CPS decision-making has been identified in some of the major studies into the CPS. Baldwin’s (1997) work, discussed earlier, identified the subjective and idiosyncratic nature of prosecution decision-making and made clear (although indirect) reference to heuristic techniques and mental shortcuts being used by prosecutors. Importantly, though, he also emphasised the time

pressure under which prosecutors reported that they worked: ‘[p]rominent in almost every interview’ were complaints from prosecutors that they lacked the necessary time to properly consider the cases they had, and that ‘[t]hese pressures of work, they said, inhibited them in the task of case review and inevitably meant that they were not able to conduct reviews in as thorough a manner as they would like’ (1997, p. 547). He was, however, skeptical of the time pressure arguments put forward by prosecutors. He felt they were no worse than experienced in many other professions; it is impossible to tell from Baldwin’s work alone whether prosecutors were justified in their gripes over workload and therefore indicated to him that they were working under conditions of acute cognitive load or, as Baldwin suggests, there was little to such complaints. It is not disputed, however, that difficult intellectual work under time pressure leads to what psychologists’ term ‘cognitive load’, and it is under conditions of cognitive load that decision-makers make greater use of mental shortcuts. Baldwin identified one mental shortcut in particular used by prosecutors – that of ‘satisficing’ when he noted that prosecutors admitted to often reviewing Crown Court cases in superficial ways and ‘[t]he question that tends to be asked is, as one prosecutor put it, ‘whether the evidence is sufficient rather than whether the case could be stronger’’ (p. 547-8).

Baldwin also identified the role played by gut feel and intuition. Regarding intuition, Baldwin noted that ‘[m]ost of the CPS lawyers acknowledged that, in conducting case reviews, much depends upon experience, ‘instinct’, developing a ‘feel’ for a case, ‘sixth sense’, ‘gut feel and the like’ (p. 550). Baldwin concludes:

*Case review needs to be examined in its social, organisational and psychological context. Prosecution decision-making emerged from this study as a human and individual process, in which the personal attitudes and approach of the reviewing*

*lawyer are of great significance...This is in marked contrast to the official aim of review as a painstaking, almost academic, process based upon nationally accepted criteria set out in the Code for Crown Prosecutors. (p. 554)*

There is a danger, however, in applying the psychological models from Dhimi and Thompson (2012) or Kahneman (2011) too rigidly to prosecutor decision-making. The earlier discussion set out some reasons to be cautious in uncritically adopting such models – for instance we may recall Gigerenzer and Gaissmaier’s (2011) warning that the landscape of heuristics is a ‘colourful loose patchwork’ that is in need of ‘theory integration’ (p. 474), and the difficulties of isolating and identifying heuristics in action outside of the psychology laboratory was noted too. This means that lifting the descriptions of various heuristics from the page of the psychology paper and applying them directly to the mind of prosecutor is fraught. Decision-making is a complex, messy and half hidden (to the decision-maker before one even considers the position of the researcher). The reality of how heuristic decision-making ‘operates’ for a CPS prosecutor is likely not to be exactly identical to how Dhimi and Thompson (2012) or Kahneman (2011) set out.

Yet the psychological research, even if it is presented somewhat rigidly in the psychological literature and suggestive of a mechanical decision-making process, still holds great value for understanding CPS decision-making. Dhimi and Thompson’s (2012) or Kahneman’s (2011) work can be used as a demonstration that prosecutor decision-making is unlikely to be rational and purely objective in the manner set out by the Code. Even if the precise way in which prosecutors use heuristic decision-making devices differs in reality from the descriptions put forward by Dhimi and Thompson or Kahneman, that does not devalue the underlying message that it is wrong to assume rationality and objectivity as a rule. The

psychological research, whilst perhaps not directly and mechanistically applicable to CPS prosecutor decision-making, nonetheless provides the valuable entry point to taking a wider and richer view of prosecutor decision-making that does not suffer from the false assumption of objective rationality.

There are other difficulties and limitations to the application of the wider literature on decision-making to contemporary CPS prosecutors. First, prosecutors do not always work under cognitive load and conditions of uncertainty. There will be instances of prosecutors having time to consider a case slowly and methodically, double checking all facts and delaying a decision until further information is collected and supplied from police and witnesses. In such conditions prosecutors are likely to make use of logical and rational decision-making process ('System 2' thinking, or being to the right of the Dhami and Thompson (2012) model). My point, though, is that this is not the norm. The interviews with prosecutors show that some report having to make quick decisions to get through their workload that day, and report feeling under time pressure.

Secondly, precise definitions differ, and often the studies rely on illustrative examples rather than precise definitions (compare Kahneman 2011 and Gigerenzer and Gaissmaier 2011, for instance). It is equally noticeable that there is no theory of what happens when two or more shortcuts conflict.

Thirdly, there is a methodological difficulty in researching the use of mental shortcuts in CPS decision-making. Outside the psychology laboratory, it is very difficult to identify when and how a mental shortcut is being used. Gilbert and Gill's (2000) work is a good example of the difficulties inherent in applying some psychological studies in that their research involved

testing nearly 50 university undergraduates in university psychology laboratory conditions – a world away from a busy CPS prosecutor’s office.

Finally, decision makers are often not aware that they are employing mental shortcuts. The difficulties of identifying ‘heuristics in action’ in prosecutorial decision-making through methods such as statistical analysis and interviews is addressed in the next chapter, on research methods.

A more general criticism can be made of the application of heuristics to CPS prosecutorial decision-making; it might lead one to interpret CPS prosecutor decision-making as somehow error strewn and unreliable. The focus on mental shortcuts risks may seem like an attempt to devalue expertise, and ‘overly concerned with failures driven by artificial experiments rather than by the study of real people doing things that matter’ (Kahneman 2011, p. 234-5). One model of decision-making that can be set in contradiction to those arguing for a focus on mental shortcuts is the Naturalistic Decision-making model (or NDM model) explored by Klein (2016), an American research psychologist interested in decision-making. His NDM model runs counter to the idea that professionals use (irrational) mental shortcuts, but instead argues that professional expertise and experience improves decision-making and makes decisions more reliable and of higher quality:

*NDM studies found that experienced decision-makers recognize patterns and don’t compare options. They evaluate an option by imagining how it would play out.... We used to believe that expertise depends on learning rules and procedures. NDM research demonstrated that expertise primarily depends on tacit knowledge.... The goals become clarified while they are being pursued...experienced decision-makers*

*use their mental models to define what counts as data in the first place...And as discoveries are made about the nature of a situation, different aspects of the data are revealed...insights also arise by detecting contradictions and anomalies and by noticing connections (Klein 2006, p. 1).*

Klein's NDM model is applicable to prosecution decision-making but does not, in my view, override the argument for incorporating mental shortcuts into a richer description of prosecution decision-making. For instance, professional expertise and insight can certainly improve decision-making. But as Kahneman (2011, p. 240) points out, it does so under certain conditions, namely when the environment is sufficiently regular to be predictable and an opportunity to learn these regularities through prolonged practice. The extreme example of chess is used by him as an example of a regular and predictable activity for which experience and insight is brought to bear. Prosecutorial decision-making is neither predictable and repeatable like chess (as every case is different) or at the other extreme wholly irregular or unpredictable (many case files require consideration of quite similar facts). Both models, therefore, have something to say about prosecutorial decision-making – NDM with its recognition of the benefits of expertise and professional insight, heuristics with its focus on shortcuts and errors. Indeed, Klein and Kahneman jointly published an article exploring their two differing perspectives called *Conditions of Intuitive Expertise: A Failure to Disagree* (2009) that largely concluded that depending upon the circumstances of the problem both types of decision-making techniques can play a role.

Accepting that prosecutors use mental shortcuts, even in a mixed economy of quasi-rational decision-making, does not mean that their prosecutorial decisions are poor, bad, wrong, or less desirable than those that could be arrived at through 'pure logic'. Beresford and Sloper

(2008 p. 6) state that ‘laboratory-based research on the effectiveness/accuracy of heuristics has shown that using mental shortcuts can result in highly accurate/high quality decisions with substantial savings in cognitive effort’.

If a description of prosecution decision-making is to be put forward that aligns to the known decision-making research, heuristics must play a part. There are situations in which it is highly likely that cognitive load and uncertainty lead prosecutors to make use of mental shortcuts. Indeed, the psychology literature would suggest that it would be unusual if they did not, given the consistency of observations of mental shortcuts across other fields of decision-making. I argue that this is an important, and hitherto under-researched, component of decision-making in prosecutorial work.

### *The principles of prosecution*

Chapter Six will describe how CPS prosecutors in interview described how they made use of a set of principles of prosecution to inform their case decision making. Their views on the importance of the principles of prosecution brought more sharply into view the literature on the creation of the CPS. This section will review official government and CPS policy documents to identify some of the sources of these principles of prosecution that the prosecutors spoke about.

The genesis of the principles of prosecution can be traced to before the CPS was created. The story starts in 1879 with the passing of the Prosecution of Offences Act. Prior to this act, prosecutions were largely a matter for the police, and prior to that largely a matter for private citizens. Concerns over the consistency and quality of police-led prosecutions were evident from at least the mid-1800s, with the Criminal Law Commission of 1845 noting that police-

led prosecutions were being conducted ‘in a loose and unsatisfactory manner...the duty is frequently performed unwillingly and carelessly...the direct and obvious course for remedying such defects would consist in the appointment of public prosecutors’ (Grieve, 2013).

The Prosecution of Offences Act 1879 created the office of the Director of Public Prosecutions (DPP). The DPP in those early days dealt only with those cases of the utmost importance or difficulty, amounting often to only a few hundred cases a year. The vast bulk of criminal prosecutions continued to be taken forward by the police.

This situation persisted until 1962, when a Royal Commission on the Police (1962) reported that: ‘In general, we think it is undesirable that police officers should appear as prosecutors except for minor cases. In particular, we deplore the regular employment of the same police officers as advocates for the prosecution’ ( p. 114). The Royal Commission of 1962 prompted some police forces to create their own ‘prosecuting solicitors departments’. These were salaried legal departments of the police force, employing professional prosecutors that were held in the reporting chain that led directly to the Chief Constable. Other police force areas had County Councils assume the task, still others ‘outsourced’ the work to firms of local solicitors. Across all three of these arrangements, it was the Chief Constable who retained the final say on whether or not to take forward a case.

Concern over the prosecution arrangements in England and Wales continued through the 1970s. Ashworth (2000) recalls that:

*the most influential event was the publication in 1970 of a report by the British section of the International Commission of Jurists. This report drew upon arguments of principle - that it was wrong for the police, who investigated crimes, to take decisions in relation to prosecution, which require impartiality and independence - and also more pragmatic arguments - that the police were experts at investigation, and it would be better use of their time to focus on this rather than to undertake all prosecutorial duties. This report was constantly referred to in the 1970s, but it took a spectacular miscarriage of justice to provide the impetus for reform (p. 258).*

The spectacular miscarriage of justice was the Confait case. The Confait case brought into sharp relief the problems brought by leaving the power to direct prosecutions solely in the hands of the police. Maxwell Confait was found strangled in a burned-out house in east London in April 1972. Police began a murder investigation and attempted to find suspects. There were reports made of three youths seen in the area on the afternoon of the murder letting off firecrackers. The police arrested the three youths, aged 18, 15 and 14. The 18-year-old had learning difficulties and an estimated mental age of 8. The three were interviewed by police over the weekend without access to lawyers or their parents, and made various confessions. All three were charged, tried and convicted variously of manslaughter, arson and burglary, and sentenced to imprisonment. The three claimed to have been subjected to violent treatment by the police during their time in police custody being interviewed. In 1975, following a campaign from the boys' family and support from some politicians, the case was referred for appeal on the basis that the police had used force during interviews and questions coming to light around the forensic estimates of the time of death. The convictions were overturned, and the boys freed.

Following the acquittals, the then Home Secretary, Roy Jenkins, ordered an inquiry to examine how the prosecution of the Confait case went so badly wrong. Sir Henry Fisher conducted the enquiry and recommended a Royal Commission into Criminal Procedure be set up. This was duly done, and began sitting in 1978 continuing on to 1981, with a remit 'to examine the powers and duties of the police in respect of the investigation of criminal offences and the rights and duties of suspect and accused persons, including the means by which these are secured; the process of and responsibility for the prosecution of criminal offences; other features of criminal procedure and evidence as relate to the above; and to make recommendations' (1981, p. iv)

The Royal Commission on Criminal Procedure recommended the creation of an independent prosecution service for England and Wales that would have three core functions: the conduct of all criminal cases once the decision to proceed has been taken by the police; the provision of legal advice to the police, as and when requested, on matters relating to the prosecution of offences; and the provision of Advocates in the Magistrates Courts in all cases where proceedings are commenced by the police...and the briefing of Counsel in all cases tried on indictment which are not the province of the Director of Public Prosecutions.' (1981, p. 145)

The Government's response to The Royal Commission on Criminal Procedure (1981) was provided in a White Paper of 1983 entitled '*An Independent Prosecution Service for England and Wales*'. It largely accepted the Royal Commission's recommendations (although did not agree that the CPS should be set up on a local basis, preferring a nationally organised prosecution service with strong local accountability).

The first clear sign of the emergence in policy documents of what are identifiable as the principles of prosecution can be found in the report of the Government White Paper of 1983.

The introductory paragraph, for instance, echoes, accepts and refocussing the Royal Commission's recommendations, when it says:

*The Royal Commission concluded that the present arrangements were unsatisfactory in a number of respects. In particular the present system, in the view of the Royal Commission, is lacking in openness and accountability and does not make for consistency in policy and practice. Moreover, the lack of overall coherence in the present arrangements, and the division of responsibility for finding and determining expenditure, in the Royal Commission's view, do not permit the pursuit of maximum cost-effectiveness and efficiency. The Government has already accepted the Royal Commission's recommendations in principle, and intends to introduce a system which will remove the unsatisfactory features of the present piecemeal arrangements (Cm. 9074, 1983, p. 7, emphasis added)*

These themes, with the addition of fairness, are confirmed in the concluding paragraphs:

*The Government is satisfied that the proposals outlined above would enable a stronger element of consistency, of policy and practice, to be introduced into the prosecution process of England and Wales than the present system permits. They would improve efficiency by injecting a coherent structure into the present variety of arrangements and would make for a continuing improvement in the procedure for checking that prosecutions are justified and practicable in individual cases. Finally, they are designed to introduce a clear line of public accountability for policy,*

*accompanied by an essential degree of control over cost and efficiency...The proposals are designed to produce a workable, effective and fair system which consumes the minimum of public resource while meeting the criticisms to which the present arrangements give rise. (Cm. 9074:10, emphasis added).*

It is worth, at this point, trying to tease out a little more, in broad terms, what each of these principles might mean. The principle of fair and just decisions is in many ways what much of the Code Test language aims to describe. The principle is that the CPS make decision that are justified legally (the evidence is compelling, collected in the correct manner and usable in court) and that the decision to prosecute is fair and just (which brings in the wider sense of only prosecuting a case if it is in the public interest to do so). Consistency was at the core of The Royal Commission on Criminal Procedure recommendations. The Royal Commission had observed wide variation in the approaches and rates of prosecution between police forces and aimed to bring a greater level of consistency between CPS Areas. It was never the case that complete consistency was aimed for (as discussed below, The Royal Commission suggested a more locally devolved arrangement than was eventually adopted) but some of the wide variation would be mitigated giving a sense of a ‘locally based service with some national features’ (1981, p. 153). Prosecution decisions should be broadly comparable across the country and between similar cases. Openness and accountability aimed at ensuring that Parliament, and through them the public, had the information necessary to assess CPS decision-making and hold the CPS to account<sup>41</sup>. The principle of openness and accountability fell short of direct accountability to the Government or Parliament in the manner more usual

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<sup>41</sup> Prosecutorial accountability through Parliamentary or Ministerial routes is of course only one such possible route of accountability. Hodgson (2020) points out that ‘In the United States, prosecutors are directly elected in the locality where they serve, understood as an important element of democratic accountability’ (p. 133). Further, Hodgson (2020) reminds us that in some jurisdictions, accountability is wholly removed from the prosecutor: ‘Italy has adopted the opposite approach in defining prosecutors’ relationship with the executive. Anxious to avoid the political discrimination experienced during World War II and the Fascist period, prosecutors operate under a principle of mandatory prosecution with no accountability either to the electorate or to a political authority’ (p. 134).

to other Government Departments of State, with the CPS only ‘superintended’ by the Attorney General rather than under the Attorney’s direct control.<sup>42</sup> The principle of an efficient and cost-effective prosecution service encourages the CPS to marshal public funds appropriately in order to gain maximum value for the public in return. In general, this means allocating funds efficiently and cutting waste such that the greatest number of offences can be prosecuted successfully at the least cost, whilst at the same time recognising that some prosecutions will be more costly than others and can be justified on grounds other than simple costs. The final principle of independence from the police harks back to the founding circumstances of the CPS – the Confait case – and attempts to put into effect the benefits of the split between investigator and prosecutor. This principle suggests that the CPS will not simply act as the prosecuting arm of the police in the way the prior system of police prosecutors did, but instead be able, at times, to turn against a particular police action. It suggests that the CPS should set out to take an initially sceptical view of police information and seek to test the evidence presented to ensure it is sound, both in terms of the evidence itself, but also the means by which it has been collected.

These principles have been used as a focal point for criticism, debate and proposals for reform ever since. For instance, focusing on the principles of fairness and consistent decision-making, the criminal justice researchers Block, Corbett and Peay (1993) examined CPS decision-making and found that around a fifth of acquittals should have been identified in advance (and so discontinued before trial). The National Audit Office (1989, p. 11) (NAO) focused on the principle of consistent decision-making to criticise the CPS for variations in prosecution rates between CPS Areas, noting that, whilst there was some evidence that the

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<sup>42</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/965815/Framework\\_agreement\\_between\\_the\\_Law\\_Officers\\_and\\_the\\_Director\\_of\\_Public\\_Prosecutions\\_CPS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965815/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions_CPS.pdf)

CPS was effective in keeping weak cases out of the system, performance was very varied between areas. Sosa (2012), writing for the Policy Exchange think tank, highlighted consistency and fairness problems too with variation in pre-charge decisions (p. 57), and public interest discontinuances (p. 10).

In the early years the balance between local and national accountability was of particular focus, with, for instance, Sanders (1986 and 1987), suggesting that whilst the national accountability arrangements allow for independence from local police force oversight, they lessened independence from central government.

What exactly is meant by cost effectiveness has been much contested and has been central to much of the debate about CPS reform over the last 40 years. In the first decade of the CPS's existence there was criticism that the CPS was not sufficiently efficient and effective because it had insufficient time to properly train its staff for their new roles, that the resources initially provided were insufficient to match the workload resulting in serious understaffing and that performance indicators were not sufficiently robust (NAO 1989). More recent work (Sosa 2012, p. 6) suggests that the CPS had moved on from the difficulties of the first decade but identified newer challenges that had taken their place. Despite the focus on cost effectiveness as an important indicator of performance and a driver for much CPS reform, it is still a contested issue amongst prosecutors. In interviewing Chief Crown Prosecutors, Sosa (2012) explained issues of cost effectiveness, with some prosecutors rejecting the idea that cost effectiveness of decisions should play a part in management of CPS performance:

*While most CPS prosecutors are committed to their role as prosecutors, driven to secure convictions, there are some, particularly in leadership roles, who view the*

*CPS as serving a more impartial role. They see the CPS as a referee in the administration of justice, rather than as an advocate for one of two opposing sides. When describing the CPS as an organisation committed to justice as opposed to prosecution, one top CPS prosecutor boasted, 'I don't even know my conviction rate' – because it was unimportant to that prosecutor's assessment of his or her own success as a prosecutor (p.43).*

Continuing the debate on the appropriate role of costs in prosecution decision-making, Sanders (2016) reflects that '[r]esources have been a running theme... 'Austerity' policies are exacerbating things: for example, cuts to victim services and CPS Direct, return of more charging to the police, less advice given through discussion or station-based prosecutors, despite the House of Commons Justice Committee urging action on all this' (p. 98). Porter (2019), a legal researcher, found that the drive for efficiency and cost effectiveness featured strongly in the prosecutors' rationale for case decisions, with many prosecutors reporting the desire to achieve performance targets and lower discontinuance rates as trumping the commitment to a more victim centred approach. She argued that this drive for efficiency should be seen within a wider frame of a 'New Public Management' ideology within the CPS, discussed earlier. Her work brings to the fore the importance in of cost effectiveness and managerialism in prosecution decision-making.

The principle of prosecutorial independence from the police is perhaps the principle that has attracted most attention and debate. The lack of resources experienced by the CPS in its early years (NAO 1989) brought into focus issues surrounding independence from the police. Without sufficient resources to match the workload and a limited power only to stop prosecutions but not select which start (as charging powers at this point still remained with

the police) the CPS was in a structurally weak position (Sanders 1986) to exercise independence from the police.

Attempts to set the ‘correct’ degree of independence from the police resulted in two major reviews of CPS practice. The first, The Royal Commission on Criminal Justice (1993) (the Runciman Commission) recommended strengthening the CPS vis a vis the police. The Royal Commission, set up in the wake of the Guildford Four<sup>43</sup> and Maguire Seven<sup>44</sup> miscarriages of justice (another example of the enduring impact of miscarriages of justice upon CPS practice and reform), recommended a strengthening of the role of the CPS, suggesting that the police should seek early advice from the CPS on criminal cases and that the CPS should be able to discontinue weak or unjustified cases at any point. The second, Lord Justice Glidewell’s review published in 1998, sought to make the CPS work more closely with the police to improve efficiency at the cost of independence. Sir Iain Glidewell, a judge of the Court of Appeal, was asked to conduct a review of the CPS in 1998, following concern about high discontinuance rates. Glidewell concluded that discontinuance rates were too high (a sign of poor-quality decision-making) and that this was due to the CPS and police not communicating sufficiently about cases. He recommended that the CPS should be reorganised to match the police 42 area structure. This ‘co-terminosity’ with the police would, it was hoped, simplify cooperation and improve working efficiency between the two organisations. From a position in 1986 of organisational independence the CPS was brought much more closely aligned to the police, trading a measure of independence in favour of operational effectiveness<sup>45</sup>.

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<sup>43</sup> <https://www.bbc.co.uk/archive/guildford-four-released-after-15-years-1989/z889bqt>

<sup>44</sup> [http://news.bbc/1/hi/northern\\_ireland/4249175.stm](http://news.bbc/1/hi/northern_ireland/4249175.stm)

<sup>45</sup> The notion that prosecutorial independence must be delivered by means of the prosecutor being operationally distinct from the investigator and not involving themselves or directing the investigation is only one way of securing notional independence. One need only look to France to see a mechanism that aims to safeguard independence that is quite contrary to the system in place in England and Wales. Hodgson (2020) says that ‘It is interesting to compare how this inherent tension [between investigator and prosecutor] is dealt with in the two jurisdictions. In France, the prosecutor’s judicial status, training and neutral, public-interest-centred ideology is thought to ensure independence within the framework of a broadly inquisitorial procedure. The written dossier of evidence and hierarchical accountability to

The principle of independence from the police continues to be a major concern. Soon after the Glidewell changes had been implemented, Ashworth (2000) pointed out that the CPS remained in a structurally weak position. He noted that whilst the decision to continue a prosecution rests with the CPS, those cases that the police choose to divert by way of caution never reach the CPS, and so rather than the CPS being an 'independent' prosecuting agency, the police retain and exercise great power over who is prosecuted through their decisions on who to 'pass' to the CPS. Relations between the CPS and police continued to be 'a source of friction' (p. 40) and that the police 'often feel CPS decisions not to prosecute are poorly considered and/or explained and that the prosecution service is overly risk averse' (p. 40). More recent research paints the same picture. Hodgson (2020) says that:

*'[t]he operation of the CPS is therefore something of a paradox in which it remains structurally dependent upon officers, but is forced to operate at a distance, preventing the development of a culture that would enable the CPS to reap the benefits of working closely with the police, without the disadvantage of being dominated by them' (p. 125).*

Thus the relationship between the police and CPS has been a difficult one. At times the emphasis seemed to be on the importance of CPS independence from the police (for instance, at the outset of the CPS in 1986) and more focussed on ensuring due process for suspects, and at other times, more recently, the emphasis has been on efficient and close joint working with the police in an effort to control crime.

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the minister of justice represents further potential checks on her role, and her ability to require that certain investigations be carried out allows her to shape the enquiry beyond that determined by the police. The crown prosecutor, on the other hand, has no vocational training, no involvement in the investigation, and acts more explicitly as a party to the case. Yet these very different features of the crown prosecutor's role are understood to guarantee her independence, just as the procureur's judicial status and authority over the police are seen to guarantee hers' (p. 133).

The relationship between the police and CPS can be viewed as a spectrum or axis. Packer (1964), of Yale University, put forward two ideal typical models of criminal justice: the ‘Due Process’ model and the ‘Crime Control’ model. He likened his Due Process model to an obstacle course and stressed the possibility of error in informal administrative fact-finding exercises (i.e., police investigations). The Due Process model would ‘insist[...] on formal, adjudicative, adversarial fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him’ (p. 14). Common to the Due Process model are safeguards such as the right to silence, burden of proof lying on the prosecution and prosecution disclosure responsibilities. A Crime Control model is one in which suspects are quickly screened, the innocent exonerated, and the remaining suspects dealt with by police and prosecutors as presumed guilty. The Crime Control model exhibits uniformity, with cases generally being gathered together into ‘types’ with perceived commonalities and dealt with in very similar ways, despite any underlying differences. Packer likened the Crime Control model of criminal justice to a conveyor belt, saying that under this model ‘repression of criminal conduct is by far the most important function to be performed by the criminal process...[i]f the laws go unenforced, which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process, a general disregard for legal controls tends to develop’ (p. 9). As a result, there is a placing of trust in, and limiting restrictions on, administrative fact finding by the police. Packer thought crime control to be generally the more prevalent model. He identifies the ideology of Due Process to be ‘far more deeply impressed on the formal structures of the law than is the ideology of Crime Control; yet an accurate tracing of the strands of which it is made is strangely difficult’ (p. 14).<sup>46</sup>

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<sup>46</sup> Packer’s models are simple and binary. They provide ‘pure’ examples of types of systems sitting at the ends of a spectrum along which criminal justice systems can be plotted. He warns against the idea that either model exists anywhere in a pure form, but puts the models

Packer's models are helpful when thinking about police-CPS relations and the way in which the CPS, and individual CPS prosecutors, try to put into effect the principle of independence from the police. Packer's two models form the ends of the axis of police and CPS relations – at one end a close working relationship focussed on jointly driving down crime, at the other a sense that the CPS need to be ever watchful for police overzealousness (as per Confait). As will be seen from the interviews, there are prosecutors who report adopting one or other of these more extreme positions, with many placing themselves somewhere in between. The alternate, and conflicting, ways in which a prosecutor might interpret their role - on the one hand as 'crime fighter', on the other as 'officer of the court and guardian of the rule of law' - and how this affects the notion of 'fairness' in prosecution decision-making - is a dilemma that is alive today for prosecutors trying to come a decision on a case.

The message to draw from this is twofold. First is that Packer's typology still finds expression in the language of contemporary prosecutors even though many have not read Packer, they apparently still broadly think in the terms he describes. The second is more general; if Packer's work shows how conceptually useful it is to conceive of the aims as axis upon which prosecutors place themselves or otherwise can be plotted. This device of the axis to interpret and conceive of the aims is something I use and build upon for the other aims in the concluding chapter.

Stepping back from the individual principles and taking stock of prosecution philosophy in general over the last 30 years, Sanders (2016), suggests that '[w]e can see that the failure to

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forward as a means by which to conceptualise and evaluate a criminal justice system. It is not clear from Packer's work, however, that his models are conceptually exhaustive. He plots two ends of a single spectrum, but, as will be discussed in the last chapter, his approach can be built upon by identifying other axis upon which prosecutorial decisions can be based, such as cost effectiveness, or consistency.

identify clear principles and core values to underpin the CPS, and to then construct a new organisation accordingly, had the consequence of powers being added and taken away in reaction to events' (p. 89). This is only partially correct. There were principles outlined by The Royal Commission on Criminal Procedure (1981) and further developed and adopted by the Government as founding principles upon which the CPS should operate. In summary, a set of five principles can be identified within the Royal Commission and subsequent Government White Paper – fairness, consistency, cost effectiveness, accountability and independence, that were identifiable at the time of the creation of the CPS as being the cornerstone of a successful prosecution service. The principles are identifiable within many subsequent government and inspectorate reports and in some academic work as a framework with which to analyse and debate the CPS.

The descriptions of the principles given above are imprecise and general. They are open to various interpretations and do not suggest just one course of action for any particular case. Their interpretation has changed over time too. Yet this apparent ambiguity or fuzziness demonstrably does not stop them being meaningful to prosecutors and playing a clear, and often quite powerful, part in shaping their thinking and affecting their decision-making – as a component of a prosecutor's 'Frame'.

The principles are identifiable in prior research into the CPS. Baldwin (1997) and Gelsthorpe and Giller (1990) underline the importance of values and operational philosophy in understanding prosecutor decision-making and warn against taking too narrow a view on the explicit processes and procedures of decision-making (i.e., what the Code says, or the narrow mechanics of case decision-making). For instance, Baldwin (1997) focused on the role of values as part of the explanation as to why prosecutors decide to prosecute or discontinue a

case. Baldwin found that ‘the values to which Crown Prosecutors subscribe vary in fundamental ways, and these differences have a considerable bearing upon the way that decision as to whether cases should proceed to the Crown Court are reached’ (p. 550). Similarly, Gelsthorpe and Giller (1990) highlighted the important role played by wider ‘philosophy’ that prosecutors feel is important but that are not explicitly listed in the Code. Their study highlighted the importance of uncovering the CPS’s ‘operational philosophy’ (p. 153) when trying to understand decision-making by prosecutors. They define ‘operational philosophy’ as ‘the system of ideas and procedures for constructing and implementing decision-making under the specific organisational conditions of the Prosecution Service’ (1990, p. 153). They demonstrate that an organisational philosophy existed, could be identified and shown to have an impact upon decision-making as prosecutors ‘do assess cases in light of the exigencies of everyday organisational practices and it is these which shape their ‘operational philosophy’’ (p. 162). Finally, Sanders (2016 and 2018) identified what he called the ‘the three core criminal justice values... ‘Justice’ [for victims and perpetrators], ‘Democracy’ and the ‘Three Es’ (efficiency, effectiveness and economy)’ (p. 139). His three values (or five if you expand out the three Es) related fairly closely to the values of Fairness (Justice), Accountability (Democracy) and Cost Effectiveness (the three Es).

The key argument in this section is that the principles of prosecution, whilst being loosely defined, variously expressed, open to interpretation and in some instance in conflict, are nonetheless an important part of the prosecutor’s ‘Frame’ within which prosecutors make case decisions. They are of continued relevance for today’s prosecutor, and this point will be highlighted further in the later chapters that detail my empirical findings. The principles of prosecution therefore comprise the third important component of a CPS prosecutor’s ‘Frame’, and so, along with particularly important case factors and aspects of psychology, need to

feature in a richer and better description of how prosecutors decide to prosecute or discontinue a case.

I argue that prosecutors cast their intellectual net far more widely than the Code when making case decisions. They do so to help them navigate through the ambiguities and uncertainties of the Code. The Code lists some of the important considerations for prosecutors but it by no means sets out all the considerations that prosecutors say are important and use in their day-to-day decision-making. As Rogers (2006) points out, '[T]he Code does not require prosecutors to identify an aim in seeking the punishment of the accused' (p. 775). The principles I have identified from the literature, I argue, provide an important part of the conceptual framework within which the various and numerous considerations that prosecutors consider as important can be grouped, related to one another and better understood.

But these core principles could have been clearer. There was not a lack of core principles to the CPS's work but an inconsistent application of the principles, or, more specifically, the application of certain interpretations of the principles at certain times, in favour of other interpretations of other principles. The preceding review of prior research concerning the principles of prosecution show that at one time one or more principles were pulled to the fore, at others they were pushed back in favour of others. The interpretation of the principles, and their relative hierarchies in the reformer's considerations or academic critic's mind change over time and between authors, but it does not mean certain core principles were absent. It means that they were applied in a confusing, contradictory or inconsistent manner.

Sometimes cost effectiveness trumps independence. Sometimes consistency trumps local accountability. The point here is not which principles are uppermost at any one time, or that a

particular interpretation an application of a principle is the ‘correct’ one, but only that the key five principles have been critical and contested themes running through discussions about what the CPS is and should be and that the principles are analytically useful means to interpret, understand and make sense of contemporary prosecutor views.

### **Reflections on the paucity of research into CPS decision-making**

One final point to be repeated is that the CPS is relatively under-researched – certainly when compared to other parts of the criminal justice systems, such as the police, prisons or the judiciary<sup>47</sup>. For instance, Soubise (2017) observes that “there has been little research on how the Crown Prosecution Service (CPS) deals with magistrates’ courts cases” (p. 847). The CPS plays a critical part in the criminal justice system in England and Wales and it is striking how few empirical studies exist that focus on prosecutor decision-making.

Others have noted this too. Baldwin (1997) reflected on this lack of research:

*Although academic research into the workings of the criminal justice system has proved a major growth industry in the past 20 years, it is curious that the voices of those responsible for making prosecution decision have scarcely featured in it. A great deal has been written by researchers in this period about the extent to which the CPS has been able to assert its independence, and as is often the case with socio-legal research, many of the conclusions reached have been critical, sometimes stridently so. But prosecutors have always remained shadowy figures in the research, and little is known about the way they approach their key role of case review. Their role is, however, a vital one because, in making decisions about whether a prosecution*

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<sup>47</sup> It is worth mentioning that whilst studies of defence practitioners are similarly scarce comparative to the police, judiciary and prisons, studies have been made. For instance, see McConville et. al. (1994), Mulcahy (1994), Travers (1997) and Newman (2013).

*should or should not proceed, prosecutors (like police officers) act as ‘gate-keepers’ to the criminal justice system as a whole. (p. 543)*

His view was accurate in 1997 and continues to be accurate today. The paucity of empirical work with CPS prosecutors means that they remain ‘shadowy figures’ in research terms.

Statistical studies of the CPS are rare. Indeed, I have found none that make use of primary CPS statistical data, but only those that make use of published performance data sourced from CPS business reports or Inspectorate reports (Griffiths and Sanders (2013) made use of a ‘CPS database’ to identify medical negligence files, but say themselves that “our aim is not to draw statistically robust conclusions from our data but to explore the decision-making process and gain an indication of patterns” (p. 158). The statistical analysis of the CPS that I conducted (and presented in Chapter Five) appears to be the only empirical statistical research into the CPS that goes beyond simple bivariate analysis<sup>48</sup> favoured by the Inspectorate; a form of so called ‘administrative criminology’ that ‘seeks...to provide management information primarily for use by members of the court bureaucracy, policymakers, administrators and others to assist them in the running of the court system’ (Baldwin 2008, p. 378). As statistical studies of CPS prosecutorial decision-making are so rare, one can only look to other jurisdictions (mostly the U.S) for statistical analysis of prosecutorial decision-making, as referred to in the first section of this chapter.

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<sup>48</sup> There are, of course, numerous official and policy reports that make use of data, such as the CPS Annual Reports and reports from Her Majesty’s Crown Prosecution Service Inspectorate (HMCPIS). These reports, however, contain only descriptive statistics showing increases or decreases in certain things; they do not generally make use of more sophisticated and robust statistical analysis, such as the logistic regression used in this research, or even present standard deviation alongside the descriptive statistics. As such, it is often more difficult to draw firm conclusions about the data trends as it is often unclear what the nature of the relationship is when other factors are not held constant, or clearly determining outliers. On the whole, they display a use of statistics that is less rigorous in approach than that found in statistical academic analysis.

Interview-based studies into CPS decision-making are similarly few in number – with the relevant major interview-based studies of CPS decision-making being McConville, Sanders and Leng (1991), Gelsthorpe and Giller (1990), Baldwin (1997), Hoyano (1997), Hall (2018), Griffith and Sanders (2013), Soubise (2017), Fairclough (2018) and Porter (2019) and I have presented their findings earlier in this chapter.

Other theoretical or legal commentaries on CPS prosecutor decision-making (that do not involve empirical field work) are also limited in number: Sanders (1986, 1987, 2016, 2018), Ashworth (1987 and 2000), Gelsthorpe and Padfield (2003), Sosa (2012) and Rogers (2006 and 2017).

Clearly, looking across both the statistical and interview-based studies, many of these studies are dated, with only Rogers (2017), Soubise, Fairclough and Porter published in the last five years.

The reason for this lack of research is a matter for speculation. With regards to the lack of statistical research, the next chapter (Methodology) discusses in more detail the difficulties of drawing together CPS data in order to conduct statistical analysis. It may be that such difficulties are part of the explanation as to why so few researchers have attempted to conduct such an analysis. However, it may also be the case that the CPS has been reluctant to give access to this data. Regarding interview-based research, there was, perhaps understandably, a burst of research interest (and more funding) in the first ten years after the creation of the CPS but since the late 1990s there has been little research, although the work of Rogers, Fairclough and Porter may just herald a new wave of interest in the hitherto under-researched CPS.

## Chapter Four: Methodology

This chapter sets out how my fieldwork was conducted. First, it returns to the research questions and discusses the research strategy that informed the choice of methods. Next, the statistical and interview methods are presented and discussed. The limits to the data and research methods are highlighted. In the final section I offer some reflections on my research process, including the issue of whether I should be considered an inside researcher.

### Research questions and strategy

It will be recalled from Chapter One that the primary research question was:

*How do CPS prosecutors make case decisions?*

Three subsidiary questions were then posed:

1. *To what extent do prosecutors use the Code when making decisions?*
2. *What do prosecutors believe is important when considering a case, and why?*
3. *Which aspects of a case most influence the case outcome?*

Interviews with prosecutors were used to address all three sub-questions (and statistical analysis also used only for the third).

Interviews were appropriate because decision-making is an internal, mental phenomenon, seemingly directly apparent only to the thinker. To gain an insight into the aspects of a case that the prosecutor is weighing up, their thought process must be laid bare, and this is better

done through the prosecutor explaining ‘how it seems to them’. So, it was important to hear in their own words how prosecutors describe their work - the ‘social life as participants experience it, rather than in categories predetermined by the researcher’ (Bachman and Schutt 2014, p. 237). An interview method was therefore most appropriate for these three sub-questions. Of the four main types of interview strategy (Noaks and Wincup 2004, p. 80) semi-structured interviews were chosen. Semi-structured interviews offered ‘more opportunity to probe, typically with the use of follow up questions’ (Noaks and Wincup 2004, p. 79) and allowed the prosecutors to have the freedom to articulate in their own words their thinking and still appropriately to be prompted by me to further explore their thinking (in certain directions) and provide further explanation as necessary.

There was good reason, nonetheless, to use statistics as well as interviews to analyse the third sub-question. This was, in part, one of simple opportunity. Case data is collected by the CPS in a manner that (after processing) was suitable for statistical analysis of correlations between case facts as recorded on the CPS systems and case outcome. The opportunity arose in that I was able to secure almost unfettered access to the entire CPS data set. No other researcher appears to have had or made use of such comprehensive access before. The findings from this statistical analysis are therefore novel simply by virtue of being the first detailed study to make use of this hitherto unavailable data set as well as for the findings drawn from them.

Ultimately, this was mixed methods research. The choice to conduct mixed methods research was not just simple opportunity - as mentioned above, it was also very intentional. A mixed methods approach was chosen for two reasons: at the research design stage I felt that interview data alone might have been insufficient to answer the research question fully and the study of prosecutor decision-making would likely be enhanced by the addition of a

second method (Creswell and Piano Clark 2011, p. 11). Using a second method enabled comparison to be made with the interview findings. The comparison of findings through use of statistical and interview data enriched the research questions, analysis and overall findings; use of two methods allowed a triangulation to take place that strengthened the overall confidence in the findings. As Ritchie (2003) says, triangulation can be used to ‘check the integrity of, or extend, inferences drawn from the data...[and is a means] of investigating the ‘convergence’ of both the data and the conclusions derived from them...It is also often cited as one of the central ways of ‘validating’ qualitative research evidence’ (Ritchie, 2003, pg. 43). This was the case for this research.

## **Research methods**

### *Statistical methods*

I requested access to the CPS’s case data direct to CPS senior management. Access was granted on condition that a series of research agreements (attached at Annex A) were in place and followed. With the agreements in place, access was granted to the data sets via the CPS’s Management Information Team (for management information stored on the MIS database) and HR team (for personnel information held on the I-Trent database). The CPS data management teams downloaded the requested data and provided the data files to me via email. In addition, I was granted direct electronic access was granted to the CPS’s Case Management System (CMS) upon which I could examine individual case information.

A sample of cases was selected for analysis rather than a full year’s data because of the practical limitations to preparing and cleansing the data. The data were drawn from two different databases (one management information database called CMS/MIS that carries case information and one HR database called I-Trent). To get the full picture necessary for my

analysis the case information held on both systems needed to be matched and merged into a single case record. It was not possible to do this in an automated fashion and this meant that, instead, the two component parts of the data had to be matched up with each other by hand, with cases discarded from the sample if they could not be matched up to be complete. This data reconciliation and cleansing was so time consuming that it put a practical limit on the number of cases that could be analysed.

The use of a sample did not undermine the statistical analysis, however. The sample size was set at 3,791 cases drawn from the 2014/15 reporting year. An analysis of a sample of this size enables claims to be made about the entire year's data (i.e., just over 500,000 cases that year)<sup>49</sup> that will be correct to within a 4 per cent margin of error, 19 out of 20 times that the analysis is conducted. Similar sample sizes are used elsewhere in social research, with a sample of between 1,000 and 3,000 cases often used in social science research to examine sample frames of sometimes millions (Bachman and Schutt, 2017, p. 113).

A stratified sample was used. The CPS prosecutes rather than discontinues a substantial majority of the cases submitted to it, with relatively few cases each year being discontinued for evidential or public interest grounds compared to the majority that are prosecuted. Taking a simple random sample of cases would, if the cases were drawn in broad proportion to the overall national annual case mix, have left me with too few discontinued cases upon which to successfully conduct statistical analysis, hence the stratified sample was needed. The table below shows the overall case numbers used in the sample, compared to the proportion occurring within the entire year's caseload (i.e., the proportions if I'd used an unstratified sample).

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<sup>49</sup> <https://www.cps.gov.uk/underlying-data/cps-caseload-2013-2016>

Table 2. Description of the sample

Case type	Cases in sample	Percent of sample	Percent total caseload that year
Pre-charge – Prosecuted	598	16%	21%
Pre-charge - Discontinued evidential	594	16%	3%
Pre-charge - Discontinued public interest	434	11%	2%
Post-charge – Prosecuted	602	16%	68%
Post-charge - Discontinued evidential	593	16%	3%
Post-charge - Discontinued public interest	575	15%	2%
Post-charge – Discontinued ‘other’	395	10%	2%
Total	3,791	100%	100% <sup>50</sup> (849,048 cases)

Eighteen data points were collected for each of the 3,971 cases in this sample (where possible – as will be seen - some of the categories had very patch data). The date points are described in Table Three.

Table 3: Description of variables

Variable no.	Category	Variable group	Variable name	Source	Variable type
1	Dependent variables	Decision made	Discontinued evidential v discontinued PI	MIS	Categorical - dichotomous
2			Discontinued pre- v post-charge	MIS	Categorical - dichotomous
3			Discontinued v prosecuted	MIS	Categorical - nominal
4	Independent variables	General	Year of offence	MIS	Continuous - interval
5			CPS Area	MIS	Categorical - nominal
6		Offence	Principal offence Category	MIS	Categorical - nominal
7		Defendant	Age	MIS	Continuous - interval
8			Ethnicity <sup>51</sup>	MIS	Categorical - nominal
9			Gender	MIS	Categorical - dichotomous
10			Number of previous convictions <sup>52</sup>	CMS	Continuous - interval

<sup>50</sup> Figures taken from the 2015 HMPSI report on Discontinuances

<sup>51</sup> Defendant ethnicity is ascribed, generally by the police in the first instance.

<sup>52</sup> The description ‘previous convictions’ uses a simple count of convictions and does not signify seriousness of the offending. To gather data on seriousness requires a ‘manual’ and time-consuming process that is impractical for this work. The prosecutor listed as ‘owning’ the case (and the one that I used to for the purposes of statistical analysis) is only the last prosecutor to whom the case was assigned. There may have been a long chain of ‘ownership’ to some cases. Where this has happened, I only analysed data relating to the final prosecutor in the

11		Prosecutor <sup>53</sup>	Age	I-Trent	Continuous - interval
12			Ethnicity	I-Trent	Categorical - nominal
13			Gender	I-Trent	Categorical - dichotomous
14			Religion	I-Trent	Categorical - nominal
15			Disability	I-Trent	Categorical - dichotomous
16			Sexual orientation	I-Trent	Categorical - nominal
17			Career length	I-Trent	Continuous - interval
18			Team type (magistrates' courts, Crown Court, CPS Direct)	CMS	Categorical - nominal

My statistical research design was 'correlational' rather than a more basic 'comparative' design (Howitt and Cramer, 2017, pg. 4). Logistic Regression was used to analyse the correlation between the dependent and independent variables. This test was chosen because logistic regression was able to simultaneously analyse each independent variable whilst controlling for the effect of the other independent variables *and* when the dependent variable is categorical (Field 2018, p. 879), which of course mine was. If my dependent variable had not been categorical (i.e., 'prosecute' v 'discontinue' rather than, say, a scale of 1-20) then the choice of available test would have been far wider. As it was, I was restricted to using logistic regression.

Logistic regression was in any event a good test to use as it provides information on which independent variables affect the dependent variable in a statistically significant way, but also shows the strength and direction of that influence. This allowed me to focus on those correlations that exhibited a particularly strong effect, rather than focussing on all correlations irrespective of strength of effect. The prior research of Forst and Brosi (1977)

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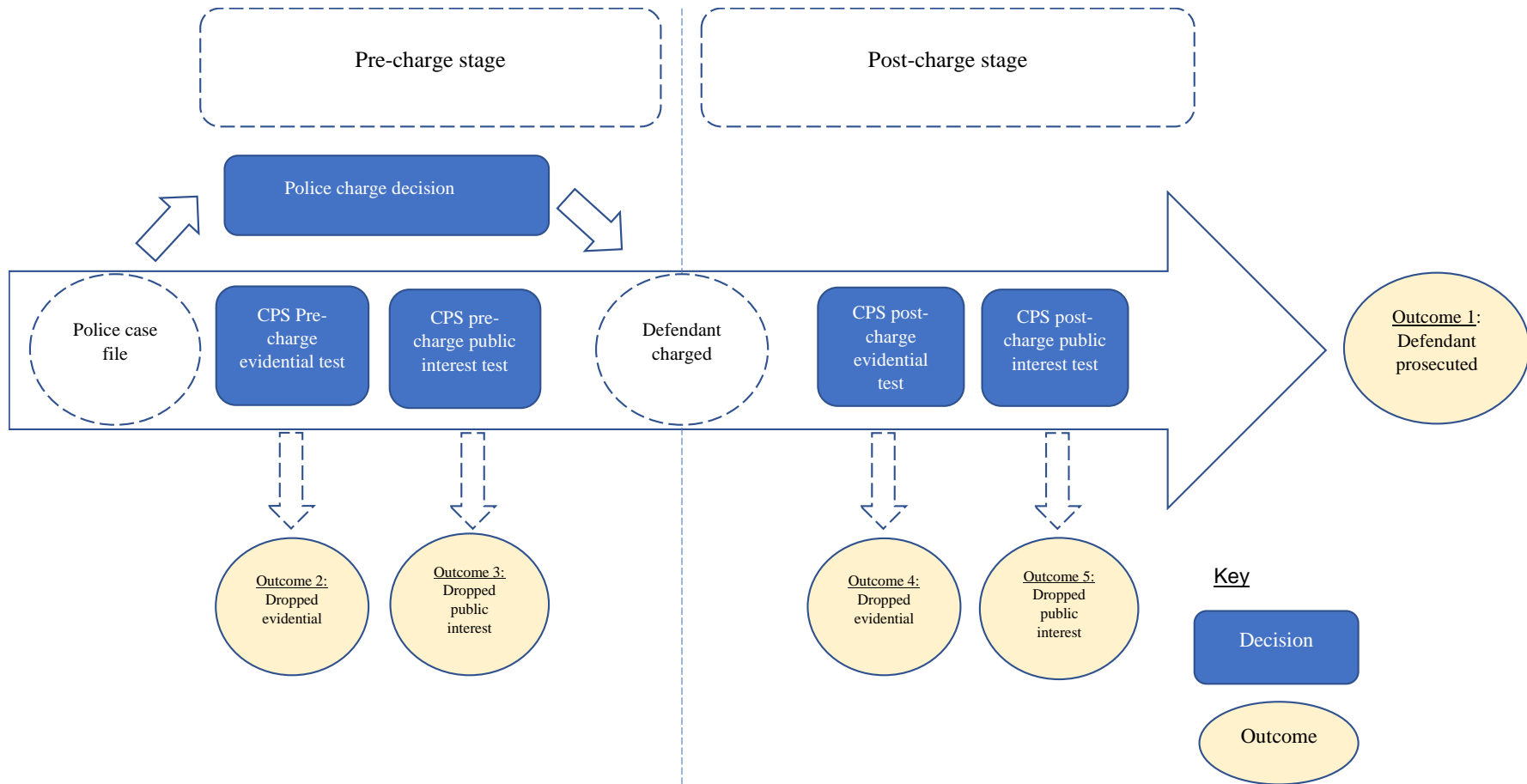
chain – the one recorded on the system as owning the case. For 'multi-handed' cases (more than one defendant to the charge) only the first defendant in the list was used for the purposes of the analysis.

<sup>53</sup> Prosecutor ethnicity, gender, religion, sexual orientation and disability are all self-reported.

will be recalled from Chapter Three, in which a statistically significant effect was found but of a weak nature, leading to the authors putting less weight on the findings. My approach of using logistic regression allowed me to take account of the issue of statistically significant but weak results and instead focus on the statistically significant and strong results.

The following diagram provides a basic illustration of the possible case outcomes for a prosecution case and assists in describing the analytical approach:

Diagram 4: The basic outcomes for a prosecution case



I used three separate statistical analyses to address sub-question three:

1. The decision to prosecute: a comparison was made between all cases prosecuted and all cases discontinued. This meant comparing cases that fell into outcome 1 from the above diagram (all prosecuted cases) with all cases that fell into outcomes 2-5 (all discontinued cases). This analysis helped identify the factors that correlated better with a decision to prosecute or discontinue a case.

My focus then turned to those cases that were discontinued to find out which factors influenced when or why a case might be discontinued by a prosecutor. I undertook two further tests:

2. Discontinuation pre vs post charge: a comparison of cases that were discontinued prior to charge versus those discontinued post-charge to determine which factors better correlated with each type of discontinuation. This meant comparing those cases that fell into outcomes 2 and 3 (all cases discontinued pre-charge) as a single group with outcomes 4 and 5 (all cases discontinued post charge) as a single group. This helped identify which factors might led to a decision being dropped pre-charge rather than in the later post-charge phase.
3. Discontinuation on evidential vs public interest grounds: a comparison of cases that were discontinued on evidential grounds versus public interest grounds. This meant comparing those cases that fell into outcome 2 and 4 (all cases discontinued on evidential grounds) as a single group with those that fell into outcomes 3 and 5 (all cases discontinued on public interest grounds) as a single group. This helped identify

which factors might lead to a decision to discontinue a case on evidential grounds rather than public interest grounds.

Together, these three separate strands of analyses gave me a better understanding to be formed of which factors increase the likelihood of the various case outcomes.

### *Interview methods*

I gained permission from CPS Headquarters to approach Chief Crown Prosecutors directly to ask for research participants. I then sought permission from Chief Crown Prosecutors in each of the 13 CPS Areas and from CPS Direct to speak to their prosecutors. Of the 14 Chief Crown Prosecutors approached, seven replied. Interviews took place in all seven CPS Areas.

My initial target was 40 interviews, spread across the maximum number of CPS Areas. Methodological textbooks, such as Creswell (1998), suggest around 20-30 interviews may be a suitable sample for an interview-based study. Additionally, review of past PhDs held by the Institute for Criminology suggested that between 30 and 40 interviews might be an acceptable figure. In the event, I completed 34 interviews. This was because in the latter interviews – from about interview 28 onwards - the amount of new data and perspectives that had not previously arisen significantly reduced. This suggested that saturation point (MacLean et. al. 2010, pg. 283) had been reached, and the marginal value of further interviews was severely reduced.

The prosecutors that attended interviews were selected by the management in each Area, apparently in accordance with my desired mix of prosecutor types – a non-probability sample (Ritchie, Lewis and Elam, 2003, pg. 78). I interviewed four types of prosecutor. First,

magistrates' courts lawyers specialised in taking charging decisions and dealing with the lower level higher volume magistrates' courts work. Second, the Crown Court prosecutors who dealt with the more serious Indictable Only matters in the Crown Court and dealt with some appeal matters. Third, a single interview with an in-house CPS barrister who worked on the most serious Crown Court matters in the Area. Fourth, Rape and Serious Sexual Offences (RASSO) prosecutors who specialised in cases of a serious sexual nature.<sup>54</sup> The table below shows the spread of research participants across CPS Areas, team type and gender.

*Table 4: Sample of interviewees*

CPS Area	Total no. of interviews	Gender		Team type		
		Men	Women	Magistrates' courts team	Crown Court team	Rape and Serious Sexual Offences team
Area 03	<b>5</b>	2	3	3	1	1
Area 04	<b>4</b>	1	3	1	2	1
Area 05	<b>5</b>	2	3	1	2	2
Area 06	<b>6</b>	2	4	2	3	1
Area 08	<b>5</b>	2	3	2	3	0
Area 09	<b>5</b>	3	2	2	2	1
Area 12	<b>4</b>	3	1	2	2	0
<b>Total</b>	<b>34</b>	<b>15</b>	<b>19</b>	<b>13</b>	<b>15*</b>	<b>6</b>

\*includes a CPS in-house barrister.

I was told by prosecutors that different CPS Areas took different approaches to selection of participants, with some asking for volunteers and others asking certain prosecutors to participate to provide a good mix of prosecutors from different teams. This non-probability sampling method (Bachman and Schutt 2014, p. 109) could have limited the generalisability

<sup>54</sup> CPS Areas typically are split into a number of constituent sub-units, sometimes known as branches or teams. They are of three types: magistrates' courts teams deal with those cases bound for the magistrates' courts and the Crown Court do likewise for 'indictable only' cases that will be prosecuted in the Crown Court. Some Areas have more recently further differentiated their teams into 'anticipated guilty' teams that expect to receive a guilty plea at some point and so do not prepare for a trial and 'anticipated not-guilty' teams that prepare for trial. Specialist units have been set up across the CPS that deal with serious sexual offences. These are called Rape and Serious Sexual Offences teams, or RASSOs for short. Prosecutors will also generally spend some time away from their usual duties to undertake charging work where they consider the initial charges that should be laid in a case (other than for those cases dealt with 'out of hours' by the CPS Direct charging service. Alongside the legal teams there will be an administrative structure comprising administrators who work in support of the lawyers.

of my findings, although it can be seen from the table above that despite this approach a reasonable cross-section of prosecutors was achieved.

Semi-structured interviews (Noaks and Wincup 2004, p. 77) were used for this study. The interview plan is attached at Annex B. Each interview lasted around an hour. This was because I was interviewing prosecutors during the working day and had to fit into their professional commitments. Thus, most commonly, I was offered prosecutors in one-hour slots, the standard time for a business meeting, and somewhat outside of my control. Noaks and Wincup (2004) note that this is ‘commonly the case when access has been gained to interviewing subjects in criminal justice institutions’ (p. 78). Each interview was recorded using a digital recorder.

Whilst some topic areas and questions were developed prior to the interview phase beginning, not all interviews covered all questions. Each interview typically covered about eight to ten of the 20 questions listed in the interview schedule. This is all that was possible reasonably to cover in the hour-long interviews. Each question asked took up about five to eight minutes of discussion. No interview covered all 20 questions in the interview plan. This was partly due to the time constraints but, far more often, due to a prosecutor saying something novel or of particular interest resulting in a choice to spend a disproportionate amount of time exploring that topic more deeply.

All 34 interview recordings were accurately transcribed by an external company (EQ Transcription Services). To be sure of the quality of the transcription, I listened to each recording again and made corrections to the transcript. There were few errors; most of those I corrected related to CPS, legal or criminal justice specific terms or acronyms that were mis-

transcribed. Having a third party transcribe the interviews was primarily driven by a practical concern: it helped speed the fieldwork process as it saved me hundreds of hours of transcribing (although of course came at a financial cost). Third-party transcription did offer a further benefit, however. It took away any risk that in transcribing the work I would somehow add in my own 'interpretative connotations' (Atkinson, 2004, pg. 390) to what was said by prosecutors, perhaps by – unconsciously – resolving unclear or ambiguous statements in favour of 'what I knew they meant' rather than keeping strictly to what was said. The transcriber had no such frame of reference and so (it could be argued) could be relied upon to present a more reliable representation of the discussion. This increased the reliability of the transcriptions.

I read and re-read each interview transcript several times. This was, in part, to check accuracy; apart from the minor typographical errors mentioned above, the transcripts were accurate. But I did this also to reflect further on what was said during the interviews and begin to consider the emerging themes from the interviews and identify what may later become codes in the data analysis. This reflective approach to the transcripts 'should be seen as an integral part of the analytic process' (Noaks and Wincup 2004, p. 129).

I used NVivo software to record the coding of my data and to gather the categories of data for later analysis (in lieu of traditional methods of highlighters, paper and Post-It Notes). I did not rely on NVivo for conducting any analysis or identifying patterns; NVivo was used only as a 'tool to facilitate the researcher's analytic process rather than as a substitute for [it]' (Noaks and Wincup 2004, p. 133), and as a 'textbase manager' tool (Ritchie and Lewis, 2003, pg. 206). All the analysis of patterns and contradictions within the data set was done by me manually, with NVivo only used to conveniently store, present and sort the data I had

analysed. Using NViVo in this way was worthwhile. A paper system for storing and sorting the data would have been messy and somewhat impractical. Whilst I chose not to make use of all of the analytical potential of NViVo it did assist me in keeping an ordered and readily accessible and searchable record of my data. This helped speed the analysis process.

I completed all the interviews and had them transcribed. I attempted as far as possible to adopt a grounded theory approach (Glaser and Stauss, 1967) in which I did ‘not begin with a prior hypothesis to be tested but induced [my] hypothesis from close data analysis’ (Silverman 2014, p. 119). My analysis was not, of course, completely hypothesis free as I entered into the data analysis phase already holding some broad initial ‘categories of interest’ drawn from my prior reading that I intended to develop much further during the data analysis phase. I knew that my coding structure would be themed by a set of broad topics, such as use of the Code, important factors, use of intuition and mental shortcuts, etc. So, whilst the broad themes of the data analysis did not simply emerge from the data, theory-free, the more detailed analytical content and coding structures within the broad set of topics did emerge from the data as per grounded theory would suggest. I made ‘continual movement between data...and theory so that data analysis is theoretically based and theory is grounded in the data’ and ‘modif[ied] and broaden[ed] [my] initial categories’ (Silverman, 2014, p. 123). For instance, one of my initial broad ‘categories’, before, beginning the analysis, was a notion of the importance of non-rational decision-making. As I moved back and forth between the interview data, my literature review findings and the psychological theory, I began to draw out from the prosecutor accounts a number of strands within the broad initial data category, such as the distinctions between the use of intuition, life experience and evidence of mental shortcuts.

## **Limitations to my fieldwork methods and findings**

There were a number of limits to the statistical analysis. The primary limitation was that much of the HR data on prosecutor characteristics that was collected centrally by CPS HR and the CPS data teams via self-reporting mechanisms, namely the HR survey filled out each year. Responding to the HR survey was voluntary and so for some categories of data, such as prosecutor ethnicity, religion and sexuality, the data captured by the CPS HR survey was patchy with many missing data points where prosecutors had chosen not to respond to those questions. For example, the number of ‘missing cases’ for prosecutor sexuality shows that the analysis is based on so small a sample as to put any findings on that score in doubt. It is clearly noted in the next chapter wherever missing data precludes a statistical analysis to be made.

As well as being patchy, certain data that I wanted to analyse were lacking in their entirety. For instance, as will be seen in Chapter Six, prosecutors in interview reported that the mental health of the defendant was an important factor for them in their decision-making. The CPS does not hold information on defendant mental health in a manner that is practical for statistical analysis. Mental health is not a factor that is identifiable from the management data collected on a case – unlike, say, ethnicity or gender of a defendant - which is held as ‘meta-data’ against the case on the database and so easily searchable. Such information would be held within the text of witness statements or police reports. To find the relevant mental health information a researcher would have to read through the case material in each case. Similarly, prosecutors suggested that a defendant’s background was important considerations in a case, but this too is not something that the CPS routinely collect data upon and so could not be tested statistically in a practical manner. Again, there was no information on victim characteristics that I could access for analysis. Victim characteristics were found to be

important factors that influenced prosecutorial decision-making across a number of the quantitative studies of prosecutor decision-making in other jurisdictions and at other times (e.g., Myers and Hagan (1979, p. 448), LaFree (1980), Stanko (1981, p. 226). Statistical analysis to provide a comparator with contemporary CPS practice would have been potentially insightful, because aspects of connected to the victim featured prominently in the interviews and would likely have been a fruitful comparison to make with the statistical data.

Encountering limits to the data set was not surprising. The data were collected by the CPS for internal management and HR purposes and was not collected or arranged for the purpose of analysing prosecutor decision-making through use of statistical testing. The data necessary to analyse CPS decision-making is spread across three different databases (CMS, MIS, I-Trent), with prosecutor related information held on an HR database, case specific data held on a case management system and overall case outcomes held on a separate management information database<sup>55</sup>.

While gathering the data for my fieldwork, it became apparent just how difficult it might be for a researcher to secure data from the CPS. There is no immediately apparent way to automatically link the data up between the three databases; there is no use across all three of a unique reference number or identifier.

This causes two difficulties. First, a researcher may well find it difficult, especially from outside the organisation, to ‘ask the right question’ in terms of the data request from the CPS. Without knowing something of what the CPS holds and of how it is held, it would be easy to

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<sup>55</sup> The databases have been around for some time. The Case Management System (‘Compass CMS’) used by lawyers and managers to hold case information and track progress of individual cases, and the management information system (‘Compass MIS’) that draws data from the CMS system was brought into use in 2003. (HMCPSI, 2006, s. 1.12). The HR data were held on a specialist HR database called I-Trent, which is newer<sup>55</sup>. The databases are administered by three separate teams (HR, IT and the performance branch respectively).

ask the CPS to provide something it does not in fact hold. This leads to the second effect. Even if a researcher manages to frame their request in the correct manner and have the three teams extract the necessary data for them they are still left with the problem of matching up the data in the three databases to get to a unified picture. So, researching the CPS using statistical data drawn from the CPS is very difficult and this may well be a contributing factor as to why there is so little quantitative work available. (One is reminded of the difficulties faced by Griffiths and Sanders (2013) in trying to gather cases from the CPS database on medical negligence (p. 158).

A more fundamental problem with a statistical analysis is that, even with a perfect data set, such an analysis does not uncover a psychological mechanism of decision-making itself but only identifies some of the factors at play. In other words, regression modelling is ‘psychologically implausible’ (Dhami and Belton 2017, p. 217). Prosecutors do not make decisions in the way a statistical model identifies the important correlates; they arrive at those factors in an entirely different psychological manner. All that is (at best) demonstrated about CPS prosecutor decision-making by a statistical analysis is the identification of a set of important factors. . No light is shed on why those factors are important, or how they interact or play a part in the decision-making process.

There were methodological limitations to the interviews also. During the interviews I asked prosecutors to think back to decisions they had made in the past. Prosecutors may have simply suffered from forgetfulness when asked to recall a certain case decision or some aspect of past behaviour and so failed to report something to me that was significant at the time. It is unknowable as to how much forgetfulness affected the findings, but it is likely that to a certain degree the findings are inaccurate through failed recall despite prosecutor best

efforts. Even if prosecutors felt able to accurately remember their decision-making and thinking at the time, their recollection may simply play them false. The interview data were also limited by the inherent difficulty in introspecting; the response given by prosecutors in response to questions may very well be the ‘true’ and ‘honest’ answer as it seems to them, but the question remains as to whether their response is accurate to the thought process they actually used. It is likely – but impossible to say to what extent – that prosecutors make a post-hoc rationalisation and faithfully (to them) relay their impression of a decision-making process that is not what occurred. Researching the use of intuition and mental shortcuts makes this much more likely to have occurred as, almost by definition, intuition and heuristic decision-making are sub-conscious or at least of limited consciousness in terms of decision-making. Psychological research has drawn attention to this. For instance, Gawronski, Hoffman and Wilbur (2006) examined the degree to which research participants were aware of their own attitude and the degree to which they understood their attitude to affect their behaviour. They found that: ‘people sometimes lack conscious awareness of the origin of their attitudes’ and whilst ‘there is no evidence that people lack conscious awareness of [their] attitudes per se...there is evidence showing that, under some conditions, [unconscious] attitudes influence other psychological processes outside of conscious awareness’ (p. 469). Equally, prosecutors may have simply not been telling the truth in interview, but instead displaying aspects of what Asch (1951), the USA psychologist, called the social desirability effect. When asked how they make decisions some prosecutors may – instead of giving the answer they know to be true – provide an answer that they feel the situation demands. For instance, prosecutors may perhaps have suggested that they stick to the Code processes, perhaps feeling that they are expected to say so or that doing so accords with what they feel a prosecutor should be seen to say. The social desirability effect would have taken the prosecutor away from a more accurate answer that they might otherwise have given.

My choice of methods helped to mitigate some of these limitations. Comparing the observations from the interviews with the analysis from the statistical analysis helped, for instance. The factors that prosecutors report as being important to decision-making were broadly similar to those that correlate statistically. This helped build my confidence that those factors were the most important ones.

To further mitigate the inherent limitations of the interview and statistical approaches, an additional methodological approach might, on reflection, have been added in addition to the two used in my mixed method approach. Prosecutors could have been asked to consider a vignette of a difficult case about which they could explain in detail to the researcher their likely decision and explain the reasons for it. A vignette approach would have provided a further means by which to better compare what was said by the prosecutor with the ‘reality’ of their decision in a finely balanced vignette. The vignette answers might either have shown a consistency between what was reported to be the case by prosecutors when asked in interview and then demonstrated in the vignette, or could have highlighted an inconsistency. Inconsistency between vignette answers and reported approaches to decision-making might have better indicated unconscious decision-making and the use of mental shortcuts. Use of vignettes in addition to the two approaches used in my fieldwork might have made for a much richer set of data against which to draw conclusions from the interviews and one that, due to the possibility of extra triangulation, led to a set of firmer conclusions about decision-making.

I made the decision not to use vignettes prior to commencing my fieldwork because I felt, then, that the dual mixed methods approach was sufficient to enable me to compare and

contrast findings, and that a further research method risked muddying the water rather more than making things clearer. I was also concerned that by adding a third method the time taken overall to conduct the research phase of the work would be elongated too much. In retrospect, these concerns seem unfounded. For the reasons set out above I now believe a vignette approach would have been useful in that I would have gathered another insight into prosecutor decision-making that would have further strengthened my conclusions.

### **Ethical safeguards**

Before beginning my fieldwork, I sought and received ethical approval from the Institute of Criminology's Ethics Committee. I sent a research information sheet (attached at Annex C) to all participants at the point they chose to participate so that they knew broadly what I wished to interview them about. Noaks and Wincup (2004) identify the importance of being 'explicit to what uses the data will not be put, as well as how it will be used' (p. 83) and to do this at the initial phase of the interview. Prior to beginning each interview, I presented each with a participant consent form (attached at Annex D) that they all were willing to sign. This participant consent form made clear that their contribution to my research was given on the condition of anonymity. Prosecutors were told that they would be referred to with numbers, not names, and places or other identifiers redacted from this final work. They were free to withdraw from the research process at any time. The research ethics agreement also clearly signalled the intent to record the interviews, and permission to record was further sought orally from each interviewee at the start of the interview. Participation in the interviews was voluntary. No-one was compelled to take part in the interviews by me, or, as far as I know, by their CPS managers. All participants appeared willing to speak to me and not under duress. The interviews were conducted at local CPS offices.

## **The challenges of insider research... and concluding that I am not an insider**

At the time of the research, I was employed by the CPS. My ability to conduct robust research into the CPS at the outset of my studies was undoubtedly affected by my relationship to the CPS as both employee and researcher. It is therefore important to explore my 'positionality' (Chavez, 2008, p. 475) in relation to the CPS. Positionality is important because one's position relative to the research subject can affect the value of the findings. This is for two reasons. First, if one researches one's own organisation there is potentially less objectivity brought to the research than that brought by an outside researcher. The inside researcher will already have thoughts, feelings and perspectives on the organisation in question and is at greater risk of unwittingly introducing those into the analytical process. Secondly, the participants may respond differently to questions posed by an insider compared to those posed by an outsider. They may feel less inclined to speak frankly to an insider as they may worry that the anonymity and confidentiality of the interviews could be compromised if the researcher and research participant are known to each other or jointly to a third party in a different work setting.

A short review of my professional history provides context. I joined the Civil Service graduate scheme in 2002 as a generalist Civil Servant, having studied politics at undergraduate level and criminology at postgraduate level. After initial short postings at the Ministry of Justice (as it is now) and the Home Office, I joined the CPS in 2005. I spent three years working in various policy, project management and operational roles both in CPS HQ and in CPS Surrey. I joined the Cabinet Office for two years working on non-criminal justice issues before returning to the CPS in 2010. Over the next five years I worked on various change and reform programmes at CPS HQ. In October 2013, I began my PhD. In 2015 I joined the Home Office to work at the Independent Inquiry into Child Sexual Abuse (with no

direct connection to CPS work). In April 2019 I joined the Department of Health and Social Care to work on Covid-19 issues.

Each of my departures from the CPS (to the Cabinet Office, Home Office and Department of Health), have involved intra-government secondments from the CPS. I have remained a CPS employee, albeit most often on loan elsewhere, since 2005. Whilst away from the CPS, I have maintained a connection with the organisation informally through personal contacts and formally through regular meetings with my ‘owning’ line manager. In this way I have been able to keep up to date on the changes the CPS has undergone recently - both those changes that are observable from the outside (for instance, efforts to prosecute historic sexual cases, or changes to the charging arrangements with the police) but also the less clear internal changes such as those to management personnel and leadership. This was relevant to the research as this knowledge of internal CPS business helped build rapport during the interviews; I was, for instance, able to engage in office gossip about various senior moves.

The CPS has paid the fees for this PhD in their entirety. The Acknowledgement section is the place I have paid fulsome thanks to the Service for this incredible opportunity; I raise it here in order to expose the fact that the organisation I am researching both employs me and has paid for the research – two facts critical to my positionality and objectivity.

As an employee of the CPS conducting CPS funded research the temptation is simply to label me an inside researcher, that is, my work could be described as falling into the category of ‘research by complete members of organisational systems and communities in and on their own organisations’ (Brannick and Coghlan, 2007, p. 59). Yet categorising myself as an inside researcher is problematic. The first part of this section considers the advantages and

challenges experienced as an employee of the CPS researching one's own organisation. In the second part of this section, irrespective of my employment with the CPS, I discuss whether I am, in fact, distanced sufficiently from the research participants to be able to claim that this is outsider research and that therefore I can claim a greater measure of objectivity in my analysis as I look at things from a more distanced vantage point.

### *Opportunities and drawbacks of researching one's own organisation*

My status as a CPS employee and my network of contacts within the CPS presented opportunities. The relative ease with which I was granted access to just about all data held by the CPS (excluding case information relating to terrorism and security) was remarkable. The access was agreed in principle following a short conversation with a Board-level Director. I then had to arrange a series of research agreements (which were largely standard templates used for other, external, researchers). With those signed, I then dealt directly with the management information and HR teams to extract the data I wanted. To my knowledge, neither of those three parties (the Director, the senior manager granting the research nor the data providing teams) checked back with one another to coordinate their actions. I believed this situation reflected the organisation's inherent trust in me – after all I was a senior manager myself, a CPS employee for ten or so years at that point, and well known across Headquarters (then at least, if not so much now). This easy access to the data enabled me to conduct and present analysis based on data sets that have not been analysed in this way or to this depth before.

Yet my relationship with the organisation did not remove every obstacle. I still faced access issues in gathering my interview data. My career history shows that, apart from the 2007-2008 period of working in an operational Area – CPS Surrey – I was a headquarters

operative. I knew the senior Directors around Headquarters and the key leaders for corporate functions (including, critically, those who controlled management and personnel data, and granted research permissions) but knew less well the Chief Crown Prosecutors and operational staff in CPS Areas, including the lawyers that I wanted to interview. This was what Brannick and Coghlan (2007) call a problem of primary versus secondary access (p. 67). My primary access to the organisation enabled me quickly and easily to get agreement to the research and to secure the data for the statistical analysis. Yet I had limited secondary access to prosecutors at Area level. I found myself working through CCPs and reliant upon their cooperation.

In most instances CCPs were cooperative, but in each CPS Area, as noted above, interview participants either self-selected or were selected by local Area managers. Greene (2014) lists better interaction with research participants as being one of the advantages of insider research. With this in mind I emphasised my CPS links, believing it would be a means to build trust and rapport with participants and that it would signal a comfortable environment for prosecutors to talk about life in the CPS, safe in the knowledge they are ‘keeping it in the family’ and need not be guarded as the might with an intrusive outsider. It is unclear the extent to which this worked. Whilst I presented myself to them as a trusted member of the organisation, I do not know whether they saw me that way, or even if they did see me as a trusted member of the organisation, whether that would in itself prompt them to open up. Even if these prosecutors appeared to make open and frank remarks, it is hard to know whether they would have made those same remarks to other, non-CPS researchers. Finally, any openness on their part may have been driven by the anonymity clauses in the interview consent form rather than from anything connected to my status.

Some of the prosecutors appeared noticeably wary at the outset of the interview. This was particularly the case with some of the prosecutors in one of the Areas I visited. These prosecutors gave shorter, clipped answers to my questions and the interview felt like a guarded interview rather than a flowing conversation. I felt that they answered my questions with the answers they felt they were expected to give, rather than perhaps the ones they felt were true (the social desirability effect, discussed above). It is possible also that they were simply uncertain as to what the research was about (despite the information sheet sent to them prior to the interview and my explanation and reassurance at the beginning of the interview) or that they worried I may 'judge' them for giving the 'wrong' answers. The research value of their answers was, I felt, lessened due to their slight reticence.

#### *Challenging my status as a CPS insider*

The notion that I am CPS insider is debatable. As noted above, I have spent a considerable amount time outside the organisation. I began my research in 2013 and finished it in 2021. Only the first two years were spent working in the CPS and the latter six outside. I could feasibly lay claim to six years being enough time to enable me to claim the objectivity of the outsider. All my fieldwork was conducted after I began to work elsewhere on secondment (in 2015 for the statistical analysis and 2017 for the interviews).

Moreover, I have never been a prosecutor, and so sit as an outsider to that professional grouping. Rather than simply saying that because I am an employee of the CPS, I am therefore an insider, it is worth considering the professional group boundaries that exist within the CPS. There is a prosecutor/non-prosecutor split in the CPS. I am a generalist Civil Servant and not legally trained. I am certainly not an insider to the professional sub-group of prosecutors within the CPS. I do not know what it feels like to make a case decision or to

work as a prosecutor in the CPS. I share with prosecutors the organisational culture of the CPS, a shared history and outlook and many of the same frustrations and professional enjoyments as other members of the CPS, but this does not, in itself, make me a prosecutor insider. Prosecutors were not certain to view me as ‘one of them’. I feel I can claim an outsider’s objectivity in regard to what prosecutors do and say. Never did I feel like I was a prosecutor, never did I think I could or would see things from their perspective. I was conscious throughout the interviews and later analysis of never having completed a file review or made a prosecutorial decision. I was also conscious of being educated in a different tradition to the prosecutors – as a social scientist not a lawyer, and likely our perspectives of critical issues differed. Taken together these factors mean that I could look upon prosecutors as an ‘other’, an outsider, and they, me.

Beyond the prosecutor/non-prosecutor split, there is an Area/HQ split in the CPS. Whilst I employed the strategy of emphasising my CPS links to engender trust between interviewee and interviewer, this may not have been the best strategy. I initially thought that emphasising my insider status would give them a sense that I could be trusted, had the interests of the organisation at heart and would therefore not misuse the data or seek to catch them out in some way. But, perhaps, for some prosecutors, my status as a member of HQ represented to them a set of connections, links and even friendships with senior managers across CPS Headquarters that meant it would have been foolish to be too open or frank in case I relayed their frank views more widely irrespective of the research agreements and the consent forms. Whilst I was a CPS insider, I was still from HQ and an outsider to their Area.

It is clearly not sufficient to think of myself as simply as a classic inside researcher. A more nuanced analysis of the inside researcher might view my status in terms of a typology rather

than a dichotomy. Banks (1998), an education researcher, for instance, offers a useful typology, as depicted in the table below:

*Table 5: Typology of insider research*

	<b>Indigenous</b> (shares perspectives, behaviours, beliefs with the researched group)	<b>External</b> (researcher a different set to the researched)
<b>Insider</b> (assimilated to the internal group)	Indigenous insider	External insider
<b>Outsider</b> (perceived by the researched group as being an outsider)	Indigenous outsider	External outsider

In Banks’s typology my research would better be classed as ‘Indigenous outsider’ research – the prosecutors would have accepted that I am indigenous to the CPS yet perceived me as external to the ‘set’ of prosecutors.

Yet even Banks’s typology does not wholly solve the problem of where I position myself regarding the CPS. For instance, whether I am ‘indigenous’ depends on who is asking the question. I have a strong claim to be indigenous to the CPS, but I would not claim to be of the same set as the prosecutors. But does my view matter, or theirs? The former colours analysis and reflections upon the research, but the latter might affect the research data offered up by the research participants at interview.

It is difficult to pin down what exactly constitutes insider research. Naples, a professor of sociology and women’s studies at the University of Connecticut, says ‘[i]nsiderness or outsidersness are not fixed or static position, rather they are ever-shifting and permeable social locations’ (Naples 1996, p. 140), and Kanuha (2000), a social work researcher in the US,

nicely describes in her own work about insider research of mixed-ethnicity Hawaiian's that she felt she had to 'research at the hyphen of Insider-Outsider' (p. 443). I feel that I, too, in some ways sit atop that hyphen.

In conclusion, however, I do not consider myself to be an inside researcher. Whilst I am a member of the organisation being researched, my time away from the organisation provides sufficient distance to introduce objectivity akin to that of an outsider. Also, perhaps more importantly, whilst my research participants were fellow CPS employees, they were drawn from a separate professional and organisational set to me. In short, there is a prosecutor/non-prosecutor split within the CPS, and an HQ/Area split. I was a non-prosecutor from HQ researching Area based prosecutors. I did not feel, and I suspect was not perceived as being by my interviewees, a member of the group I was researching. This is significant to the research because the exercise of being aware of my own position and accepting my changing and developing viewpoints helped overcome some of the pitfalls of compromised objectivity inherent in researching one's own organisation.

## **Chapter Five: What CPS management data reveal about case decision-making**

This chapter presents the findings from the statistical analysis of CPS management data. The headline results of the analytical tests will be given first, there will then be a deeper examination of the headline results to identify which factors correlate most strongly with case outcome - suggesting that these correlating factors are important to prosecutors when making case decisions.

### **The headline analytical results**

Sub-question three ('What aspects of a case most influence case outcome?') was addressed both statistically and in interviews. For the statistical part of the analysis of this question, the question was examined by conducting three separate analytical comparisons:

1. The decision to prosecute: cases prosecuted versus case discontinued
2. Timing of the decision: cases that were discontinued prior to charge versus those discontinued post-charge
3. Reason for discontinuance: cases that were discontinued on evidential grounds versus public interest grounds

The results of each of these three analyses is presented in turn. The full data tables showing the logistic regression outputs are attached at Annex E.

*Test 1: The decision to prosecute*

Without considering the individual factors (the independent variables), the Logistic Regression model correctly predicted the outcome of 68.3 per cent cases from the sample essentially by random chance. But when the individual factors of the case were included, the logistic regression model correctly predicted the outcome of 75.9 per cent of cases. Knowledge of the case factors, therefore, helps to predict a prosecutor's decision to prosecute or discontinue a case.

Of the 15 independent variables that were tested as part of the Logistic Regression, seven were found to be statistically significant (at the sig <0.5 level) when predicting whether a case was likely to be discontinued. They seven were: Defendant gender, Defendant ethnicity, Defendant previous convictions, Principal offence category, Are, Date and Prosecutor gender.

Identifying the statistically significant correlations is an important step in the analysis, but the strength of the effect is useful to understand also. Strength of effect in logistic regression analysis is demonstrated by the 'Odds ratio ExpB'. Three of the seven statistically significant factors were shown to have a large strength of effect score (higher than 2.0 for one or more of the categories within the variable):

*Table 6: Strength of effect for Prosecution vs Discontinuance*

<b>Case factor</b>	<b>Strength of effect (Log Reg. Odds ratio ExpB)</b>
Defendant previous convictions	0.675 - 4.789
Principal offence category	1.957 - 6.2
Date	1.450 to 2.893

The four other variables (Defendant gender, Defendant ethnicity, Area and Prosecutor gender) showed a statistically significant but had a low strength of effect score compared to the others (i.e., the upper range was lower than 2.0).

The strongest predictor of whether a case will be prosecuted or discontinued was the Principal Offence Category. The analysis showed that offences categorised as falling into the offence category of 'All other offences' were 6.2 times more likely to be discontinued compared to the baseline Principal Offence type, controlling for all other factors. The second strongest indicator that a case would be discontinued was when it was classed as being a 'Public Order offence' – and was 5.1 times more likely to be discontinued than the baseline Principal Offence type, controlling for all other factors in the model.

#### *Test 2: Timing of the decision*

As with the decision to prosecute or discontinue a case, knowledge of certain factors help to predict the point in the process when a case is discontinued. Without considering the individual factors (the independent variables) the logistic regression model would have correctly predicted the outcome of 60.3 per cent cases from the sample essentially by random chance. But when the individual factors were known, the logistic regression analysis correctly predicted the outcome of 76.6 per cent of cases, so, as before, knowing the case factors helps predict whether a case is more likely to be discontinued pre- or post-charge.

Of the 15 independent variables that were tested as part of the Logistic Regression, 13 were found to be statistically significant when predicting whether a case was likely to be discontinued at the pre- or post-charge stage. The 13 were: Defendant age, Defendant ethnicity, Defendant previous convictions; Area, Date; Prosecutor grade, Prosecutor

ethnicity, Prosecutor gender, Prosecutor religion, Prosecutor disability, Prosecutor sexual orientation, Prosecutor age and Prosecutor career.

Seven of the statistically significant variables were shown to have a large strength of effect score on the dependent variable (timing of decision):

*Table 7: Strength of effect for Pre- vs Post-charge Discontinuance*

<b>Case factor</b>	<b>Strength of effect (Log Reg. Odds ration ExpB)</b>
Defendant age	2.626 – 3.199
Defendant ethnicity	1.629 - 2.419
Defendant previous convictions	0.118 - 2.01
Area	0.491 - 2.59
Prosecutor ethnicity	2.244
Prosecutor gender	65.335
Prosecutor sexual orientation	2.288

The other six variable showed a statistically significant but had a weak strength of effect score.

The strongest predictor of whether a case is discontinued pre-charge rather than post-charge was ‘Prosecutor gender missing’. Cases with this data missing were 65 times more likely to be discontinued post-charge than pre-charge (I conclude that this result is spurious and explain why so in a later section of this chapter). The next strongest predictor or whether a case was to be discontinued pre- or post-charge was defendant age. Compared to very young defendants (10-13 years old – the reference category) cases against defendants aged 14-17 were 3.1 times more likely to be discontinued post-charge rather than discontinued pre-charge, cases against those 18-24 years old 2.7 times more likely to be discontinued post-charge rather than pre-charge, and cases against those 25-59 years old 2.6 times more likely

to be discontinued post-charge rather than pre-charge, controlling for all other factors in the model.

*Evidential vs Public Interest discontinuations*

Once again, knowledge of certain factors helps to predict whether a prosecutor will discontinue a case on evidential or public interest grounds. Without knowledge of the individual factors the Logistic Regression model correctly predicted the outcome of 54.1 per cent cases from the sample essentially by random chance. But when the factors were included in the model, the analysis correctly predicted the outcome of 68.4 per cent of cases.

Of the 15 independent variables that were tested as part of the Logistic Regression, ten were found to be statistically significant when predicting whether a case was likely to be discontinued at the pre or post charge stage. The ten were: Defendant gender, Defendant age, Defendant ethnicity, Principal Offence Category, Area, Date, Prosecutor gender, Prosecutor ethnicity, Prosecutor religion and Prosecutor sexual orientation.

The following independent variables are those that were shown to have a high strength of effect score for the dependent variable (evidential vs public interest discontinuance):

*Table 8: Strength of effect for Evidential vs Public Interest Discontinuance*

<b>Case factor</b>	<b>Strength of effect (Log Reg. Odds ration ExpB)</b>
Principal offence category	0.345 - 4.008
Area	1.738 - 2.279
Prosecutor gender	13.321
Prosecutor sexual orientation	1.712 - 2.118

The other six variables were statistically significant but had a weak strength of effect score (their highest range was below 2).

The strongest predictors of a case being discontinued on public interest rather than evidential grounds are Principal Offence Categories. Discontinued drugs cases are 4 times more likely to be discontinued in the public interest rather than on evidential grounds compared to the reference category. Public order offences are 3.7 times more likely, Criminal damage cases are 2.8 times more likely and Sex offences 2.6 times more likely so to be discontinued on PI grounds. The other particularly strong relationship is Prosecutor sexuality, where prosecutors identifying themselves as gay are 2.1 times more likely to discontinue a case on public interest grounds than evidential grounds, but, as will be seen later in the chapter, there is good reason to think this is spurious.

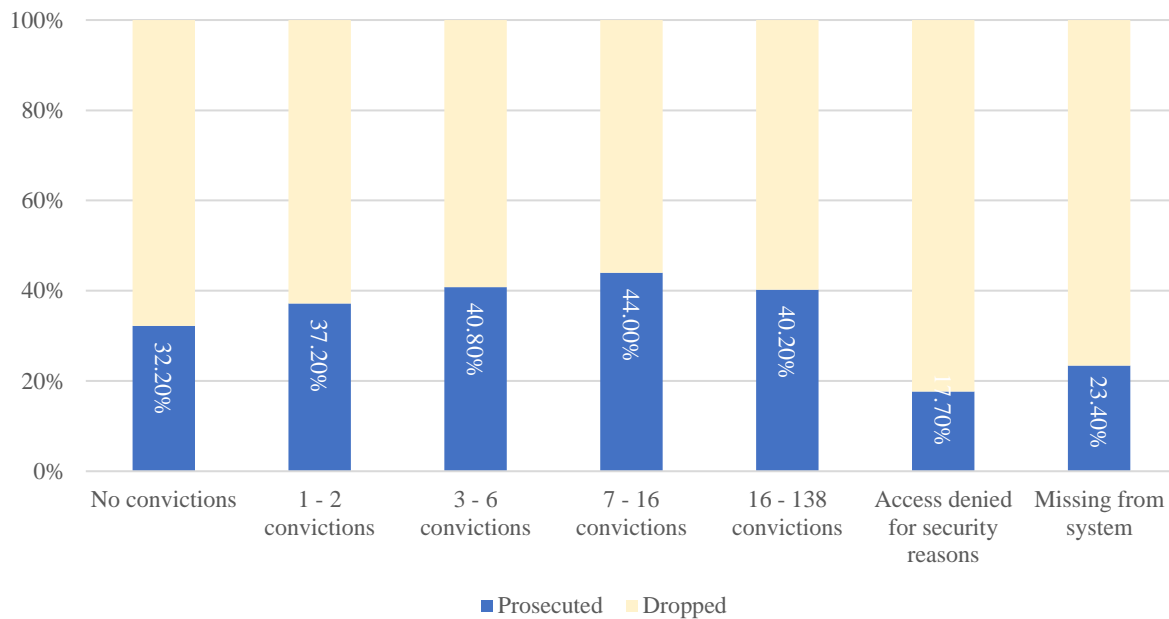
### **Interpreting and exploring the headline analytical results**

#### *Previous convictions*

It should be noted that for many cases in the sample the previous convictions were unobtainable for research purposes. 1,635 cases of the 3,791 total cases do not have previous convictions data available. This reduced the sample size somewhat but still left a sufficient number to upon which to conduct the statistical analysis.

The data shows that, in general, a prosecutor is more likely to choose to prosecute a case if the defendant has more previous convictions.

Figure 1: Effect of previous convictions on the decision to prosecute



Across the sample of cases, 32 per cent of defendants with no previous convictions were prosecuted. Those with between 7 and 16 previous convictions were most likely to be prosecuted, with 44 per cent of those prosecuted. In general, as the number of previous convictions increased, so did the proportions of prosecutions compared to discontinuance in that part of the sample. This held true until a defendant had 16 or more previous convictions. Intuitively this was to be expected as relevant previous convictions indicate a tendency toward recidivism and tend to attract more forceful criminal justice interventions.<sup>56</sup>

The pattern was not completely uniform; the proportion of cases in the sample that were prosecuted lessened when a defendant had already faced 16 or more prosecutions. On the face of it this seems to run counter to the argument that more previous convictions would increase the likelihood of prosecutions. Upon a random dip sample by me of defendants with

<sup>56</sup> This is shown most explicitly in the Sentencing Guidelines, in which previous convictions is an aggravating factor to sentencing. See [Magistrates' Court Sentencing Guidelines – Sentencing \(sentencingcouncil.org.uk\)](http://sentencingcouncil.org.uk)

very high (above 30) previous convictions it was apparent that many were repeatedly convicted of begging or shoplifting offences.

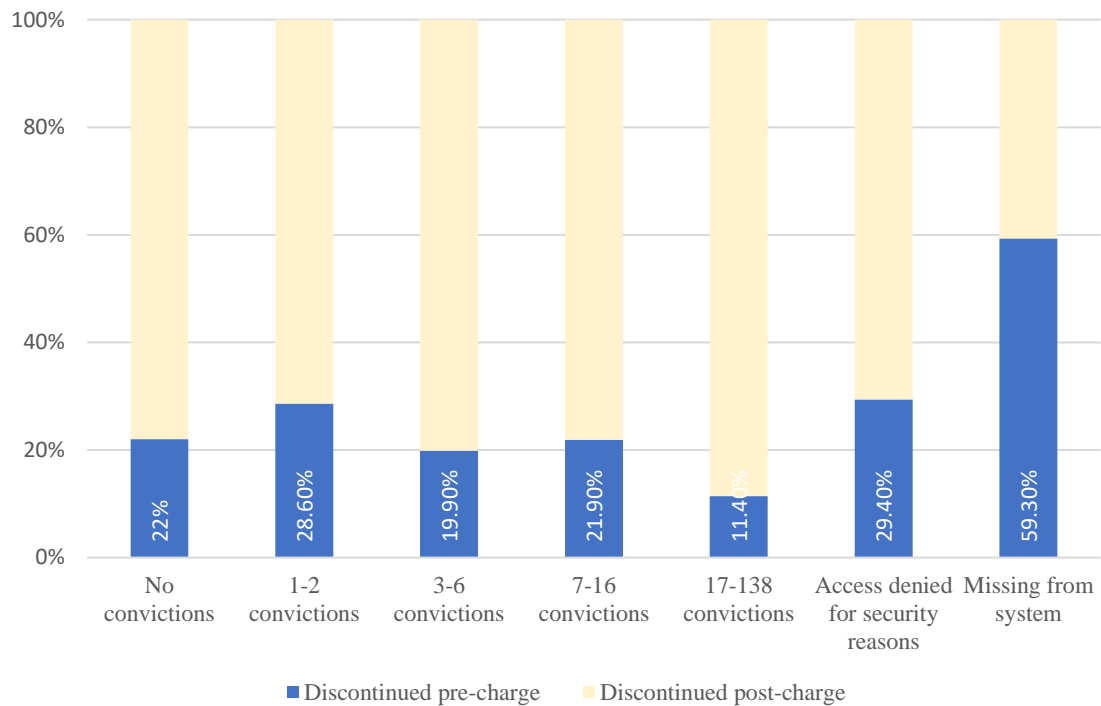
One possible explanation for this statistical finding is that begging or shoplifting are often connected to substance misuse issues, and continued prosecution was seen as likely to be ineffective (demonstrated by the evident repeated failure of past prosecutions in effecting behaviour change). Prosecutors were therefore less inclined to prosecute as they considered the cost of a prosecution to outweigh the likely benefit (in terms of a reduction in recidivism) and in some cases diversion away from prosecution was thought to be the better option than repeated prosecution.

Introducing a finding from the interviews to this section, one prosecutor illustrated this point well when they described how prosecution for cases of begging tended to be ineffective:

*One thing that springs to mind, things like begging where you're kind of...you're very reluctant often to proceed with them because you just think, what's the point? What are they going to get at the end of the day, are they going to get an absolute discharge? Can't fine them, they've got no money. It's such a sad crime really...  
(Prosecutor 23)*

Previous convictions also exerted a strong effect on the timing of the discontinuation, but the pattern here is not so clear as on the decision to prosecute or discontinue.

Figure 2: Effect of Defendant previous convictions on the decision to discontinue pre- or post-charge



As with the previous figure, it should be noted that for many cases in the sample the previous convictions were unobtainable from the data (i.e., they were not recorded correctly by the CPS on the case management system or they were complex or special cases) and so some 1,252 cases of the 2,591 total cases discontinued did not have previous convictions data available for research purposes.

The analysis shows that the category that exerts the strongest effect on the decision to discontinue pre- or post-charge (the dependant variable) is 17-138 convictions (Odds ratio of 16.138 toward post-charge). This suggests having many previous convictions generally leads to a charge even if it is a later discontinuation post-charge.

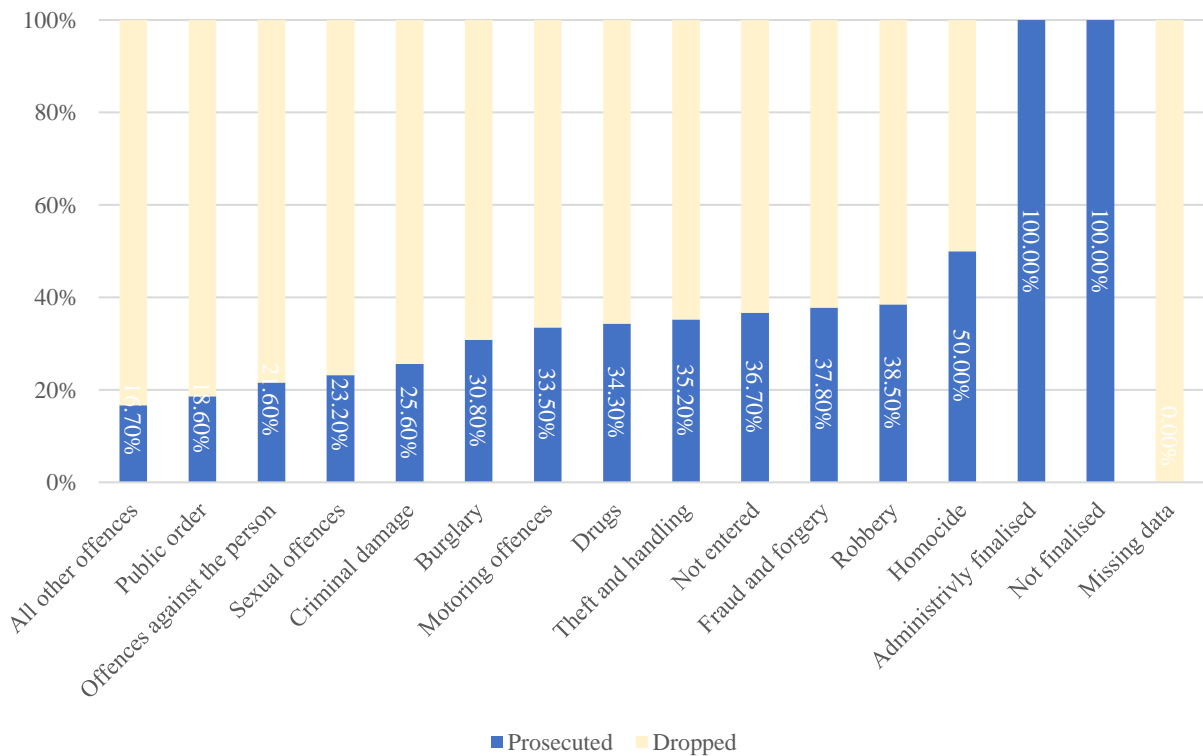
There was no statistically significant difference in the proportion of cases discontinued on evidential vs public interest grounds when analysed by the number of previous convictions.

Overall, the analysis shows that the more previous convictions, the more likely a suspect is charged and that the case is less likely to be discontinued.

### *Offence type*

There is a clear relationship between offence types and a decision to prosecute, with clear variation between offence types and the likelihood of prosecution. Of the cases in the sample, those of robbery were, for instance, nearly double as likely to be prosecuted than public order offences. Very broadly, the case types that are more likely to be prosecuted tend to be those of a more serious nature, suggesting (as one might expect) that prosecutors are more likely to prosecute cases of serious criminality over those of lesser.

Figure 3: Effect of Principal Offence Category on the decision to prosecute

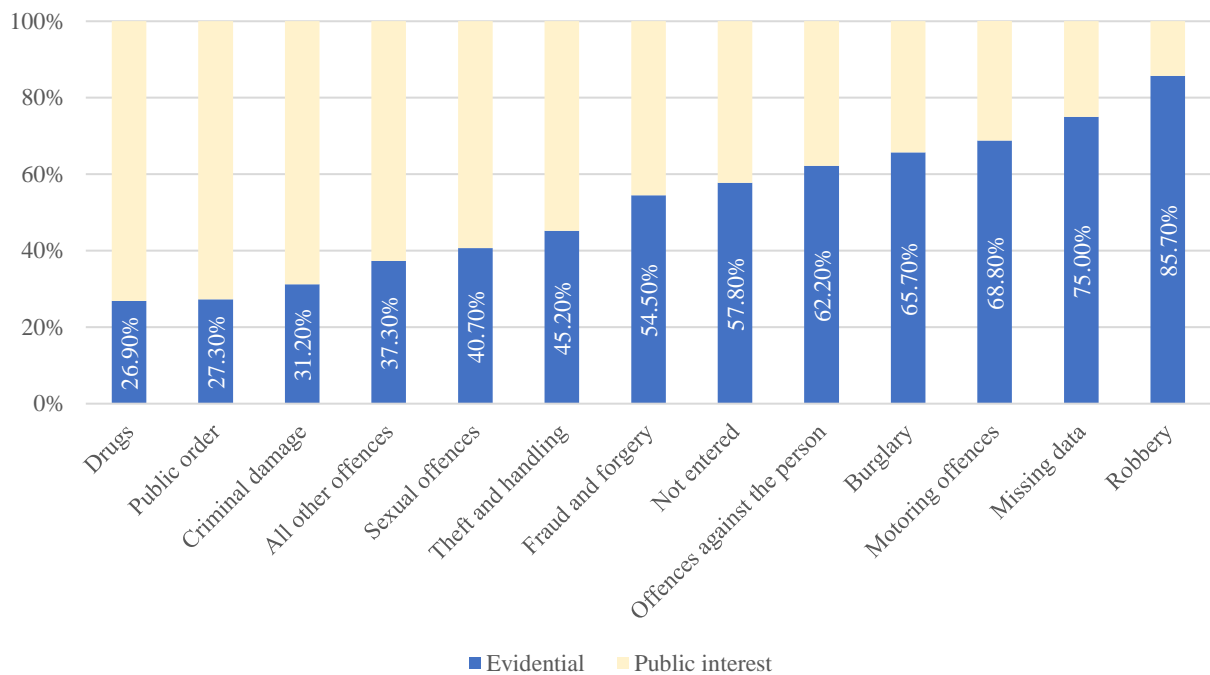


There are grounds for great caution, however. The data categories used by the CPS to group offence types are only a proxy measure of offence seriousness and when put together limit the depth of the analysis that can be made. The fit between the offence types and a notion of seriousness is not a perfect one. Burglary, for instance, is seen as a very serious crime, especially when connected to a residential dwelling and even more so when conducted when the occupants are in the dwelling. Stiff prisons sentences follow a conviction for this sort of offence. Yet according to the statistical analysis it is prosecuted in lower proportions than ‘Motoring Offences’ which are on the whole considered to be less serious (although some motoring offences can lead to very significant harm being done, of course, and are therefore very serious indeed). Many crimes of very different levels of seriousness are grouped together into a single ‘Offence Category’ and so there is not a direct relationship between Offence Category and seriousness (other than homicide, perhaps). For instance, ‘Drugs

Offences’ could range from importation of Class A drugs to repeated use of marijuana. Equally, ‘Sexual Offences’ could range from serious sexual assault (including rape, for instance) down to many more minor sexual offence types.

As with previous convictions, the picture becomes more complicated when delving below the topmost question (prosecute vs discontinue). The data shows clear variation in the proportion within the sample of cases that are discontinued on evidential grounds compared with those discontinued on public interest grounds. For example, motoring cases in the sample were discontinued on evidential grounds at a far higher proportion than, say, drugs offences.

*Figure 4: Effect of Principal Offence Category on the reasons for discontinuance*



One possible explanation for the difference in discontinuation for evidential versus public interest reasons might be that those cases that tend to rely more upon pieces of ‘objective’ evidence are more likely to be challenged upon, and therefore discontinued, on evidential

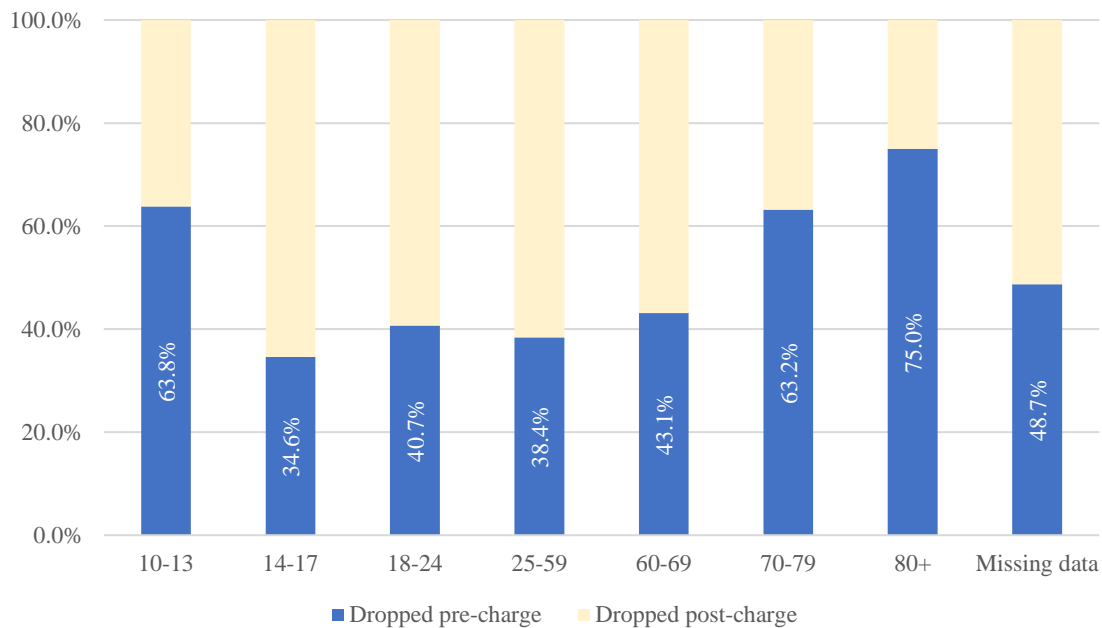
grounds. For instance, motoring offences often turn on traffic camera evidence, and burglary cases often rely heavily on forensic evidence. If this evidence proves problematic a discontinuation on grounds of evidence will follow. Sexual offences, on the other hand, could be said to include a higher proportion of cases in which the evidence is not disputed directly but the case comes down to one account against another as to what occurred, without recourse to other witnesses. These cases might, therefore, be discontinued less frequently on evidential grounds than motoring or burglary cases. This is speculation, and the data does not allow for further investigation.

There was no statistically significant relationship between offence category and the decision to discontinue a case pre- or post-charge. There is a clear pattern of offence type to decision to prosecute and a clear pattern (albeit a different one) of offence type to reason to discontinue. Overall, however, what is clear is that offence type appears to bear a relationship to case outcome, although the way in which the CPS brigade different offences into very loose ‘principal offence categories’ does not allow for much further insight.

### *Defendant age*

The data shows that, in general, prosecutors are more likely to discontinue a case at a pre-charge stage if the suspect is particularly young or old.

Figure 5: Effect of Defendant age on decision to discontinue pre- or post-charge



Within the sample of case for which the defendant was especially young or especially old, there was a higher proportion of cases discontinued at a pre-charge stage. For defendants aged 10-13 and those aged more than 70 this is unsurprising, as there are clear grounds for discontinuing a case against a child or a very aged person on public interest grounds on account of age. Defendant age will be usually evident from the first consideration of the case at pre-charge stage, and so likely to be taken into account then, hence the greater proportion of discontinuances at that stage.

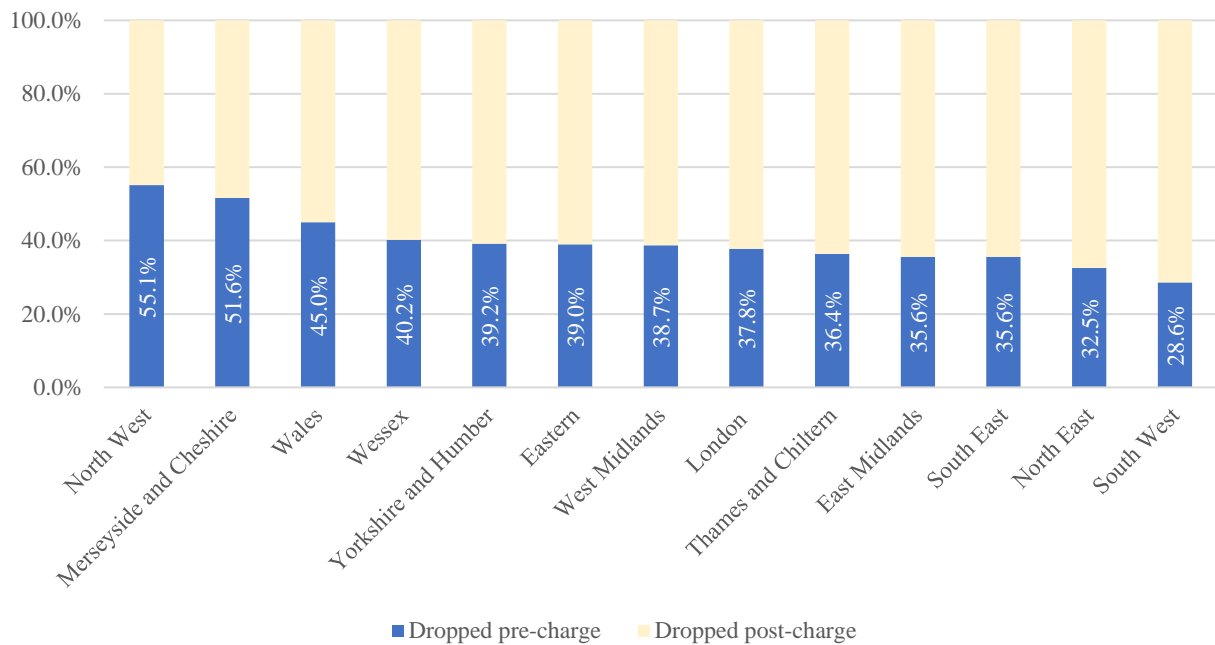
There was, however, no statistically significant finding for defendant age affecting the prosecutor's overall decision to prosecute or discontinue, or that related to decisions to discontinue on evidential rather than public interest grounds. If age and infirmity were of particular importance to prosecutor decision-making one might have expected it to have a statistically significant and strong effect on decision-making as the overall decision to prosecute, and on pre- v post- charge decisions also. It does not, and this lack of triangulation

between the three statistical comparisons weakens the overall strength of the finding that age affects prosecution outcomes.

### *CPS Area*

The data shows some variation in prosecution rates between CPS Areas. Regarding pre-charge discontinuance across CPS Areas, the picture is one of consistency across most Areas with a few outliers that buck that consistency.

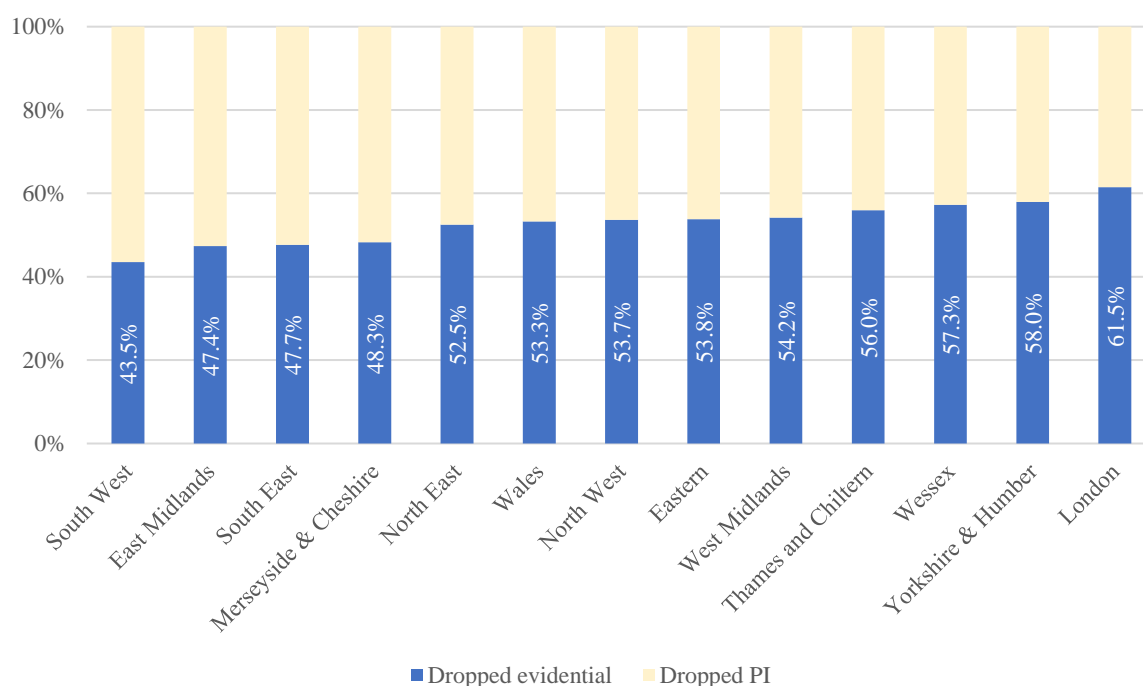
*Figure 6: Effect of CPS Area on the decision to discontinue pre- or post-charge*



Seven of the 13 Areas discontinued at a pre-charge stage between 35 per cent and 39 per cent of the total discontinued cases. In the North West, however, pre-charge discontinuation occurs considerably more at the pre-charge stage (55 per cent) with Mersey and Cheshire close behind (51 per cent). On the other hand, the South West discontinue proportionately fewer cases pre-charge: only 28 per cent. The overall spread, therefore, if one were to compare South West and North West is some 23 per centage points across the sample.

The Area variation also showed itself regarding the reason for discontinuation.

Figure 7: Effect of Area on the reasons for discontinuance



The data shows a spread of outcomes between Areas, with the South West discontinuing proportionately the fewest number of cases on evidential grounds compared to public interest grounds (44 per cent of all cases discontinued in the sample) through to London, which discontinues the highest proportion of cases on evidential grounds (62 per cent of those in the sample) compared to public interest grounds.

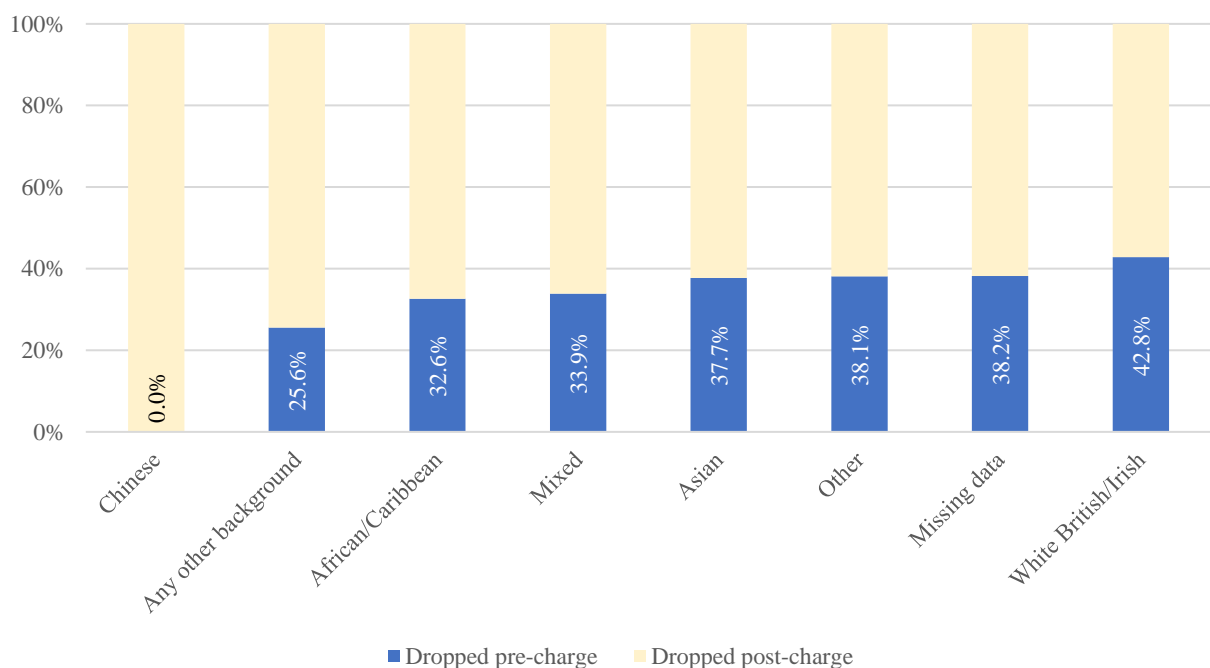
Once again, it is difficult to draw firm conclusions from the patterns observed across both these charts. First, one must consider what is missing; as with defendant age, CPS Area was not found to correlate with the main question that focussed on differences in proportions of cases prosecuted vs discontinued. The observed difference is therefore only in a sub-set of cases: observed differences between those that were discontinued. Second, there is no consistent picture between the two charts that lends itself to a clear interpretation or speculation about what is causing the observed statistically significant differences. For

instance, whilst the North West and Merseyside discontinued the most cases proportionately at a pre-charge stage, neither stand out in terms of discontinuing cases for evidential or public interest reasons.

### *Defendant ethnicity*

There was no statistically significant relationship between ascribed defendant ethnicity and the likelihood of prosecution or discontinuation, or the reason for discontinuation (evidential versus public interest). The data did reveal, however, a statistically significant and strong relationship between the defendant’s ethnicity and decisions about when a case is likely to be discontinued.

*Figure 8: Effect of Defendant ethnicity on the decision to discontinue pre- or post-charge*



As can be seen, cases of white defendants were discontinued earlier (at a pre-charge stage) in greater proportion (42 per cent of sample) than those with a minority ethnic defendant (25 per

cent to 37 per cent). The data for Chinese defendants should be discounted due to the small number of cases in the sample, only five defendants in the sample were recorded as being Chinese, so the analysis may not be reliable.

It is not clear why White British/Irish defendants had their cases discontinued earlier in the prosecution process than African/Caribbean defendants. If it were simply a tendency of CPS prosecutors to be tougher, harsher or somehow more predisposed to prosecute black defendants – i.e., a systemic disparity or even discrimination in treatment because of race – then presumably defendant ethnicity would have been identified as a factor in the overall decision to prosecute instead of discontinuing, which it did not. Being black does not *per se* make it more likely that a prosecutor will continue to prosecute.

There may be a connection between defendant ethnicity and the willingness of prosecutors to prosecute (or, at least, to not stop a prosecution at an early stage). One possible explanation is that ethnic minority suspects are less likely to engage in plea bargaining negotiations compared to white suspects due to issues with trust, as shown by Roberts and Bild (2021), who find that:

*'[s]ome of the differences in custody rates for Black and Asian offenders and White offenders were due to different guilty plea rates – BAME defendants were less likely to plead guilty and therefore less likely to benefit from plea-based sentence reductions. However, the discrepancies remained statistically significant even after controlling for plea.'* (p. 14)

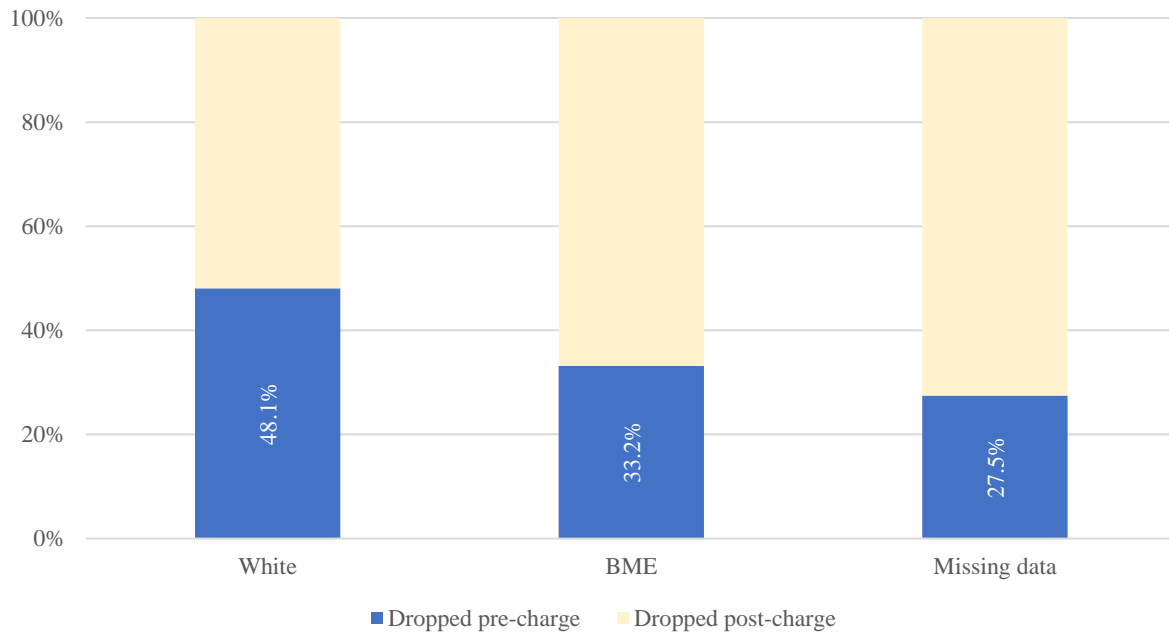
Their findings relate to sentence reduction for guilty pleas rather than plea bargaining before trial, but if a reluctance to enter guilty pleas exists at a sentencing stage it is reasonable, perhaps, to assume it might also affect pre-trial matters at a pre-charge stage. As such, the original charges against ethnic minority suspects might be continued with to a much later stage in the proceedings, before eventually being dropped.

Caution should be exercised before drawing firm conclusions. The statistically significant and strong relationship only related to one of the three tests and the overall decision to prosecute and reasons for discontinuation do not correlate with defendant ethnicity. If defendant ethnicity were a strong factor in the minds of prosecutors when making case decisions it would be reasonable to expect that there would be a relationship in these other two Areas, but there is not. The review of the prior literature into CPS decision-making in Chapter Three discussed both the MacPherson Report (1999) findings and the more recent Lammy Review (2017). The Lammy Review concluded that in general there was little evidence of racial disparities in CPS decision-making and overall my fieldwork findings appear to support this. This issue is picked up again in the final chapter.

#### *Prosecutor ethnicity*

Prosecutor ethnicity exerted an effect on case outcomes, too. White prosecutors appeared more likely to discontinue prosecutions at the pre-charge stage than black and minority ethnic (BAME) prosecutors.

Figure 9: Effect of Prosecutor ethnicity on decision to discontinue pre- or post-charge



It is unclear why and how prosecutor ethnicity should affect the point at which a case is discontinued.

In common with many of the other findings discussed so far, this is the only test of the three conducted that identified a statistically significant relationship concerning the prosecutor's ethnicity. There was no statistically significant and strong relationship across tests for the overall decision to prosecute or discontinue for evidential vs public interest reasons. Just as with the issue of defendant ethnicity, if ethnicity was a critical factor in decision-making it is unclear why it would not affect the overall decision to prosecute rather than just the stage of discontinuance.

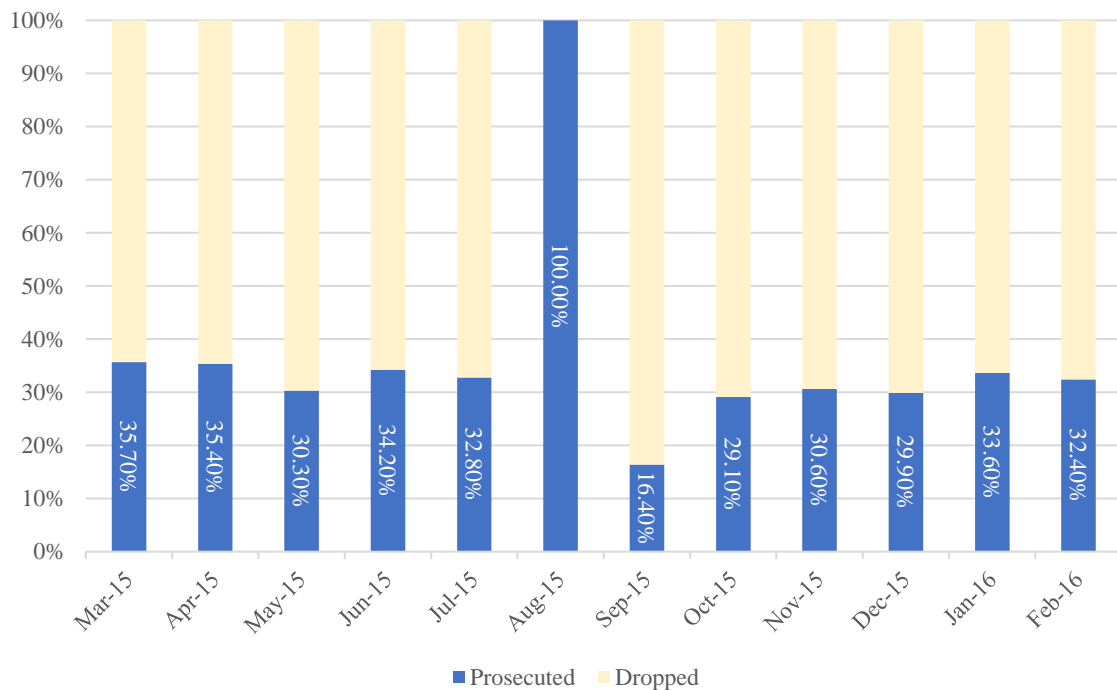
### **Factors that may be discounted as spurious**

Three factors were identified by the statistical analysis as showing a strong statistical effect on case outcome but should be considered as spurious results and not considered as holding value to answering the research question.

### *Date of finalisation*

The date that the offence was dealt with by the CPS was shown to be statistically significant to the decision to prosecute, and that it exerted a strong effect. I consider this to be a spurious finding, however, and suggest it should be discounted. The following figure shows the effect of date on the decision to prosecute.

*Figure 10: Effect of Date on the decision to prosecute*



The figure shows that a stark difference in cases within the sample that were finalised in August and September compared to the rest of the year. All other months hold a broad average of between 29 per cent to 35 per cent of cases prosecuted in any month. August has 100 per cent prosecuted (88 cases prosecuted, 0 discontinued) and September showing fewer prosecuted (16 per cent, 91 cases out of 554) prosecuted.

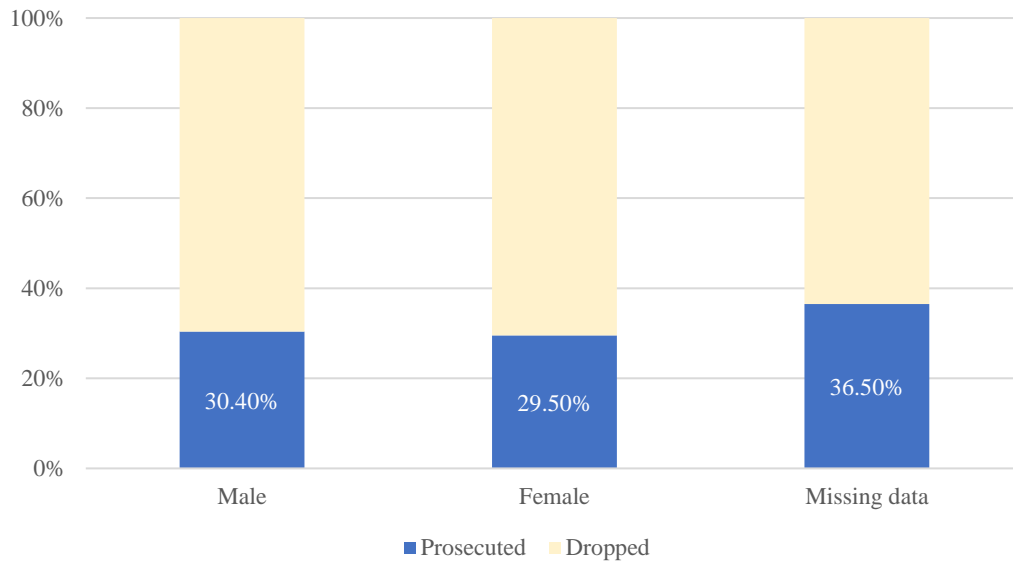
It is most likely explained as an administrative phenomenon rather than a prosecutorial one. Prosecutors and associated administrative staff are more commonly on holiday in August (as are court and judicial staff) and less business gets done. Paperwork builds through August and is dealt with upon the return to work in September. By the end of September, the business has ‘caught up with itself’ and a steady flow of cases is processed from that point forward. This view is further strengthened if one quickly averages August and September – across the two months a total of 644 cases were finalized, which is 322 per month on average with a discontinuance rate averaged across the two months of 71.7 per cent, which is high but not terribly so compared to the other months of the year. There is little of relevance to the primary research question in this finding, and it should be discounted.

There was no statistically significant effect of CPS Area on the decision to discontinue pre-charge vs post-charge or to discontinue on evidential vs public interest grounds.

#### *Prosecutor gender*

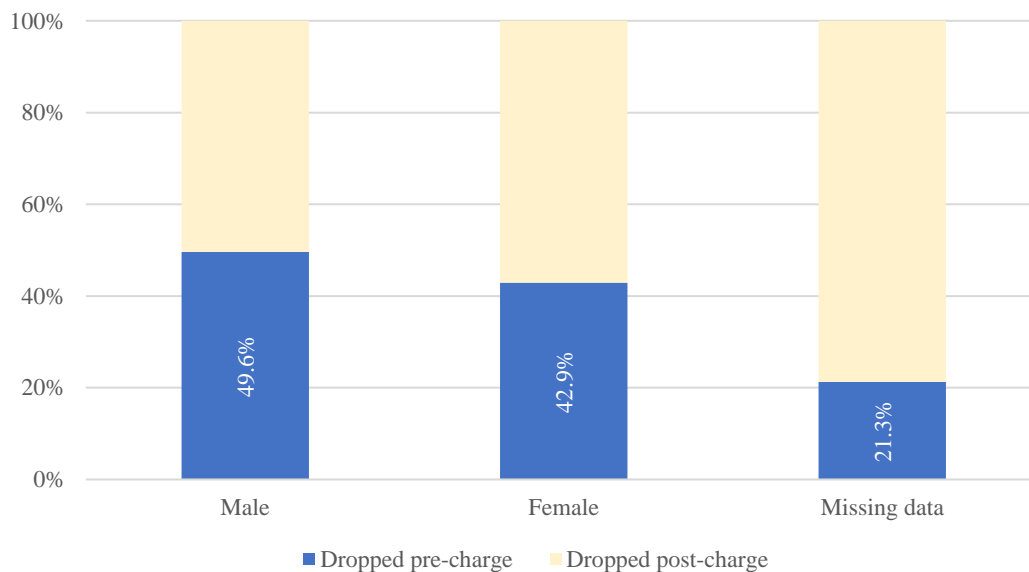
The statistical analysis showed there to be a statistically significant relationship with a strong effect between a prosecutor’s gender and both the decision whether to prosecute or discontinue a case and whether the case is discontinued pre-charge or post-charge.

*Figure 11: Effect of Prosecutor gender on the decision to prosecute*



The data shows that the different proportions of cases prosecuted and discontinued by male and female prosecutors is slight – 30.4 per cent vs 29.5 per cent respectively. The noticeable difference is in the ‘missing data’ result, which shows a higher proportion of prosecutions for cases within the sample where prosecutor gender is not known.

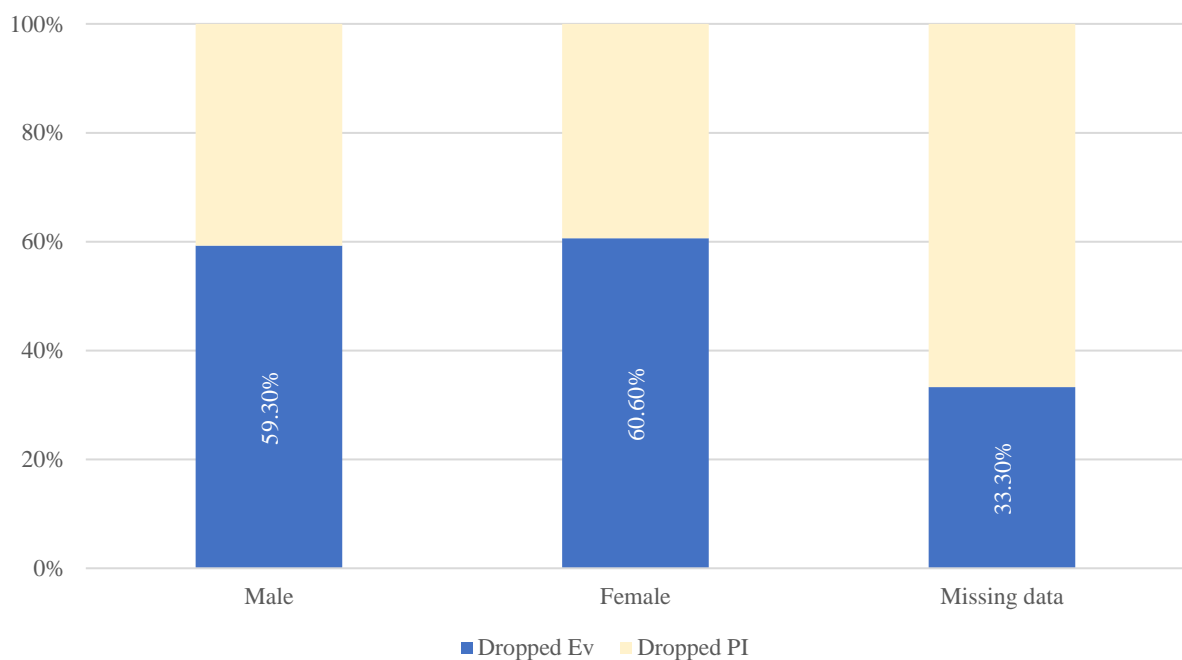
*Figure 12: Effect of Prosecutor gender on the decision to discontinue pre- or post-charge*



There is a seven-percentage point difference between the proportion of cases discontinued pre- and post-charge, with male prosecutors discontinuing 49 per cent of cases pre-charge compared to fewer discontinued pre-charge – 42 per cent - by female prosecutors, suggesting men are more likely to discontinue cases pre-charge. Whilst the difference between male and female prosecutors is more marked here than in the prior figure, the still more marked results is that for missing data, which shows discontinuations pre-charge at under half the rate of pre-charge discontinuations by male prosecutors.

The same conclusion can be drawn from the analysis of the impact of prosecutor gender on reasons for discontinuance, shown in the figure below:

*Figure 13: Effect of prosecutor gender on the reason for discontinuance*



Once again, where the prosecutor’s gender is known, there is essentially no difference in likelihood of discontinuing on evidential or public interest grounds. The difference between cases dropped for evidential reasons compared to public interest reasons by male and female

prosecutors is marginal (1.3 percentage points) and the statistically significant correlation is therefore likely caused by the missing data.

All three results relating to prosecutor gender can be discounted. The differences observed between male and female prosecutors is slight, with the far larger difference being between cases for which prosecutor gender is known (i.e., male and female categories combined) and those cases for which the data is missing. There is no logical cause why cases in which the prosecutor's gender is not known should systematically drop cases at a pre-charge stage, and the result should therefore be considered spurious.

#### *Prosecutor sexuality*

The following two figures illustrates how Prosecutor sexuality influences the decision to discontinue a case at the pre- vs post-charge stage and on evidential or public interest grounds.

*Figure 14: Effect of prosecutor sexuality on the reason for discontinuance*

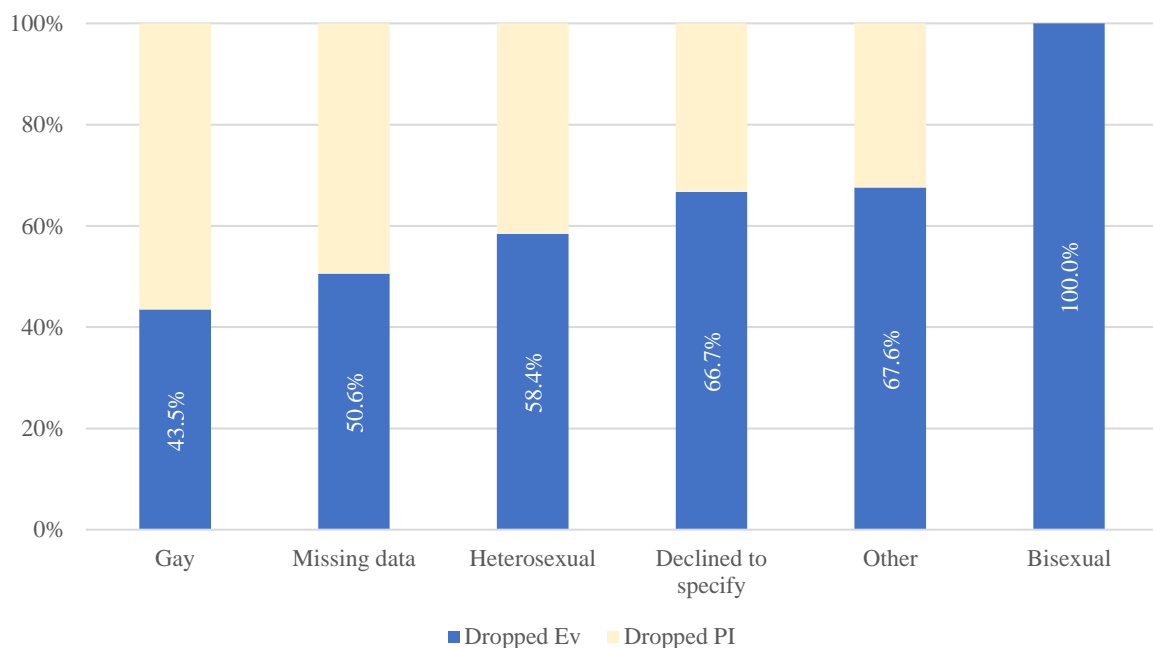
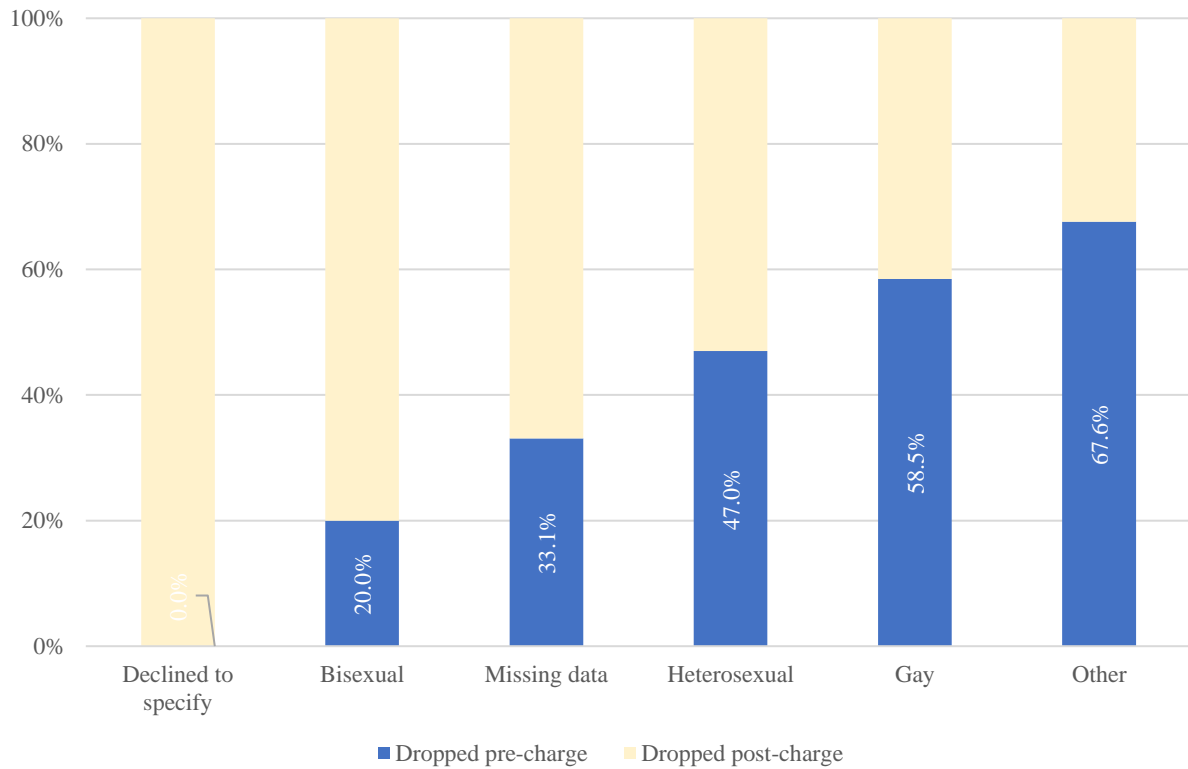


Figure 15: Effect of Prosecutor sexual orientation on the decision to discontinue pre- or post-charge



Prosecutor sexuality data were one of the most patchy and incomplete data sets. It is difficult to interpret meaningfully the effect of prosecutor sexuality on pre- and post-charge discontinuances and evidential vs public interest stages given the large number of prosecutors for which the data is not known. Looking at the figure on reason for discontinuation, out of 2,196 cases in the sample that were discontinued a total of 1,206 cases did not have any sexual orientation information listed. Only five involved prosecutors identifying as bisexual. Three declined to specify. The urge to make any sort of interpretation using these data must be resisted.

*The overall picture*

Overall, some core factors can be identified as exerting a particularly strong effect on case outcomes. Other factors appear to be correlated with case outcome, but further exploration leads to the conclusion that they are spurious findings. The important factors in determining case outcome – and therefore by proxy, being considered important to prosecutor decision-making - are previous convictions, defendant age, offence type, CPS Area, defendant ethnicity and prosecutor ethnicity. The analysis suggests that these factors are important to prosecutors when making case decisions. These findings are useful because the statistical analysis has revealed a set of factors shown to correlate strongly with case outcome, and these factors can be compared and contrasted with the interview observations to strengthen the overall conclusion (as will be done in the final chapter).

The following table gives an overview of the results from the three statistical comparisons.

Table 9: Overview of the statistical tests

Independent Variable	Prosecute or discontinue	Discontinue pre-charge or post-charge	Discontinue for evidential reasons or public interest reasons	Results are either statistically insignificant or show only weak effect on any of the three decisions	Description of effect
Defendant previous convictions	X	X			More previous convictions = more prosecutions
Principal Offence Category	X		X		More serious = more prosecution
Defendant age		X			Very young or very old = less prosecution
Defendant ethnicity		X			Eth. Minority prosecutions = discontinued later. No overall patten of greater prosecution for eth. Min.
CPS Area		X	X		Notable variation between Areas
Prosecutor ethnicity		X			No clear pattern of effect
Date of prosecution	X (spurious)				n/a
Prosecutor gender		X (spurious)	X (spurious)		n/a
Prosecutor sexual orientation		X (spurious)	X (spurious)		n/a
Defendant Gender				X	n/a
Prosecutor age				X	n/a
Prosecutor religion				X	n/a
Prosecutor disability				X	n/a
Prosecutor career length				X	n/a
Team type (mags/Crown)				X	n/a

## **Chapter Six: CPS prosecutor views on case decision-making**

This chapter presents the findings and analysis of the 34 interviews with CPS prosecutors.

The findings are presented in four parts. The first part explores how CPS Prosecutors use the Code, with over a third reporting that they do not use the Code in their day-to-day work.

In the second part, prosecutors give their views on what they consider to be most important when making case decisions, such as the role of victims, notions of cost, accountability for decision-making, the effect of local issues on decision-making and what prosecutors consider the overall aim of prosecutions to be. In doing so, they reveal the importance to their thinking of some of the wider political trends observed within criminal justice over the last 30 years.

The third part focusses on psychology. CPS Prosecutors describe how ‘gut feel’ and intuition play an important part in their decision-making and the use of hunches is seen as positive.

‘Life experience’ is often seen as a positive factor in coming to what they considered to be a correct case decision.

The fourth and final section of this chapter examines the specific case factors that CPS prosecutors reported as being important to them in coming to a case decision. These were defendant previous convictions, the seriousness of the offence, youth and old age of the defendant, mental health issues, complainant credibility and socio-economic factors connected to the defendant.

## **The extent to which prosecutors use the Code when making decision**

The first research sub-question was '*To what extent do prosecutors use the Code when making decisions?*' and so this framed the basis of the first set of interview questions.

Prosecutors were asked what use they make of the Code, how they interpret and use the evidential and public interest stages and to what degree they follow the suggested Code Test sequencing.

Opinion was broadly split on whether they made use of the Code in their daily work.

Questions on this subject were asked in 21 of the interviews. Just under two thirds (13) reported the Code as being useful to them in some way in their day-to-day work whereas just over a third (8) reported not using or referring to the Code during their work. Of those saying it was useful, few described following the Code Text in the formal and sequenced manner that the Code suggests, but rather described using it as an aide memoire, a source of standard text for explaining case decisions or simply as something to 'hide behind'.

### *Some prosecutors do make use of the Code*

The Code was reported as being useful by 13 of 21 prosecutors. They reported using the Code in every case they consider:

*If I'm doing charging advice, I will literally refer to it in the charging advice and look it up. So, I don't just do it off the top of my head. I just constantly refer back to it if I'm doing charging advice. (Prosecutor 12)*

Another prosecutor was able to immediately put a hand on their copy of the Code (and even brought a copy to the interview):

*I suppose I've always got it, sort of, there. I have it physically on my desk and also in the back of my mind guiding me through the way I look at the file. (Prosecutor 03)*

One prosecutor (in a Complex Casework Unit) said that the Code was useful, especially in respect of the public interest and crystallising thoughts on a case:

*I think the Code is actually very useful on public interest...And I will quite often refresh my memory from the Code where I have a difficult public interest decision, and I find it quite helpful... And if you have a case where the evidence is there, but sometimes you ... right, the evidence is there, but it's just like, 'Yeah, I really should be prosecuting this person.' And I will then look at the Code, and I can work my way systematically through the public interest factors, and very often that helps me to crystallise why we shouldn't be prosecuting this person. So, I find that very useful. (Prosecutor 06)*

This prosecutor showed the Code being used as the Code text suggests it should be; it is used to structure and clarify decision-making and is constantly referred to when making case decisions. However, not all prosecutors who reported making use of the Code said they used it in this manner. There were a variety of uses for the Code according to prosecutors.

One of these other useful functions of the Code was that it gave them an accepted form of words to communicate with the public, victims, interest groups and Members of Parliament:

*Every time I'm looking at something, I get it out and I make sure I've got my wording right. And when I'm asking the boss to re-instate a case that we might have stopped before, I always look at the wording. And when I'm thinking about the public interest, it's where I go because that's where the help is. And you're on safe ground. I write lots of letters to MPs, to the public, and all the rest of it. And I don't think people want me to have words of my own. I think they want me to have the words of my organisation.*

*(Prosecutor 28)*

The same prosecutor suggested a second use of the Code, explaining how their awareness of the Code as a public document played into their considerations:

*I think it is quite helpful because I think the words in it are deliberate. And I think it's been amended, so that there are things in there that you can go and look to. But I think it's just part of it because I think the other part is our policy. And sort of sitting where I sit now, it's all out there on the internet. You get people quoting these things back to you. And if you're not careful, and you answer using different words, then you're getting yourself into a knot. Just as a lawyer, you should be careful with your words, and that is the key set of words that everything we do should be on.*

*(Prosecutor 28)*

In a similar vein, two other prosecutors described a further use they made of the Code – as a ‘safety net’. The first prosecutor, working in a Crown Court team, emphasised the Code’s use as a safety net for less experienced prosecutors:

*I think when you start off, you want to be making the right decisions. So, it's very important to be making the right decisions, and so you just keep double-checking. It's almost like a little safety net, if that's the right term, but it's sort of a safety net. You think, 'Well, this is my gut feeling on reading it. Now, I'm looking at the Code. Am I doing the right thing? Yes, I am, by the Code.'* (Prosecutor 25)

The second prosecutor, an experienced magistrates' courts prosecutor, was rather franker about the safety net function of the Code:

*It's something to hide behind I suppose, isn't it?* (Prosecutor 16)

*Some prosecutors do not make use of the Code*

Just over a third (8 of 21) of prosecutors said that the Code was not useful to them and that they didn't use it to inform their day-to-day work. For some this was because they felt they had built up experience over the years that meant they no longer needed to refer to it. One prosecutor of around 13 years' experience said:

*I think when you've been doing it for a long time, I think you just know. I think once you've been doing it for a while you don't really see much new under the sun, and you know whether the evidence is there, whether you're going to get a conviction which is the reasonable test approach. You know also the public interest side of it as well if you're being honest...so, we don't sit there looking at the latest edition [of the Code], and I personally wouldn't change my approach for slight changes in the wording in the code, which is essentially the same thing we've always been doing.* (Prosecutor 31)

Another prosecutor (who had been with the CPS since its creation) echoed this:

*Younger people might say, 'Well, look, yeah, we are very aware of this. We check everything off in the Code against what we do'. But I think, to be honest, when you've been doing it for a while you know whether something's going to float or sink. And you make the assessment on the evidence on your experience and everything else.*  
*(Prosecutor 20)*

A CPS in-house barrister was the most forthright of the participants in reporting how they did not use the Code in their decision-making:

*I don't use it as a written document as it currently is. I wouldn't use it. I wouldn't ever go to the Code in order to write an advice. I go with my knowledge of evidence and I go with my knowledge of what's in the public interest and what's not. The only time, I suppose, I would ever cite the Code is if I'd written an advice suggesting either that we don't proceed with a case or I've been asked to advise in a case where somebody else has said we don't proceed and I think we should. And then I'd start saying, right, here are the boxes that we tick in the Code one way or the other. But other than that, day-to-day, I don't go to it ever. (Prosecutor 13)*

This view, that the Code is of little use to decision-making other than to provide a 'tick list', was echoed by another prosecutor:

*Well, I suppose one is required to follow the code where there is sufficient evidence to give the means and prospect of conviction. Whether the case is in the public interest. So, I have to reach a conclusion in relation to it. I also have to say the case is a judicial review or something all about policies I've considered and that type of thing. So, I sort of annotate all of that, but I think in a sense when you're actually reviewing a case you don't think to yourself at the time what does the Code of the Crown Prosecutor say. (Prosecutor 11)*

One experienced prosecutor went further in expressing their skepticism about using the Code:

*I think you'll actually find quite a few of our prosecutors don't necessarily understand the Code in full. So, if they consider that the evidential part of the Test is not met, they'll still consider the public interest, whereas actually they should be stopping. (Prosecutor 27)*

### *Interpreting the text of the Code*

In Chapter Two, I argued that there was insufficiently detailed information in the Code about the evidential and public interest tests. The evidential test gives little further explanation of what 'a realistic prospect of conviction' might mean. The public interest test presents prosecutors with a non-exhaustive list of factors but no single definition of 'the public interest'. It is perhaps not surprising that prosecutors offered a variety of interpretations as to the meaning of both tests and how they are (or should be) applied.

18 prosecutors were asked how they interpreted the notion of a 'realistic prospect of conviction'. The most common interpretation (given by ten of the 18 respondents) was the assessment of whether a jury would be likely to convict based on the evidence.

An experienced prosecutor working in a Complex Casework Unit (and therefore dealing almost entirely with Crown Court Cases) focused immediately upon the views of the jury as the central component of evidential stages:

*So, basically, it means that I look at the evidence, and I'd think, 'Could a jury convict?' A jury in possession of what I know, could they convict, which is a tricky one really because it means you've got to get inside the mind of a jury, and of course, every jury is different. But you get a feel for what juries will do. (Prosecutor 06)*

An in-house CPS advocate repeated this view:

*But one of the differences, I think, between advocates and office-based lawyers is that I take into account what I think a jury is going to do. And there are some cases where you can say, look, evidentially, I can see how we have made out each and every one of the aspects that we have to prove to get home on this offence, but the jury just isn't going to have it. They're going to say, the complainant deserved it...So, I don't know, if you have somebody who is charged with an ABH, because they've punched another person in the face. And the person they punched in the face has just been convicted of sexually assaulting their ten-year old daughter. And you might get the case come across your desk and the reviewing lawyer says, well, we've got it on CCTV. It's an absolute slam-dunk. Of course, we've got a realistic prospect of conviction. As the*

*trial advocate, I would quite happily say, there's no jury in the land that are going to convict this person. It's just not going to happen. And so, in those circumstances, I'd probably be advising, no, we shouldn't go ahead. (Prosecutor 13)*

One prosecutor said that the evidential stage was not clear-cut, raising questions about the standard of proof (beyond reasonable doubt) being higher than a realistic prospect of conviction, but overall concluded that the jury's view is the most important consideration:

*I don't think it has to be clear-cut. We don't have to be sure, but I think we have to have enough to be able to put before a judge or a jury. So, I think actually, we focus too much on sufficient evidence to provide a realistic prospect of conviction. I think actually, with the bit below that about a judge probably directing a jury whether they could convict. I think that's the more important part of it...Okay. So, obviously, the criminal standard is, it used to be set beyond reasonable doubt, it's now so that you're sure. The prosecutor standard is lower than that. (Prosecutor 27)*

A minority (3) of prosecutors interpreted the realistic prospect of conviction test in a slightly different way and set the evidential bar far lower. Instead of considering whether a jury would convict, they felt that there was a realistic prospect of conviction if the case could 'get past half time' – in other words there was enough evidence such that the Judge would not order an acquittal without hearing the defence case. For instance, one prosecutor, who worked in a magistrates' courts team and had long experience of taking charging decisions said that their definition of a realistic prospect of conviction is that:

*You can present a clear case to the magistrate that they will want to hear from the defendant, they'll take it beyond half time, you're not going to have the defence putting a submission in that there's holes in your case. (Prosecutor 30)*

Another prosecutor of 24 years' experience and currently working in a Crown Court Unit agreed:

*If I was sitting on the jury myself, and I was sitting as a judge myself, would I think that this charge was made out, and that helps my assessment. (Prosecutor 07)*

Beyond focusing on the jury or on getting the case 'past half time', some prosecutors (2 of 18) interpreted there to be a realistic prospect of conviction in terms of numerical probability, often citing the 51 per cent chance of conviction meaning the evidential stage had been passed:

*Well, I suppose the Code's right when it says you need to have a 51 per cent chance of getting a conviction or not. (Prosecutor 13)*

One drew attention to the 51 per cent as being a useful tool in marginal decisions on whether to prosecute:

*Well... if it's a huge drugs conspiracy and you've got a Mr. Big...and very often Mr. Bigs are very careful, and they are not out on the street dealing. So, it's all about phones and interpretation of phones, and you know that the investigation team have been after this guy for ten years, and very often if it's absolutely there ... well, it's 50*

*per cent, or 49 per cent, 51 per cent, I will go with 51 per cent, and I will prosecute.*

*(Prosecutor 06)*

Other prosecutors rejected the notion of a 51 per cent threshold and suggested that they used a higher threshold in their decision-making:

*I don't know what the actual percentage would be but it's not 50 per cent, it's greater than that, I know that...it's a much higher threshold. (Prosecutor 16)*

Some prosecutors (3) said that they considered the realistic prospect of conviction test to mean that the case was evidentially strong such that they were confident of securing a conviction. For instance, a prosecutor in a magistrates' courts team said:

*It's clearly not up to the 90 per cent plus that we have to secure a conviction upon, that's a much higher test. It's clearly more than 'I'm getting past half-time', which the test for that is might a jury, properly advised, convict? So, it's somewhere between the two. (Prosecutor 31)*

Finally, a group of prosecutors described the evidential stage in terms of a movable line that in different circumstances or with different prosecutors, might change. This prosecutor felt the demands of the evidential stage altered depending upon the case:

*My current concern [is that] a lot of the early decision-making is made by people who don't go to court. I don't think that that allows the realistic prospect of conviction to be properly assessed. It's not a line in the sand, it's a moveable feast, and*

*understanding where it moves and settles in any particular case does depend on how is that going to pan out at trial. (Prosecutor 29)*

Another felt it varied with individual prosecutors:

*You'll get different lawyers applying the evidential test differently, you'll get different lawyers choosing different counts, thinking some counts, some charges are made out, other counts aren't. So, yes, it's borne out of the fact there's no strict guide in the Code I suppose, but as I say, it's the evidential test, it's your application of what you do really. (Prosecutor 21)*

Finally, one prosecutor candidly described how they approached the issue of evidential sufficiency in cases where the evidence may not, in fact, be sufficient:

*You try and start with the evidence and see if you can build that provable case...I mean, there was one I prosecuted, 2014. I still think I was right to prosecute him. Although, in the end, people decided there wasn't enough evidence, but he was a proper dangerous bloke. Sometimes, occasionally, you might get a person sitting here, admitting they've prosecuted someone who is a proper dangerous bloke. When, perhaps, the evidence was a bit iffy because you just knew that he needed doing. (Prosecutor 14)*

Just as prosecutors offered multiple interpretations of the evidential stage, so too did they offer multiple interpretations of the public interest stage. 26 of the interviewees addressed the

question of how they interpret the notion of the public interest in the Code. A range of views were put forward, with no clear majority view emerging.

The most popular description (8 out of 26) of the public interest was an appeal to what ‘the man on the street’ or the ‘average citizen’ would think about the case:

*Is it in the public interest? Is it in the interest of citizens around us to prosecute this person for this offence? Might an ordinary person in the street think it needed to be prosecuted? I do try to think in those terms. (Prosecutor 31)*

*Does the person out on the street think that this person should be prosecuted I suppose? If you really want to whittle it down. Yes, you’re looking at it from the member of the public’s perspective really...I think that’s how I look at it. (Prosecutor 26)*

Around a fifth of respondents (5 of 26) said that the perceived interests of the victim were foremost in their interpretation of the public interest (recalling the influence of the wider political and social changes across criminal justice that have seen the role of the victim become more central):

*I would say the public interest begins with the individual victim, if there is a victim in the case, which pretty much puts public interest there satisfied, unless then something happens and the victim. (Prosecutor 32)*

For some prosecutors (4 of 26), the wording in the Code appears enough.. They explain ‘the public interest’ as what is written in the Code:

*There’s the Code. Take it on board. Think of examples and apply it in the first instance. What’s their automatic reaction? Does that fit in with what the Code says? (Prosecutor 25)*

*To some extent provided you show compliance that you’ve looked at the things that you’re told to look at. (Prosecutor 11)*

The next most common (3 of 26) interpretation of the public interest was explained as a sense of what the press would make of the case:

*I couldn’t encapsulate it in a nice one liner if that’s what you’re saying. I mean the public interest is the public interest isn’t it. What would, I suppose you could say, I once used the, what would the Daily Mail reader, if I didn’t prosecute this case what would the Daily Mail readers say. That’s quite a good test. They’d be up in arms wouldn’t they, and you could, that’s a way of looking at it. What would the Daily Mail readers say? (Prosecutor 16)*

*Well in that scenario I profoundly hope that during your various conversations someone has mentioned to you the Daily Mail test. It’s the point where if the tabloid papers get hold of it [they would ask whether it] is...a proportional use the public money or is it just a waste of public money...? (Prosecutor 18)*

Three prosecutors relied on their own sense of ethics and judgment, forgoing any externally reference yardstick to measure the public interest and taking a personal view:

*I think the true answer is probably my own ethics, actually. My own morality and what I think is right and wrong. (Prosecutor 13)*

Another experienced prosecutor brought together the point made in the earlier section about the introduction into decision-making of a prosecutor's own life experience with the consideration of what in in the public interest:

*I think it's the public interest as I perceive it. As a [x]-year-old [gender], who's had a fairly pleasant life, grown up in a fairly middle-class environment. I will prosecute it from what my perception of the public interest is, which I'm assisted with because I've seen a lot of life and seen a lot of cases...I think your reference point for what is right and wrong does depend on your background and your experience. (Prosecutor 09)*

Another Crown Court prosecutor explained how lack of detail in the Code led to a reliance on one's own sense of right or wrong:

*So, assuming cases like that, robberies, burglaries etc., that generally is met with my review being very brief. So, I guess I've never thought what works in terms of what you're actually doing there, what are you asking yourself. Who is the public? What are the public? Why? Who would you ask that question of? I guess it's just my view of what I think is right or wrong I guess...it's born out of the fact there's no strict guide*

*in the code I suppose, but as I say, it's the evidential test, it's your application of what you do really. (Prosecutor 21)*

Finally, one prosecutor drew a distinction between what interests the public and what is in the Public Interest. They struck a more detached and paternalistic view of what is in the public interest:

*I think public opinion could be quite negative on something that is in the public interest [to do]. So, something could be for... I suppose, it's like us saying, we know what's in your best interests and we know how to best protect you, by prosecuting this person but that might not be the most popular answer to a section of the public. (Prosecutor 10)*

Overall, there was no consistent view of the public interest, only a range of competing interpretations and definitions. Two similar cases might be treated differently depending upon whether the prosecutor holds, say, the complainant as central to public interest decisions, or rather decides cases according to their own ethics or perhaps a notion that public order must be maintained.

#### *The two-part Code Test*

Prosecutors in 16 of the interviews were asked about the sequencing of their decision-making and whether they followed the decision-making processes set out in the Code by considering the evidential stage first and then only if that is passed moving on to the public interest stage.

Most prosecutors (11 of 16) reported following the sequential mechanism, as this prosecutor said:

*So, it's always, like I say, it's starting with the evidence and is there any evidence and if there's not well too bad. The case goes out the window, serious or not, and then move onto the public interest. I suppose I go through the steps as they have them in the code. I hope I do. I try to. (Prosecutor 03)*

Another lawyer of ten years' experience, specialising in pre-charge advice said:

*It's just the application of the evidential code first, obviously. Most cases will fail or succeed on that part of the Code and then obviously apply for the public interest test on that, as well. I suppose you do have both in mind at the same time, but I would say I mainly will do the evidential code first then the public interest. (Prosecutor 34)*

Three prosecutors reported focusing on the evidential stage far more than on the public interest stage. One prosecutor from a magistrates' courts team said:

*I think the reality is, we address the evidential issues, sort out those, make sure that all of that is in order. Be satisfied it's in the public interest and indicate that we know it is without necessarily going through the same lengths to show that in a review. (Prosecutor 20)*

Another prosecutor echoed this, suggesting that they focus less on justifying the public interest decision if the evidential stage has already been passed:

*Certainly, if I dropped a case on a public interest ground, it would be more detailed in the final review. But at each stage...as we go towards trial it would be a light touch, I suppose, in terms of public interest. You use a line of text. (Prosecutor 01)*

Two of the 16 prosecutors suggested that in practice the two tests are, in reality, considered concurrently rather than sequentially. A young magistrates' court lawyer who had joined the CPS as a paralegal said:

*I definitely think there probably is an element in reality of considering them both at the same time when you are dealing with these sorts of less serious cases, smaller files, you hear the material's there, often there's just two statements. So, it doesn't take very long to condense that down and to get that into your mind. And so, I will always be looking at the evidence first. I guess, in most circumstances when it is such a small case, that public interest question is always there, and perhaps you're doing that as you go so you don't necessarily need to consider them separately. (Prosecutor 22)*

Another magistrates' courts lawyer said:

*I think they kind of work in tandem...You're supposed to have a sequential process, but I don't think in reality it necessarily happens like that. And sometimes you consider, yeah, we might have a case. It's not the best case. But then you go onto the public interest, and you think, 'Oh, actually, yeah, I don't think it's in the public interest', and actually you might use the flakiness of the evidence, but the backing of*

*the evidence isn't the strongest. So, maybe figure the fact that we shouldn't prosecute. So, I think, conversely that can ... the sufficiency of the evidence, if it's not as strong as it could be, figures not prosecuting the public interest. (Prosecutor 27)*

#### *Use of supporting guidance in prosecutor decision-making*

As discussed in Chapter 2, there exist a series of supporting documents to the Code, called policy guidance notes. Four prosecutors made some mention of the guidance during their interviews.

Three prosecutors mentioned the guidance during their interviews. Two described using the guidance very much in a subordinate manner to the Code in the case decision-making. One of the two said, when asked how, in practice, they use the Code in their decision-making, the prosecutor said:

*Every time because, to be honest. I think we've got various policies with regard to charging, or various tests. At one point, there was the merits test that was to be used in RASSO cases and that isn't to be used anymore but central to charging is the code for crown prosecutors but prosecuting, full stop, which hasn't changed, substantially, in the time that I've been here. As much as you can have good policies and other considerations, I think that is always my central focus in weighing up the evidence. (Prosecutor 10)*

The second said that they used the guidance. They said:

*[T]here's certain sort of policies, you know, so if you've got a mentally disordered defendant, then you should be applying that into it. But I'd still be making a view on*

*the evidence, and then start looking at the characteristics of the people involved about how I was going to deal with it. (Prosecutor 28)*

Another also mentioned actively considering the relevant guidance alongside other considerations when considering the bounds of their discretion as a prosecutor. When asked if they feel they have a lot of discretion in their decision-making, one said that the guidance documents are one part of the picture, alongside the Code and the evidence in that particular case:

*I've got enough...I've never made a decision where I've felt, oh, I wish I could have made a different decision but it's not within my remit. I've always felt comfortable and confident with my decision. So, I figure that means I'm given enough scope to make a different one. If you can justify it, with the code, with the evidence, with the policies, someone else may well have made a completely different decision but you're not going to be hung out to dry for it unless you've gone completely cuckoo.*

*(Prosecutor 04)*

The final prosecutor to mention the policy guidance during interviews indicated that it was not a particularly important factor in their consideration:

*I don't feel pressured to make a decision in one direction or the other... by our CPS policies and constraints. (Prosecutor 17)*

### **What do prosecutors believe is important when making a case decision?**

The second research sub-question was 'What do prosecutors believe is important when considering a case, and why?'. The following section explores the range of wider issues that prosecutors said in interview that they consider when making a case decision.

*What are prosecutors aiming to achieve?*

Prosecutors were asked simply to explain what it was they aimed for when making a prosecution decision. Over a third (10 of 27) said that they thought foremost about achieving a just and fair decision when deciding to prosecute or discontinue. This was most commonly explained as a sense of prosecuting only those who ought to be prosecuted, and often was linked to a notion that the prosecutor represents not just one side in an adversarial system but that prosecutors in fact had a wider commitment to justice as a whole – a position suggestive of prosecutors working within Packer’s (1964) Due Process model.

The following two quotes are fairly typical of the ten responses received:

*Justice, I suppose. From my perspective, I’ve always treated being a prosecutor as being someone in court who is fair and independent, and ... it sounds corny, but to ensure that justice is working smoothly and fairly. I observe prosecutors who I think are more of a persecutor perhaps. I think that’s the wrong approach. (Prosecutor 27)*

*Justice, I think, for the... make sure the right person is punished for whatever crime they commit and justice for the complainant.... I mean, defence are there to defend and they are wholly and solely there about that, we’re there to make sure that justice is done, whether that be for the defendant suspect or the complainant, depending on the weight of the evidence. Clearly, if the evidence is on this side, then that’s right, we should charge it and carry on, but if it’s not, then we should say no, we’re not charging, it’s not right, it’s not fair, move on. (Prosecutor 19)*

The next most common answer to the question of what prosecutors were trying to achieve when making prosecution decisions was that prosecutors were trying to achieve an outcome for the victim in the case, once again harking back to the wider political and social changes and the rise of the victim over the last 30 years. Seven of the 27 prosecutors reported victims as being central to their thinking in a case. One experienced magistrates' courts lawyers said:

*It means, in practice, security - the right result for the victim...Ensuring some justice is done for the victim...If you've got a victim in a case, what you want to do and hope to be able to do is, you want to put through the best case for them, and ensure you get a conviction on their behalf. That's the nub of the job if you like. (Prosecutor 20)*

And this member of a Complex Casework Team said:

*To seek justice on behalf of victims, to punish people who can be proven to have done something wrong. Where there is evidence to make an assessment of whether it is right to prosecute those people, to punish them or bring them to justice. (Prosecutor 09)*

The third most common theme to emerge when prosecutors were asked about what they felt they were trying to achieve was that of the symbolic value of prosecution and the need to mark or demonstrate that something is not acceptable behavior. The symbolism of a prosecution – showing the action is not acceptable to society – was important to prosecutors. Five prosecutors alighted upon the symbolic value of bringing a prosecution, for example:

*It's also just having something marked, that it's happened. Having something before the court as recognition that an offence has happened and it should be noted. It should be on the defendant's record so that people know what they've done.*

*(Prosecutor 24)*

*It sounds trite but justice is what I'm looking for. If somebody commits a crime, then it's right that that be, in the first place, acknowledged. (Prosecutor 13)*

One of the five prosecutors drew a sharp distinction between the symbolic value of launching a prosecution and the need for any particular punishment at the end of the process:

*It's not all about punishment, actually, because sometimes you're prosecuting, and you know that not much is going to happen to this person, but that's not the punishment. The punishment isn't my decision, and whether to prosecute is my decision. And even though I know that the punishment in some cases may not be substantial, the actions of that person have to be marked by a prosecution for different reasons, and sometimes it's the victim. The victim has to see that we have taken that complaint seriously, and we have felt their pain, and we think that what was done to them should be marked by a prosecution. And then, if at the end of the day a judge decides that because this person's ninety-five, and shouldn't go to prison, that doesn't necessarily mean that it wasn't right to prosecute them. (Prosecutor 06)*

Four of the 27 prosecutors described how punishment for wrongdoing was their primary aim, and saw punishment as having a role in regulating society and maintaining public order, as the following quote illustrates:

*I think it's about regulating society basically, that's what I think it is. I think it's ... my job is to put the people in court where they should be answerable for what they do.*

*(Prosecutor 28)*

Others in this group of four spoke more directly about how punishment was the main aim of their prosecution decisions, so echoing Packer's (1964) Crime Control model when asked what they were trying to achieve when prosecuting someone:

*Again you're back to the rule of law I suppose. If someone has committed an offence they are meant to be punished for it.... basically punishment and the record is reflected that you then get to see the character of somebody. (Prosecutor 05)*

*Probably some form of justice for the victim, some form of punishment or deterrent against the defendant, or trying to get him locked up. (Prosecutor 08)*

Both of these latter quotes carry the heavy implication of defendant guilt, and no sense of Packer's 'due process'. Finally, one prosecutor explained that they felt they were trying to change society for the better when making case decisions:

*We try and change society, really, I think, in the [Rape and Serious Sexual Offences Team] by encouraging society [to accept] that these bad things happen, whether we like to accept it or not. (Prosecutor 14)*

### *Altering other's decisions*

A prosecutor may choose to alter the decisions of a police officer or other prosecutor in two main instances: in a police-charged case that concerned a minor offence for which the police can take the initial charging decision<sup>57</sup>, and cases that had been charged by another CPS lawyer working in the out of hours CPS Direct service before it was passed to an Area for a full review. Prosecutors were asked whether they felt comfortable altering the prior decisions of others, either those of the police or fellow prosecutors. Prosecutors were also asked whether they felt constrained in their decision-making in light of other decisions, or whether they felt able and justified to alter prior decisions, and if so, what they did about it.

Fourteen interviews touched upon this issue and views were mixed. A third of prosecutors (5 of 14) emphasised the importance of consistency between decision makers on a case and reported that they would not usually change a prior decision made by someone else, even if they realise they may have come to a different initial decision. They limited their cause for altering a decision of others to those decisions that they found to be manifestly wrong (a fairly narrow scope). The following two quotes from prosecutors make clear that these prosecutors try to remain consistent with the prior decision made by others:

*Normally, if they're charged by someone else, in Area, they're pretty sound decisions that I would agree with. (Prosecutor 10)*

*Somebody else may disagree, and often we get some of our lawyers in my team who have made a decision and I say, 'Maybe I would have done it the other way', but*

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<sup>57</sup> Charging (The Director's Guidance) - sixth edition, December 2020 | The Crown Prosecution Service (cps.gov.uk) – see para 4.3.

*actually I can see their point. Because it's not manifestly all wrong, I'm not going to overrule the decision. (Prosecutor 19)*

For some prosecutors, the point in the process at which the further review took place mattered. The reluctance to alter a prior decision was sometimes related to reviewing cases just prior to going into court, so time was limited even if an alteration were desirable. One said:

*I think if somebody's looked at it, they would have looked at it more closely than I have had an opportunity to, not last thing before court! So, I think that's important, and actually, that's a very useful tool for me sometimes when you're having pressure from, perhaps, the District Judge or from the defence who try and do something, and you say, 'Well, actually, it's been fully reviewed by a colleague, they have taken this view, I stand by that view, and I'm going to stick to my guns' ...If it's about a decision and neither decision is particularly wrong and then the decision taken by a colleague, I don't think it will be right for me to decline that because my decision is different...Just because someone's made a decision down a certain path, it doesn't mean that I should change that to suit my own purposes. (Prosecutor 22)*

Most prosecutors, however, were less focused on being consistent with others and more willing to alter prior decisions. Nearly a half (6 of 14) said that they would feel comfortable altering the charge decisions of fellow prosecutors. For instance, a young prosecutor working in the magistrates' courts team said:

*In cases that have been charged before I receive it, I have to consider whether we can definitely prove the charges that have been charged, and quite often I change charges because I think ones fit better, from the evidence or maybe easier to prove whilst still reflecting whatever the case is about. (Prosecutor 01)*

A very experienced Crown Court lawyer agreed:

*It is a chain of decisions, yeah. It's very interesting because I think I'm a very good lawyer, and I think that I generally, and I've got to be very careful what I say here, but I think, I'm confident in the quality of my decision-making. And I'm confident in the quality of a good percentage of my colleagues' decision-making, but there are fellow colleagues who are not so confident in their decision. So, it's horses for courses, and charging lawyers ... charging is a difficult thing because you have a very short space of time to make a charging decision; there's a lot of pressure on them to make decisions in a short space of time. And I'm frequently correct, I say correct, and I'm altering charges all of the time...I'm changing things all of the time. Or I'm suggesting further charges, or I'm questioning why this charge or that charge wasn't considered. (Prosecutor 07)*

In addition to the six that said how they would willingly change a prosecutor's prior decision a further three prosecutors said that they often look to alter the charging decisions made by the police, as described by this prosecutor:

*I think one of the hardest things about making prosecution decisions, particularly because, inevitably, people come from the police, is that what we get is already a pre-*

*existing suggestion of what a particular incident should be, in terms of a charge. I think, as an organisation, sometimes we can fall down having that approach, because if the police have got it wrong in the first place, then we then inherit that and get it wrong, as well. So, I think the most important thing really is just to take a step back from whatever the facts are, have a look at the incidents, and think, 'Actually, yes, the police are considering charging X, Y, Z,' but just almost forget for a second that they've made any of those suggestions. What would I say is the most appropriate outcome or what's the most appropriate description for this in terms of a criminal act, if there is one? So, really, it's just getting down to seeing exactly what it is that's happened, and then applying those facts across to a legal framework, to find a proportionate and suitable charge for it. (Prosecutor 02)*

#### *Taking account of local and national issues*

Prosecutors were asked how they consider local issues and balance the need to respond to local issues against the need to provide a measure of consistent decision-making as part of a national prosecution agency. A large majority of those that addressed the topic (9 out of 11) reported paying attention to local issues and altering their decision-making processes accordingly.

An experienced charging lawyer currently working in a magistrates' courts team explained how they would alter their approach to decision-making to take account of a local issue, and explained this as being part of the public interest consideration:

*[I]f it's prevalent in the community, if there's a particular offence that... so for example, in the city centre of [Area] there's a problem with professional beggars. So,*

*by itself you might think, well, begging, there's no need, but there will be... the police are providing information about professional beggars, and so there's a public interest need because it's such a problem in the city centre. (Prosecutor 30)*

A deputy Chief Crown Prosecutor echoed this:

*I think that's knowing the issues in your Area, that it's knowing the issues in terms of your stakeholders and working with the Police. So, in my very first Area, there was an issue in relation to theft from churches, and [Area] was an Area where there were a huge number of churches in rural locations, and you know, we had a relatively hard-line approach to people who, you know, caused damage to churches or broke into them, or steal things, etc. I suppose that was a local issue. So, if we had youths, young people doing it, they're more likely to be prosecuted in [Area] doing that, than perhaps somewhere else, like in [mentions an urban Area], or somewhere like that. (Prosecutor 15)*

Prosecutors often identified local issues, following information from the Police. An experienced lawyer of over 20 years' service described how the information from the police is joined with their own local knowledge to identify local issues:

*[The police] make you aware that that's a problem in that Area, but generally...I mean, for example, I've been doing Courts in [Area] for nearly 25 years. I know what the problems are in that Area. Again, with [Area] you know what the problems are. (Prosecutor 05)*

Another prosecutor spoke of altering their decision in response to the priorities of the local Police and Crime Commissioner:

*In relation to some things, it's the police so in relation to city centre crime like that, like begging, drunk and disorderly it would be the police. You might get, I mean here [the Police and Crime Commissioner] has a particular interest in violence against women and girls and [the Commissioner] has driven quite a lot of work in relation to that. And I think from that the police have kind of prioritised DV so again we're trying to proceed with cases where in the past probably, I mean we've shifted on from the 'this is a domestic and you don't deal with it' you know very much gone past that.*  
(Prosecutor 23)

Another emphasised taking into account the views of the local populace:

*Well, there is a lot of, because of course we've got quite a few prosecutors from the [area] who understand [the area]. If I say [area] mentality, do you know what I mean? I don't mean that in disrespectful, but for example in [Area] Crown Court the juries there are extremely reluctant to convict anybody for a violent offence. Now, if you talk to people from [Area] it's quite a common occurrence that people start fighting in [Area] of an evening after having a few drinks and most people on the street probably don't think that it's something that you should be criminalised for so for example, that, but again it's still not going to stop you prosecuting.* (Prosecutor 26)

National issues were hardly mentioned in relation to consistency, with only one of the 11 prosecutors mentioning national issues, and even that was in relation to local issues. This prosecutor, who had had worked for the CPS since 1986, spoke of the effect on prosecution decision-making of 'national' events far from the CPS Area they worked in (this prosecutor worked far from London):

*You know, so there is an attempt I think to always try to consider what is going on. And I think our prosecutors will be quite good at asking for the basic level of information. But you know yourself when the riots kicked off in London, the chances are all of that's going to be prosecuted, even if you're doing a small thing in that, because it's part of a bigger picture. So, it is making sure you've got the information in place around what is the whole picture here. (Prosecutor 28)*

#### *The role of cost in prosecution decisions*

Prosecutors were asked how they consider the issue of cost of prosecutions in their decision-making. Most prosecutors said that they took cost into account when considering how to proceed on a case (14 of 17 responses):

*Well, it's a factor that you have to take into account along with other factors. We're a public department. It's not our money, it's the taxpayer's money. Is it worth pursuing this particular matter to the nth degree, given the cost that it would, it wouldn't be the sole factor but it's something that you would have to bear in mind? (Prosecutor 16)*

*We're told to keep an eye out on costs, and I do keep an eye on costs because it's public money and we should not be spending public money without thinking about*

*how we're spending it, which is absolutely right. I've noticed, certainly with police forces that we're dealing with, they're very much more cost conscious now, and sometimes there is almost a tension between I'm saying, 'You've got to get this evidence', and they're saying, 'It's going to cost us £5,000', and I'm saying, 'I'm sorry, you've really got to get it.' And so, we do think very hard now. We think harder than we did 5-10 years ago about cost. (Prosecutor 06)*

*[I]f, for example, two weeks before this case reached court, he got a suspended sentence for the next 12 months and this is theft of cheese, yes fine. What's the point? He's going to plead not guilty. I'm going to spend £1,500 of the public's money in order to not get anything more than a suspended sentence. To the victim of crime, terribly sorry, but... (Prosecutor 18)*

Some expressed uncertainty as to how cost effectiveness should play into the decision:

*I once defended a woman for theft of three pounds twenty-two [pence] worth of cooked chicken from the supermarket. And we had a Crown Court trial that lasted three days. And I think it cost the public purse about £15,000 to prosecute this person for theft of £3.22. But the problem is, if you don't, the whole world's going to go out stealing £3.22 worth of chicken. I think it is important. I think [prosecution] is expensive. But I don't think money can be the be-all and end-all of decisions to prosecute or not. I think that if you always weighed it up in financial terms, you'd hardly ever prosecute. (Prosecutor 06)*

Four prosecutors said that cost did not play a large (some said any) any part in their decision-making. Cost effectiveness was somehow in conflict with fairness to the victim, as this prosecutor suggested:

*I think it's left to judgment, yes, your own personal judgment, and I think it's case specific...I tend to consider the effect on the victim...cost I think is not an issue, ever, but I think it is very case specific. So, I couldn't say to you, well, this is the most important thing to me, I think it is just very subjective and it depends on the case.*  
(Prosecutor 19)

Yet on this issue, perhaps more than all others, prosecutor views were strongly expressed. Those prosecutors – in the minority – who claimed that cost played no part in their considerations spoke strongly in support of this view. Two suggested that cost effectiveness did not impact their decision-making because of ignorance as to what the cost of the of prosecution action might be:

*I think you try to reach your decision, I'm sort of going around the houses, but I guess you try to reach a decision on your own knowledge and where necessary factor in what the victim might think of it. Yes, the cost of things weighs into it, but I have to say I've not ever really thought, 'Oh crikey, it's going to cost £X,' because I don't know how much it costs. I don't know this trial is going to cost £X to run. It's not quite frankly at the forefront of my mind when I decide whether or not that offence should proceed. (Prosecutor 21)*

*Until five years ago-ish we were told not to [take account of costs]. It was not part of a factor for consideration. (Prosecutor 18)*

### *Accountability*

Prosecutors were asked who it was they felt they were accountable to when making a case decision and they responded with a range of views.

Across all the answers given to the question of who CPS Prosecutors worry about most when making a difficult case decision, the most common response given when prosecutors are asked about accountability for decision-making was that prosecutors worry about victims (7 of 12 responses):

*Not management...I'm not worried about what they'll say, I'm worried about the impact on the victim...And that's why there have been occasions when I'm not really sure about how to do things, when I have felt it's necessary to speak to them in person. (Prosecutor 22)*

*The victim and the family. Very much so. Your boss is going to say something, but you're not going to get your head chopped off for that, but if you made a mistake and who's really going to suffer from it? The damage you can do in a community when something's gone wrong. Not many go wrong, luckily, but yes, that's the driving force. (Prosecutor 29)*

*In my mind my main aim is always to satisfy victims and witnesses. If there's a victim that's disgruntled then that is of paramount importance but always I have to make*

*sure that the response that I give is also going to satisfy those who are senior to me as well and that it's pitched in the right way, and that it's sensitively and responsibly drafted but yeah, I mean our main commitment is to victims and witnesses.*

*(Prosecutor 26)*

Within the group of those prosecutors who mentioned victim issues as being at the forefront of their minds when considering a case decision, two prosecutors mentioned the impact of the VRR scheme specifically. They first mentioned that the scheme had the effect of increasing the level of scrutiny of decisions to discontinue cases:

*[When] you're at a stage [of considering whether the case is in the public interest] you've already consulted with the victim via Police, and you've got a steer as to what they think about the case anyway. And if they're absolutely adamant the case should continue I'd probably put a lot more detail in the review to justify why it isn't.*

*Because quite often, these days especially, more recently we've got VRR, Victims Right to Review case, and things like that, so I suppose more now than in the past you get maybe more scrutiny of your decisions. (Prosecutor 1)*

And another mentioned the possibility of a later VRR decision as one of the factors they take into account alongside others. When asked how they know they've made the right public interest decisions, they said:

*Well, experience. Is there a challenge to it? So, you know, challenge through VRR, or appeal, or anything like that, a complaint. Have... does it comply with actually what's written in the code? Have you actually applied the theory in the code? I'd probably just say those points. (Prosecutor 15)*

One of the 12 respondents said that when thinking about accountability they most clearly felt the pressure of being held accountable to their immediate line manager:

*I think the point I was trying to make about being pulled out of the chair [i.e., being reprimanded by the boss] is if you took a view that, I guess allowing your personal views about things like drug dealers or drug users, that they shouldn't be prosecuted because actually you think it should be dealt with in a different fashion. But that would be a very different, personal approach to take. (Prosecutor 21)*

Another prosecutor, reflecting the specific and probably unique arrangement of power and hierarchy that exists in the criminal law, worried much more about being criticised in their decision-making by Judges:

*Youths... you know, all of our decisions are capable of review in the higher... high court. You know, it doesn't happen very often, but, you know, it's like when a Crown Advocate... you know, everything I did at court, potentially I could be arguing that in the Court of Appeal. (Prosecutor 17)*

Few prosecutors felt worried about being held to account by the wider public through the press. But some interpreted notions of fairness and what is in the public interest to be drawn from attitudes in the press – the 'Daily Mail Test' of the earlier section. A couple of prosecutors also identified the press as the actor they most worry about when making a difficult case decision.

*So that's how I kind of work out my necessary because the ones that keep you awake at night are the ones where you think The Daily Mail will be demanding a prosecution here. However, a sense of natural justice would say that you've got to look at what you've got on your table. (Prosecutor 28)*

*If I'm honest, more worrying is being hung out to dry later. Not necessarily the Court of Appeal. Enquiries afterwards. So, think of the lawyer who dealt with the undercover police officer that had been in a relationship with the protestors, yeah? Now, the police should have told us that but didn't, but the lawyer was castigated in the press for not asking enough questions to find out the information. (Prosecutor 17)*

#### *Attitudes toward the police*

Prosecutors were asked about the degree to which they trusted and used police information in their decision-making. This question was asked as a way of exploring whether either (or both) of Packer's (1964) two models of criminal justice process (Crime Control, and Due Process) were still useful ways to conceptualise prosecutor attitudes towards the police; the hypothesis being that prosecutor's conceiving of their role as contributing to a 'Crime Control' model might be more comfortable working closely with the police and those conceiving the appropriate role to be that of 'Due Process' may stand off the police and take a more questioning approach.

A particularly clear example of the continued use of Packer's models in interpreting prosecutor views was given by one prosecutor who described a shift over time from an attitude suggestive of the Crime Control model to one of close working with the police to one more suggestive of the Due Process model:

*I've been in the CPS for quite a long time and we've been through a number of different ways of being in contact with the police, because we went through a stage where we were meant to be buddy-buddy with them, and then we went through a stage where we were meant to be, like, standing away from them. I think it has left people slightly confused about who's meant to be doing what, with whom, and how we're meant to be. I think here in this office we tend to be on a fairly even keel with the police...[but] when I first started with CPS it was very them and us. (Prosecutor 03)*

Overall, views were split on the degree to which prosecutors felt able to rely on police investigation evidence, with 12 of 23 respondents reporting having confidence in police summaries and 10 reporting that police information could not be relied upon and instead bypassing the police summaries to review the witness statements themselves before turning to police summaries.

Most prosecutors felt police summaries of a case to be reliable. The following two quotations (from magistrates' courts prosecutors) illustrate this:

*Generally speaking, they're pretty good. We'd always need to ... we would never rely just solely on their summary, but it is a good guide in. If you're looking for a way to get to grips with the case fairly quickly within five or ten minutes, that's a good way of doing, but then if you're preparing it for trial, you're imagining having to do that trial in a way. Generally speaking, the police summaries are good. (Prosecutor 20)*

*If it's a police case firstly I'll look at the charge and see what the charge is. I'll then look at the summary the MG5 summary of the case. If it's a CPSD case, I'll tend to look at the charging lawyer's review to see what their summary is. Well, then the MG that the police have sent in if it is fairly comprehensive and then the reason behind what the Lawyer has charged; then look at what the charges are. (Prosecutor 23)*

One prosecutor (who worked in a Complex Casework Unit) suggested that the type of prosecution team a prosecutor works within is an important factor in determining their view on independence from the police:

*I think that's quite difficult because my experience and my relationships with the police have been quite different, depending on the type of work that I have done. In the magistrates' work that I've done, I had quite a hands-off relationship with the police. They send the file in; you review it if you're one of the reviewing lawyers in the office. You request via a memo everything that's outstanding and it comes to court and then, you might have the police as a witness at court and then, obviously, you discuss various things with them at court. Then, they give their evidence and that's it, really. It's since joining the RASSO team that I've got quite a different relationship with the police. It's a lot more, because the files come to you so early on, there's a lot more consultation. There's written communication, there are conferences; there are telephone calls with them that start before it's charged and then, continue throughout the case. So, I've got a lot of a more close relationship with the police now, than I ever had in the magistrates' courts' team in terms of there's a lot more collaborative working on this sort of Area than there has been in the past, in other Areas in which I've worked. (Prosecutor 10)*

Nearly half of the prosecutors struck a tone of independence from the police and reported being much more skeptical of the police case files and generally preferring to come to their own view of the case before making a case decision. The following response was typical:

*Some of them don't contain all the information, and so that's a major thing, that you can, sort of, see it there. Other times it'll contain information, which is almost, sort of, the officer's view, which isn't quite what the evidence is showing. So, that is... so, I tend to just take them with a pinch of salt and just use it as an overview, and then get what I need from the actual statements, because that's going to be the evidence; clearly MG3s and 5s are not evidence. (Prosecutor 19)*

*[I]t's the officer's view and they don't necessarily summarise the same bits of evidence as I might like to. That's how they see the case. I would prefer to hear what the other lawyer has to think about the case. (Prosecutor 04)*

Some prosecutors reflected upon the relationship between the CPS and police over a longer time period. A youth court specialist prosecutor who had been with the CPS since 1986 reflected on how attitudes towards the police had changed over time (negatively, in their view), becoming more trusting and focusing less on independence from police decisions:

*Prior to CCU and when I was a trainee barrister, when I was a Crown Advocate, the one thing you didn't read was the police summary, you read the evidence...Because certainly in volume crime cases the MG5 is summary, is very slanted, not necessarily accurate in terms of the evidence, and not a foundation on which to build a*

*case...However, of course, charging decisions are now being made on the basis of MG5s, which as an old school prosecutor makes me very uncomfortable. (Prosecutor 17)*

Finally, one prosecutor, who was clear on the need to avoid reading police summaries, reflected that to do so would inhibit later decision-making as the police summary would frame later decision-making:

*With experience I've learned not to read the police case summary first. I think that misleads and is basically based on hearsay. It's very convenient, but it's not conclusive in terms of where the case is going. So, reading the evidence itself, first, would be my port of call. The reason for that, I make my own judgement on what's there and then you're not reading the statements with some kind of intrusion in your mind, that A, B and C are linked because the police have told you. You've got to work it out from the raw material that you have in front of you, so, from that point of view, I concentrate on that to pitch our case, first of all. How strong is our case? (Prosecutor 29)*

### **Use of mental shortcuts, gut feel and intuition**

Chapter Two described the Code, including the statement that prosecutors must be objective and impartial when making case decisions. Prosecutors gave their views on whether they made their decisions wholly rationally as set out in the Code or whether in fact they made use of subjectivity or heuristic mental shortcuts.

A picture of a mixed rational and irrational decision-making emerged. Across the 23 interviews that explored this issue in detail, a minority of prosecutors (8) mentioned rationality and objectivity:

*Analytical, impartial, objective, humane, unbiased...You've got to look at a case and you've got to be incredibly objective, and incredibly open minded and just apply the Code, and if the evidence is there, you prosecute. You don't let any personal factors influence your decision-making. I can't think of anything else really. (Prosecutor 06)*

*Whether you've done it or not and I think you do have to be fair, I think you have to take a step backwards and look at it and be fairly, fairly dispassionate well obviously then we're going to go into the public interest aren't we. You have to be fairly dispassionate. (Prosecutor 16)*

*We're evidence based. So, we're rational. At least, at work. [Laughter]. Rational. You've got to be able to make judgements. So, if you're always going to be sitting on the fence, you're going to struggle because our job is all about making decisions.*

*Whether it's on the evidence. Is it strong enough? Do you need more? Could you do without this witness? Do you need that exhibit? What are you doing with this body worn? Does it take you any further, down to the public interest and other things like hearsay applications? It's all decisions, decisions, decisions. (Prosecutor 04)*

*I think you need a good analytical mind. (Prosecutor 13)*

A majority of prosecutors (15) spoke of a more subjective form of decision-making. Of these 15, the majority (11) spoke about the importance of life experience in decision-making, whilst the other 4 spoke about the importance of gut feel and intuition.

Those prosecutors who felt life experience was an important factor in their decision-making often related this back to their family circumstances:

*Well, you can see both sides. You can say a young person who is drunk and disorderly and they have no previous convictions or have not offended before. I'd probably look more sympathetic and think that could be my son. On the other hand, I would also think, well I have got a son and he does go out drinking, but he doesn't get arrested by the police for being drunk and disorderly. And also, you know, things where instances happen in a city centre and you think, that if you've got children that could be my child, so you have a different view upon that. (Prosecutor 23)*

*I've got two relatively young kids now and the stuff that involves children you do treat differently, and I realised I was doing that a lot more strongly when the nippers popped up. (Prosecutor 18)*

Some saw in the case files situations that either they themselves had been in or being able to place those close to them in analogous positions:

*Experience. Yeah, I think experience, and I've had a wide range of experience. I grew up abroad, I've had kids, dogs, animals, friends. You know what I mean? When you get to my age, you've been there, done that and gone round in a circle. So, that*

*obviously plays in any decision-making, because you're also the person that could be on the jury. (Prosecutor 25)*

*I think you have to be fair and you have to have a good... I think you have to have a good life experience, I think, personally, I always think you shouldn't be able to make any major decision in your life until you're 30 and above. (Prosecutor 19)*

One prosecutor, related experiences from her prior professional life to her ability to make good case decisions:

*I do think that life experience is something that inevitably you bring to your decision-making. I know that a colleague of mine, you know, is always very, almost, traumatised sometimes by the injuries people sustain. I'm not, because, you know, I've been in life and death situations. It's just my experience of life, and also it would be my personality, you know, I'm not particularly a dramatic person but some prosecutors find it all quite dramatic, in my experience. (Prosecutor 31)*

One prosecutor widened the definition of life experience to include where one lives and one's political views:

*I think that the individual is always going to be important. I'm a father of four kids. That's going to impact, I suspect, on some of the decision-making that I do. I'm married. Where I live, where I work. All of these things, I think, potentially impact. Even if not consciously. Sub-consciously, they simply must. My political views are likely to impact on what I think's acceptable and what I don't think's acceptable. The*

*fact that I'm left-wing means that I might make certain decisions that other people might not agree with. (Prosecutor 13)*

Some prosecutors made an explicit link between accumulated life experience and one's ability to be a good prosecutor:

*Possibly age as well, that younger people might be more, kind of, trying to think, the youth can have inexperience or might deal with things differently. Whereas somebody that's perhaps more experienced might say, well I've seen this happen before and it worked out alright or it didn't work out, so you've got the benefit of experience or inexperience. (Prosecutor 23)*

Of the 15 who suggested that a more subjective form of decision-making was common, four spoke about using 'gut feel' to build up a picture of a case, even when the information is incomplete:

*You might get a feeling, based on everything you've read...It's just I think if you put all of the pieces together, it's a bit like when you build a circumstantial case. You can prosecute a circumstantial case, very successfully but you have to have enough pieces of circumstance to lead you to one inevitable conclusion, that they're guilty. I think the gut feeling process is a bit like that. You've got to have enough little things to give you that little hunch. That when you put them all together, you have a big hunch. (Prosecutor 04)*

One described how they used their gut feel for how the case would appear to others in court:

*It was very much picking it up on the job, but I think it is quite intuitive because as I say, because it's putting it to a jury and they're laypeople and they're using their intuition and their perception of how that person's acting, I don't think it is something that can be taught. I think the rest of it, aside, how to analyse factual evidence, etc. can be taught but in terms of how someone is presenting to you and someone's coming across, I think it is just learning on the job as to what comes across better than others. But it is just your intuition as to how that person presents because that's all anyone else has to go on, as well. (Prosecutor 10)*

One remarked upon how they felt they used gut instinct in an 'unconscious' way:

*It almost becomes a little bit of a gut instinct, which is probably quite a random thing to say and maybe it's not, for everybody but a lot of the time, because of your experience and because you've been doing it for so long, somehow, it's not even that conscious. (Prosecutor 12)*

One prosecutor, who led a Rape and Serious Sexual Offences team, said that she engaged her intuition prior to considering the evidential position:

*I always call it my wrinkly nose feeling.... So, if I read a case and then I go, hmmm, that's my wrinkly nose feeling. Then, I don't like it. There's something about it which means I don't think we're going to be successful and that's the gut feeling, hunch is my wrinkly nose feeling. That's experience, I think. Seeing how cases turn out. Cases that you've taken that didn't end successfully. Cases that you've taken that did end*

*successfully, in spite of everything. So, you kind of just have to balance it up...Everybody has their own wrinkly nose, I'm sure...I still think I've got my objectivity there. I think, yes, I think that's it. I would say I'm reasonably objective because when I get my hunch, my wrinkly nose feeling, I'm probably then, looking to either prove or disprove my thesis when I'm looking at the evidence. My methodology is to review the evidence to see whether it figures or refutes what I've thought. If it refutes what I've thought, then I will un-wrinkle my nose. (Prosecutor 14)*

### **Prosecutor views on factors**

CPS prosecutors were asked to describe the factors connected to the offence or defendant that were most important to them when deciding upon a case, and why these particular factors were important to them.

#### *Previous convictions*

Three quarters of the prosecutors who offered a view (17 of the 25) mentioned previous convictions as being especially important in their considerations of a case. It was often one of the first things they reported doing when considering a case for the first time:

*That is one of the first things I do as well. I look at the summary, look at the witness statement, and the previous convictions print from the Police. But, from the offender perspective, looking at the previous convictions and considering bad character, is one of the first things I do. (Prosecutor 01)*

Previous convictions were held to be important factors for a variety of reasons. First, some prosecutors focused on previous convictions as being useful for successfully prosecuting the case. A CPS in-house advocate said:

*Whether or not he's got previous convictions is always going to be important. Because that's going to impact on whether or not I can make a character application which, in turn, is going to impact on whether or not I've got a strong case quite often for proving the mens rea that I need to prove. (Prosecutor 13)*

Second, prosecutors felt previous convictions were important in order to gain a fuller understanding of the case and the characters involved – ultimately to enable a ‘fair’ decision to be made. A Rape and Serious Sexual Offences lawyer spoke about how previous convictions helped her understand the defendant’s history:

*I'd always look at the previous history. Just to gain knowledge into the complainants that are involved...you often get defendants who've got psychiatric problems, mental health problems. Things like that, but it's very specific to that defendant. I think, in every case that I've got, the information and the type of information I've got in relation to the defendant is quite different on each one. (Prosecutor 10)*

Third, prosecutors suggested previous convictions served a more instrumental function – in this instance checking whether there were any ongoing court orders:

*Previous convictions, whether he has any... whether he's subject to any current court orders, particularly interested in, if it's a domestic violence case and there's a recent*

*battery or ABH, whether that relates to this victim, things like that. So, the previous convictions are an important point, in my view, of reviewing the case. (Prosecutor 31)*

Finally, prosecutors felt that previous convictions also help determine whether the case merited diversion from the criminal justice system. This young magistrates' court prosecutor described this use of previous convictions as follows:

*If I'm talking about a youth I want to see if there's anything that he or she has previously got. Either as convictions or cautions or whatever to see if there's been any kind of interaction with the criminal justice system, because if there hasn't been you're more going to be pushed towards trying to keep the child out of the criminal justice system and have some kind of out of court disposal, and in a way as well that does apply to an adult, because if you've got an adult who hasn't got any kind of previous record it's possible that you might be able to keep the adult out of the system. So that's a sort of starting point, is there anything previous at all. (Prosecutor 03)*

One prosecutor reported a dissenting opinion that previous convictions are not an important factor:

*So, I think that idea that, you know, victims are the goodies and defendants are the baddies, from the, sort of, 90s cop film style of approaching it, just isn't true. Actually, some of the most fascinating cases I've dealt with I guess are ones where a defendant has never been in trouble before, perfectly upstanding member of society, and then the victim in that particular case might have a lot of previous convictions. Whether that's because they have a criminal lifestyle, because they have certain*

*vulnerabilities that have led them to be committing offences, but, actually, particularly in a Magistrates' Court, I think it's very much more a case of what you can prove on the particular facts of the case. So, Magistrates don't tend to like bad character. It doesn't tend to make any impact on their decision. So, to me, seeing the defendant has a lot of previous convictions for the same sort of behaviour doesn't really signpost me at all, in terms of my decision-making process. (Prosecutor 02)*

### *Offence seriousness*

Just over a third (9 of 25) reported that offence seriousness was an important issue. In general, the view was that offences of a certain seriousness made prosecution almost inevitable and prosecutors would set their mind to building a case against defendants charged with the most serious offences. A prosecutor in the magistrates' courts said:

*It's a bit blanket to say this, but the more serious the offence the more likely somebody needs to be prosecuted. I think that probably is a fair thing to say. So, we would be looking at that to sort of see if this is something that's too serious to divert and that will be like starting, right, well that's it then. As long as we've got the evidence, we'll be prosecuting it. (Prosecutor 03)*

Another experienced magistrates' courts prosecutor held seriousness to be the most fundamental consideration:

*... If I'm not considering how serious the offence is what the heck am I considering?  
(Prosecutor 18)*

When questioned more closely on how prosecutors determined what was serious, most reported that it was the impact on the victim (and to a lesser extent on wider society) that was the gauge of seriousness, a common theme through the interview responses. The following quotations give a sense of the consensus:

*I would say there's probably a couple of things that I would say make it serious and one is the impact on the person. So, you could have something which doesn't fall into the next category but has still had a serious impact on a person and therefore, that makes it serious because it's serious for them. I would say otherwise, serious sexual offences usually involve penetration or a child or a vulnerable adult as victim and those are the things which make it serious. (Prosecutor 14)*

*I think, for me, the starting point for what makes something serious is the effect that it has on, firstly, the victim, and then, secondly, on society. I think there are certain elements to certain types of behaviour, that, clearly, when you look at them in relation to a community or society as a whole, have a significant effect, even if perhaps, in isolation, they aren't terribly serious. I think the starting point of it is the impact that an offence will have on a victim, because the victim, as far as I'm concerned, should be at the forefront of the decision-making process. (Prosecutor 02)*

*[T]here was one I was looking at the other day, and I think it was, they had been charged with criminal damage, but a neighbour dispute, and I was reading it initially thinking, 'Why are we here with this?' Until you start to get to the end of the victim statement and you realise, actually, you can see the impact it's had upon this person and how difficult it must have been for them, and how did they put up with it in the*

*last few years. And so, I think there is an element of that that comes into your decision-making process. (Prosecutor 22)*

*Defendant age: youth and infirmity*

Prosecutors reported that the age of the defendant was an important factor in their decision-making, with 13 of the 25 prosecutors identifying this. For young defendants, many prosecutors said that along with previous convictions the age of the defendant plays a substantial part in their decision-making, including whether or not to prosecute. In these youth cases, the appropriateness of diversion was foremost in the prosecutors' mind:

*How old they are, effectively, obviously the younger they are, the more immature they are, and then you look at the background and is there a better way of dealing with this defendant? If possible, with youth service intervention? There must be a better way to do it, rather than put them through the criminal system. (Prosecutor 19)*

*If it's a youth then we've got different considerations with prosecution, and whether we could divert them.... It's difficult if they're not admitting the offence then, unless it's a very, very minor, diversion is simply not possible. But certainly, if the offence is justified you would be looking at their circumstances, and if it is the case that they haven't got many previous convictions, or none at all, you have to give serious consideration as to whether we should be prosecuting, or whether the Youth Offending Team should be dealing with it or deal with it by way of a 'caution'. (Prosecutor 01)*

Infirmity, rather than age per se, was a prominent issue too. If a defendant was unlikely to be alive at the end of a lengthy prosecution, it is unlikely to be in the public interest to prosecute:

*My view is that age, in and of itself, is not a reason not to prosecute. If the offence is serious enough and it's had a significant impact on a complainant's life, the fact that somebody's managed to evade justice for a number of years isn't a reason not to prosecute. But if you combine it with ill-health... If, in the example you were talking about, it's demonstrably the case that someone has a terminal illness and they're only going to survive for six months... And, so, in those circumstances, I think the ill-health probably has a bigger impact than the age does. I've prosecuted 80-year-olds before without being concerned that I'm doing the wrong thing. (Prosecutor 13)*

Not all prosecutors reported that old age or infirmity was an important factor. One prosecutor working in a Rape and Serious Sexual Offences team and (and discussing historic sexual offences) positively dismissed old age as a factor (this is the same prosecutor who, above, stressed the need to consider diversion for youths):

*I'm the least sympathetic, I have no sympathy, none. I'm a bit too right wing when it comes to that. No, I'm a complete leftie, but no, I had an argument with one of our counsel because the man was dying of cancer and I was like... and he was old, he was 80, I said, 'I don't care, he's abused every single one of his grandchildren, wheel him in on his deathbed.' So, I don't have... we've just prosecuted the oldest person in the country. (Prosecutor 19)*

This quotation may demonstrate less about age as a factor generally and more about the emotive issue of prosecuting historic sexual offences.

#### *Victim issues*

Seven of the 25 prosecutors said that victim issues were important factors in their decision-making. This was no surprise. Injury to the victim was frequently cited as the most important factor by the seven prosecutors:

*I would probably be victim focused. So, anything that would involve an injury or yes, I think that's what I would consider to be the most serious. So, murder, serious assaults and then, crimes, I suppose, that are less victim focused, I would consider them to be less serious. Thefts, fraud, any sort of financial disadvantage. I would put that below somebody being injured. (Prosecutor 24)*

Empathy with the victim was also mentioned by prosecutors, as this quote from a Crown Court prosecutor illustrates:

*I think the starting point of it is the impact that an offence will have on the victim, because the victim, as far as I'm concerned, should be at the forefront of the decision-making process...So, to me, it's very important to almost take a step back and think, actually, there is a person at the end of this. You know, somebody's been punched in the face in a nightclub. Somebody had their purse stolen or something like that, and, actually, what sort of impact is that likely to have on them. (Prosecutor 02)*

The vulnerability of a victim increased the importance of the victim factors for one prosecutor:

*As long as we've got the evidence we'll be prosecuting it, and along with the seriousness it's going to be the effect on the victim as well, because obviously a serious offence will have serious effect on the victim, but as well if you've got a victim who's particularly vulnerable in some way, an offence that perhaps isn't quite so serious will have a huge effect on them. That's goes in tandem with the effect on the victim.*  
(Prosecutor 03)

### *Mental Health*

The next most common response to the questions of what prosecutors consider in respect to the defendant or offence was the mental health of the defendant, with seven out of the 25 prosecutors identifying this factor as important. One prosecutor was clear the mental health is one of the primary concerns:

*Well, mental health is obviously the big one for us, isn't it? (Prosecutor 28)*

Another prosecutor explored how they felt mental health issues could affect considerations around both the evidential and public interest stages:

*Oh, I suppose evidentially, there is in the sense that say, you have a defendant that has some mental impairment or something like that, then obviously, that would impact on applying the evidential test. [It] hasn't happened to me for a while but quite a long time ago, I didn't charge a boy with, I think it was sexual assault because he*

*wouldn't...It wasn't a clear cut...because he suffered from a range of conditions. He would not have understood. I don't think we could have proved that he didn't reasonably believe that she was not consenting and that was predominantly down to his mental state at the time. So, I think it does come into the evidential test, depending on the circumstances of the case and the offence. Then, public interest wise, then yes, you would take the defendant's circumstance into account. So, say you've got an 85-year-old suspect, who was unwell, then I'd always consider any representations regarding it not being in the public interest to prosecute because of him being unwell, etcetera, etcetera. (Prosecutor 12)*

When mental health issues were at play, prosecutors appeared more likely to consider diversion from prosecution. An experienced magistrates' courts lawyer described the thought process:

*I'd like to know a bit about the background of the defendant. .... But if one of the reasons he has committed it, for instance, mental health, it might be slightly beyond his control, and then obviously there are certain other types of disposals, certain other outcomes that are potentially viable for him. I think it is important to consider the wider impact on the defendant and his life, and often we will receive letters from the defence maybe after we've reviewed the case initially to outline circumstances we weren't privy to because we don't know necessarily all of these things about the defendant. (Prosecutor 27)*

The prominence of mental health as a factor in decision-making is notable because it was a factor that was unable to be tested statistically because the CPS don't collect data on

defendant mental health in a way that is easily extractable by a researcher from the data collected. More consideration of the importance of this factor, and its importance relative to other factors will be given in the following chapter.

### *Complainant credibility*

Complainant credibility was nearly as frequently mentioned as mental health and victims, with six of the 25 prosecutors identifying it as an important aspect for prosecutors.

Most said it was important as crucial to reliability in court:

*Well, first of all, it's the factual basis of the complaint but it's also how does the witness come across? Because it's the jury that's going to be watching that. So, you want to know if they're a credible witness in how they're presenting themselves. You want to watch all of them to see how they figure each other. The credibility of the complainants and witnesses, as a whole because ultimately, that is their evidence-in-chief, so you want to know how it all stacks together and how they come across to a potential jury. (Prosecutor 10)*

But not all prosecutors approached the issue of complainant credibility from an evidential or court perspective. One prosecutor, for instance, took a default position of trust:

*I mean, it's a massive, massive part of the decision-making because we start off, I like to start off when I'm making decisions, from the point of view of the victim is most likely to be telling the truth because why would they go to the police, otherwise? The police would have filtered out the ones they really think are not viable. So, if they get*

*to me, it's usually because everybody thinks this is a true bill. So, I start from that basis. (Prosecutor 14)*

The difficulty of assessing complainant credibility was raised in particular by those working in Rape and Serious Sexual Offences Units, who more often conduct pre-trial witness interviews to assess better likely witness issues.<sup>58</sup> One prosecutor said:

*I will, of course, watch the video interview of the victim, which helps to make assessments about whether the person comes across as credible. As human beings, we make judgments all the time, based on people's voices, people's appearance, eye contact they give. So, those things are difficult, sometimes, to get from the video but it's about the best you've got. (Prosecutor 14)*

Mention of making 'judgements' based on voices, appearance and eye contact also touches once again upon the role of intuition in prosecutor decision-making that was discussed in the earlier section of this chapter.

#### *Defendant's background*

The final factor identified as important was the defendant's background. Three prosecutors spoke explicitly about this. For example, a magistrates' courts prosecutor said:

*Let's say you've got somebody who is...it tends to be more people that I ought to relate to than people that have a completely different cultural background. You've got cultural backgrounds which just require a bit of education. I like to think I'm fairly*

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<sup>58</sup> <https://www.cps.gov.uk/publication/pre-trial-witness-interviews>

*well educated. Then you've got people who are from the other end of the spectrum and just don't give a shit, and they tend to be the households that I struggle to understand, and if you struggle to understand something it's quite hard to get your emotional intelligence around it. (Prosecutor 18)*

Another touched on socio-economic status, with a suggestion that people from 'certain backgrounds' are more likely to get into disputes:

*But we'll know the names. Every Area has got the families where there are certain names, or you might find you've had experience yourself of that person. But quite often you don't know much more about that person... I think there it's almost a class ... maybe it's a class prejudice. Maybe that's one way of looking at it, and maybe the other way is to say, maybe there is a certain amount of reality to it, that people from a certain class and certain backgrounds may get involved more easily in disputes... So, maybe there's an assumption. I guess it kind of comes with experience of certain ... but, quite how we make that, I don't know. So, I'm not saying people are prejudiced, and you put people in boxes, but I think you can glean an awareness of the general background. (Prosecutor 20)*

But these considerations of socio-economic factors seemed to sit uneasily with prosecutors. For instance, the prosecutor who suggested that some defendants have 'cultural backgrounds which just require a bit of education' also said that they took efforts not to know anything about a defendant's physical appearance:

*When I'm prosecuting in court, I don't even turn around... Yeah. What they look like doesn't matter... So I had one of the press yesterday, Friday rather, saying can I send you a photograph of it to tell me whether or not that's actually the defendant before I send the photograph to the press? I said, you can send it to me. I'm not going to recognise him, because no I don't turn around. I don't know if they're black, white, tall, short, fat or thin. It doesn't matter. (Prosecutor 18)*

#### *Overall conclusion*

Stepping back from the details of the individual findings allows a series of broad conclusions to be drawn from the interviews. Ten key findings emerge:

1. **Using the Code.** The majority of prosecutors use it in some way, but often quite superficially. A large minority of prosecutors report not using it at all. A few prosecutors mentioned the supporting guidance documents and supporting policies, but their use appeared limited.
2. **Interpreting the Code Test.** Both the Evidential and Public Interest Stages are interpreted in a variety of ways. The Evidential Stage interpretations range from focussing on the likely jury decision through to focussing on a 51% chance of successful prosecution. The Public Interest Stage incorporates notions of 'the man on the street', the Daily Mail Test or a sense of following one's own ethical framework.
3. **Principles.** Most prosecutors felt notions of justice and fairness were uppermost in their mind when considering a case. The victim, symbolism and regulation of society were secondary considerations.
4. **Prior decisions.** Opinion was split on how constrained prosecutors felt by prior decisions. Around half spoke of diverging from prior decisions, half stressed consistency.

5. **Local v national issues.** Considerations of local issues predominated over national issues when considering cases, and most prosecutors reported taking local issues into account in some way during their decision-making.
6. **Cost of prosecution.** Cost matters to most prosecutors and is a factor in decision-making for many. A small, but stringent minority felt that cost should play no part in prosecution decision-making.
7. **Accountability.** The victim and line manager scrutiny were the two main factors playing on prosecutor minds when thinking about the risks of making a poor decision. Scrutiny by the press and judges were mentioned by only a few. The VRR scheme was mentioned by a few prosecutors.
8. **Trust in the police.** Opinion was split on whether CPS prosecutors trust police accounts of events, with roughly half prosecutors saying they rely upon police summaries and half expressing concerns in uncritically accepting the police summaries.
9. **Rationality.** Most prosecutors reported using their gut feel and intuition when making decisions. Life experience was said to matter. Less than half claimed to be wholly rational or objective when making case decisions.
10. **Important case factors.** Previous convictions were by far the most commonly reported case factor that influenced decision-making. Defendant age then followed, then seriousness of offence. Secondary factors mentioned by prosecutors included mental health issues, victim views, complainant credibility and defendant socio-economic background.

If we are to arrive at a more realistic description of decision-making then these factors, alongside those identified in the statistical analysis need to be brought together to form a clearer picture of all the factors that are important to prosecutor decision-making. The next

chapter brings together the strands from the statistical, interview and prior research and begins to piece them together to sketch out a more realistic description of prosecutor decision-making.

## **Chapter Seven: Towards a richer understanding of prosecutor decision-making**

This final chapter returns to considering the primary research question and describes how prosecutors decide whether or not to prosecute a case. It examines what the prior research, statistical analysis and interviews have shown about the way the prosecutors make decisions. It then goes on to reflect upon some wider considerations about prosecutor decision-making. The chapter ends by suggesting some implications for the CPS from my work, and suggests some Areas for further research.

### **Pulling it all together: The ‘Surround’, ‘Field’ and ‘Frame’ of CPS decision-making**

This section brings together the observations from earlier chapters that were drawn from the prior research, the statistical analysis, and the interview observations. It considers each of Hawkins’s ‘Surround’, ‘Field’ and ‘Frame’ in turn and sets out what, for CPS prosecutors, exists in each of these parts of Hawkins’s model. These observations help build a richer understanding of prosecutor decision-making.

#### *The politics of prosecution: the CPS Prosecutor’s ‘Surround’*

Politics affects CPS prosecutor decision-making. The wider political environment is important to setting the wider ‘Surround’ within which prosecutors operate. Chapter Three showed the effects that wider political and social changes have had on criminal justice policy and practice through identifying the effect they have had on changes to the Code. These broader changes were shown during the interviews to be important considerations for prosecutors, who were shown to be aware of the political context within which they were making case decisions and spoke in terms of the wider social and political trends when explaining and justifying the decisions they made.

Three strands of the neo-liberal and New Right political agenda were identified as affecting prosecution policy and practice in particular: New Managerialism, the role of victims, and populist punitiveness. Interviews with prosecutors provided clear evidence that each of these strands were present in prosecutor minds when making case decisions. The influence of New Public Management perspective comes across clearly in discussion of costs. When asked about whether and how they take account of cost in their case decision-making 14 of the 17 prosecutors that were asked this question said that they did take cost into account. They most frequently referring to the resources they use belonging to the public and therefore needing to be managed in a prudent manner. For example, it will be recalled that Prosecutor 16 said *'It's not our money, it's the taxpayer's money'* and Prosecutor 06 reported *'We're told to keep an eye out on costs, and I do keep an eye on costs because it's public money'*. These comments were typical of the responses of most prosecutors and give a clear indication that New Public Management perspectives regarding cost-benefit, resource allocation, and prudent management of resource has to some degree filtered down to the prosecutors sufficiently that they readily offer the public purse as an important factor in their decision-making.

The importance of the victim in prosecutor case decision-making was also clearly detectable as an important wider issue for prosecutors. Whilst prosecutors most commonly (8 of the 26 asked) interpreted the public interest as 'what the man on the street' would think (a nod to populism discussed below) the second most common interpretation of what the public interest meant (5 of 26) drew on the victim's perspective: *'I would say the public interest begins with the individual victim...which pretty much puts public interest there satisfied'* (Prosecutor 32). The centrality of the victim in prosecutor decision-making was further underlined when prosecutors were asked simply to say what they aimed for when making a case decision.

Nearly a third of the 27 prosecutors that addressed this question reported that the victim was most prominent in determining what they were aiming to achieve. Comments such as *'If you've got a victim in a case...you want to put through the best case for them, and ensure you get a conviction on their behalf'* (Prosecutor 20) illustrate the importance of the victim for some prosecutors. The mention by a few prosecutors of the prospect of their decisions being reviewed under the Victim's Right to Review scheme further supports the view that victims' views are prominent in prosecutor decision-making.

There was some evidence from the interviews to suggest that notions of 'populist punitiveness' had seeped into CPS prosecutor decision-making, too, although responses from prosecutors in the interviews that referenced punishment and popular opinion were less frequent than those relating to cost and the victim so the overall conclusion must be a little more circumspect regarding this strand of the political 'Surround'.

The 'populist' aspect of populist punitiveness can be identified also. Prosecutors were sensitive to how the press might judge prosecutor decisions and factored in populist notions into their decision-making (*'[I]f I didn't prosecute this case what would the Daily Mail readers say. That's quite a good test'*, Prosecutor 16).

The 'punitive' part of populist punitiveness was also identifiable in what prosecutors reported during interview, with some prosecutors clearly stating that their role was to punish the accused (*'Probably some form of justice for the victim, some form of punishment or deterrent against the defendant, or trying to get him locked up'* Prosecutor 08) or delivering punishment in court (*'Having something before the court as recognition that an offence has happened... It should be on the defendant's record so that people know what they've done.'*, Prosecutor 24), as well

as marking wrongdoing through prosecution (*'I think it's about regulating society basically'*, Prosecutor 28).

Whilst a sense of delivering a just and fair outcome or a satisfactory outcome overall for the victim were the most common answers provided from prosecutors, these comments from prosecutors build a picture of prosecutors' understanding of their role as being, in part at least, connected to the delivery of punishment, as per Packer's (1964) Crime Control model, and as such the prosecutors seemed to reflect the perceived importance of punishment and populist calls for punishment in their thinking when making case decisions.

Thus, these three broad political factors that have affect the criminal justice system over the last 30 years are clearly identifiable as important components of the CPS prosecutor's 'Surround'. Not all prosecutors referred directly to these issues during interview. The role of costs and the centrality of the victim were often second to other considerations prosecutors mentioned - but they remain prominent enough in my fieldwork to arrive at the conclusion that New Public Management, the victim and notions of populist punitiveness form part of the CPS prosecutors' 'Surround' and therefore have a role to play in helping us understand better the components of prosecutor decision-making. This conclusion, drawn from interview data, is in accordance with what prior research would suggest is the case, for instance. The work of Garland (2001), Hoyle and Zedner (2007), Hoyle (2012), Clark et. al. (2000), Bottoms (1995), and Matthews (2005), also suggested that this was likely to be the case.

Ultimately my fieldwork has uncovered some evidence to suggest New Public Management, the victim and notions of populist punitiveness appear to play an important part in the

decision-making of prosecutors in 2016-17 (when the fieldwork was undertaken) and so is likely still to be a factor in understanding how prosecutors decide whether to prosecute or discontinue a case. These findings show just how far the CPS has moved on from its 1986 beginnings and how CPS prosecutors have adapted and changed their perspectives in response to wider criminal justice changes. The wider social and political environment will not stop moving and developing and the Code and prosecutor views are likely to continue to evolve with them.

*(Not) Using the Code: the CPS prosecutor's 'Field'*

Chapter Two critiqued the Code and argued that the Code presented an idealised view of how prosecution decision-making happens that was not, in fact, a realistic one. It argued that prosecutors make decisions in ways that are different to the strictly rational description set out in the Code. Following Lacey (1992), this was termed the 'law in books' approach, contrasting with the 'law in action' approach.

The interviews and statistical analysis suggest a wider view of prosecutor decision-making should be taken than that set out in the Code in order to understand more deeply the complex phenomena of prosecutor decision-making.

There was strong evidence to support the arguments that the Code is not always used in the way it is supposed to be used by prosecutors, and that therefore a wider view is taken.

Chapter Six showed that for many prosecutors, the Code was not prominent in their decision-making, for instance: *'we don't sit there looking at the latest edition [of the Code], and I personally wouldn't change my approach for slight changes in the wording in the code'* (Prosecutor 31) or *'when you're actually reviewing a case you don't think to yourself at the time what does the Code of the Crown Prosecutor say'*. (Prosecutor 11). This supports some

of the prior research literature. For instance, the suggestion that prosecutors make variable interpretations of the Code and do not always follow the strictly sequential process of decision-making set out in the Code Test echoes the findings of Hoyano et. al. (1997). What is true of the Code seems to be true of the supporting policy guidance documents too, with only a few prosecutors being moved to mention the policy guidance when asked what they consider when making a case decision, and even then speaking of the policy guidance in fairly bland terms as one of a number of factors, or when checking whether a decision is likely to be considered ‘off beam’.

The statistical findings in Chapter Five provide some measure of support for this position too, although less strongly than the findings drawn from Chapter Six. The statistical analysis showed that certain factors, such as seriousness and previous convictions seem to matter much more in determining case outcome than other factors. This overall picture from the statistical analysis, then, suggests that some specific factors (listed in the Code) appear to influence prosecutor decision-making more strongly than others. This does not fit neatly with the ideal model of objective and rational consideration of a number of different, equally weighted factors as presented in the Code. Additionally, some factors that are (of course) not listed in the Code, such as prosecutor and defendant ethnicity, have some influence on case outcome. There are good methodological reasons, discussed in Chapter Four, to treat the statistical findings here with caution, which is why the primary place in the findings is accorded to the interview observations, rather than the statistical findings.

Yet it would be wrong to overplay this argument. The fieldwork did not support a position that the Code was *wholly* irrelevant to prosecutors; many prosecutors use the Code in their decision-making and some report using it in the way that the Code suggests they should. For

instance, a prosecutor described the first steps in their decision-making process in this way: *'There's the Code. Take it on board. Think of examples and apply it in the first instance. What's their automatic reaction? Does that fit in with what the Code says?'* (Prosecutor 25). And another talked of constant referral back to the Code: *'If I'm doing charging advice, I will literally refer to it in the charging advice and look it up. So, I don't just do it off the top of my head. I just constantly refer back to it if I'm doing charging advice'* (Prosecutor 12). Not only do some prosecutors report using the Code text extensively in their decision-making, but they also report thinking about cases in the objective and rational manner described in the Code. Prosecutor 06 said that to be a good prosecutor one must be *'[a]nalytical, impartial, objective, humane, unbiased... You've got to look at a case and you've got to be incredibly objective, and incredibly open minded and just apply the Code, and if the evidence is there, you prosecute'*. There was evidence too that the sequential process set out in the Code test is followed by some prosecutors, for instance: *'I suppose I go through the steps as they have them in the code. I hope I do. I try to.'* (Prosecutor 03). The point is that interview data suggests it would be wrong to take the analysis made in Chapter Two and overextend it to conclude that the Code is wholly irrelevant and wholly idealistic in its description. Some prosecutors use it as it is 'meant' to be used; the Code is not just 'law in books'.

One important theme to emerge from the interviews was the use of the Code in terms of compliance, with four of the prosecutors suggesting that the Code is used as a means of checking that a decision, once formed in the prosecutor's mind, is consistent with the letter of the Code in order to avoid later challenge (*'It's almost like a little safety net, if that's the right term, but it's sort of a safety net'*, (Prosecutor 25), or *'It's something to hide behind I suppose, isn't it?'* (Prosecutor 16) and *'You get people quoting these things back to you. And if you're not careful, and you answer using different words, then you're getting yourself into a*

*knot*'. (Prosecutor. 28). This is a different conclusion to that drawn by Hoyano (1997), who said that 'most prosecutors seldom use the Code' (p. 558). My evidence suggests that prosecutors use the Code (and also the supporting policy guidance documents) more than 'seldomly', but in a rather narrow and instrumental manner.

A prosecutor's 'Field' contains more than just the Code. The 'Field', according to Hawkins, also comprises wider factors such as the organizational context, the office politics, the culture of the different offices, the hierarchies, and the local opinion leaders. I focused on the Code as it was a prominent part – perhaps the main part – of the 'Field' and I did not focus on these wider aspects beyond the Code that comprise a prosecutor's 'Field'. This is a limitation of the research. Later sections of this chapter will consider areas for further research, and this is one of the main ones. Further research that helps develop a more comprehensive understanding of the prosecutor's wider 'Field' of decision-making would help develop a better description of decision-making.

In conclusion, the Code remains a factor in CPS decision-making and affects how prosecutors decide whether to prosecute or discontinue a case. Whilst it remains important, its role is narrower than the text of the Code suggests. Dismissing the Code merely as 'law in books' turns out not to be wholly fair because some prosecutors report using the Code as its authors intended. The data suggests that whilst the Code is an important component in CPS prosecutor decision-making, the 'law in action' perspective that encourages some degree of skepticism regarding the use of the Code in practice is sound, and other components outside of the Code text (principles, psychology) have large parts to play in explaining prosecutor decision-making.

### *The Prosecutor's Frame (1): Principles*

The first component of a prosecutor's 'Frame' are the principles of prosecution. When asked what they are aiming for when deciding whether or not to prosecute the most popular response (10 of the 27) was to point to notions of justice or fairness as the most important consideration for them (*'Justice, I suppose...but to ensure that justice is working smoothly and fairly'*, Prosecutor 27; *'We're there to make sure that justice is done, whether that be for the defendant suspect or the complainant'*, Prosecutor 19). In a similar vein, nearly a third (8 of 23) highlighted the need to be objective in decision-making (*'You've got to look at a case and you've got to be incredibly objective...and if the evidence is there, you prosecute'*, Prosecutor 06). Chapter Six reported how some prosecutors interpret fairness as being primarily what is right for the victim (*'It means, in practice, security - the right result for the victim...Ensuring some justice is done for the victim'*, Prosecutor 20) whereas others interpreted fairness as about ensuring the defendant is dealt with fairly (*'we're there to make sure that justice is done, whether that be for the defendant suspect or the complainant'*, Prosecutor 19), others about dealing with *'proper dangerous blokes'* (Prosecutor 14) whilst still others described fairness as checking police files to ensure the evidence is sufficient against the defendant. Fairness was clearly prominent in prosecutor thinking.

As was the principle of consistency. Interpretations of the principle of consistency varied between prosecutors, with a split emerging between those prosecutors who felt it was important to be consistent with the prior decisions of other prosecutors, and to a lesser extent police charge decisions (*'Normally, if they're charged by someone else, in Area, they're pretty sound decisions that I would agree with'*, Prosecutor 10), and those who felt it was important to be consistent in their own decision-making at the cost of altering others' decisions (*'I'm changing things all of the time. Or I'm suggesting further charges, or I'm questioning why this charge or that charge wasn't considered'*, Prosecutor 07). Whilst such

variation existed, the more important point for this analysis is that out of the 14 prosecutors that addressed this question in interview 11 had clear views on the importance of consistency. The other principles too require interpretation by individual prosecutors. The principle of consistency was interpreted by some prosecutors as meaning that all cases should be treated exactly equally whilst others interpreted it as applying the same broad principles but accepting inconsistency between different cases when the specific facts of the case demanded it (akin to the notions of ‘procedural justice’ versus ‘substantive justice’ (Gelsthorpe and Padfield 2003, p. 12)). Alternatively, consistency was interpreted by prosecutors geographically. The interviews showed that most prosecutors aim to be consistent with other local criminal justice actors by considering local issues in making their case decisions, but for some prosecutors local issues were less important than making decisions consistent with national policy. Consistency was clearly something that matters to prosecutors, although was interpreted in varying ways. This conclusion was strengthened by the prosecutor comments on taking account of local and national issues in their decision-making.

The comments regarding the role of costs in prosecution decision-making and prosecutors’ perspectives on cost efficiency support the conclusion that cost effectiveness is an important principle when thinking about cases. 17 prosecutors were asked about whether and how they took account of cost in their decision-making and all 17 responded with clear views on what they felt was the appropriate role. None were agnostic to cost. As with the consistency point, above, the conclusion to be drawn is not that all prosecutors interpret the appropriate role of cost uniformly, but rather that each prosecutor understood cost to be an important principle when making a case decision and that it played an important role, however it was interpreted.

The principle of accountability was shown to be important to prosecutors, too. It was addressed directly with prosecutors when they were asked to explain who they felt was accountable when making a case decision and if so to whom. Interviews showed that prosecutors felt keenly that they were accountable for their decisions. Whilst once again there was variation between prosecutors as to who they felt most accountable (to victims, mostly, but also the press, managers and judges). It is still sound to draw the conclusion that prosecutors hold notions of accountability to others in their mind when making case decisions.

Independence from the police was the final principle that prosecutors directly addressed during the interviews. Opinion was split on whether close working with the police was a desirable aim or not, with just over half expressing confidence in working with the police and trusting their summaries and just under half striking a skeptical tone toward the police. This split in attitudes towards the police echoes the distinction Packer (1964) made between the 'Crime Control' and 'Due Process' model, with prosecutors who conceive the former to be the appropriate model perhaps being more minded to work closely with the police, and those who view the criminal justice system as conforming more to the Due Process model taking a more distant and guarded approach to police information. Prosecutor views on independence from the police is again an example of where, despite prosecutors variously interpreting the principle, the conclusion to be drawn is the overall number that report holding clear views on how the CPS should 'properly' relate to the police, demonstrating this principle as a prominent and important one to prosecutors. Prosecutors recognise the importance of the relationship with the Police and factor it into their own decision-making.

The conclusion to be drawn is that these five principles – first outlined in the Royal Commission of 1981 and the Government White Paper of 1983 - remain important to today's prosecutors. No account of prosecution decision-making should ignore them.

The analysis of the principles needs to be taken one step further, however. The principles are important, but they are not interpreted uniformly by prosecutors. There is variation and this variability of interpretation of the principles of prosecution is an important aspect and should be considered in more detail. The principles are not well defined – they are broad notions, not specific instructions. They are therefore left open to interpretation and the preceding discussion showed how variable the interpretations are.

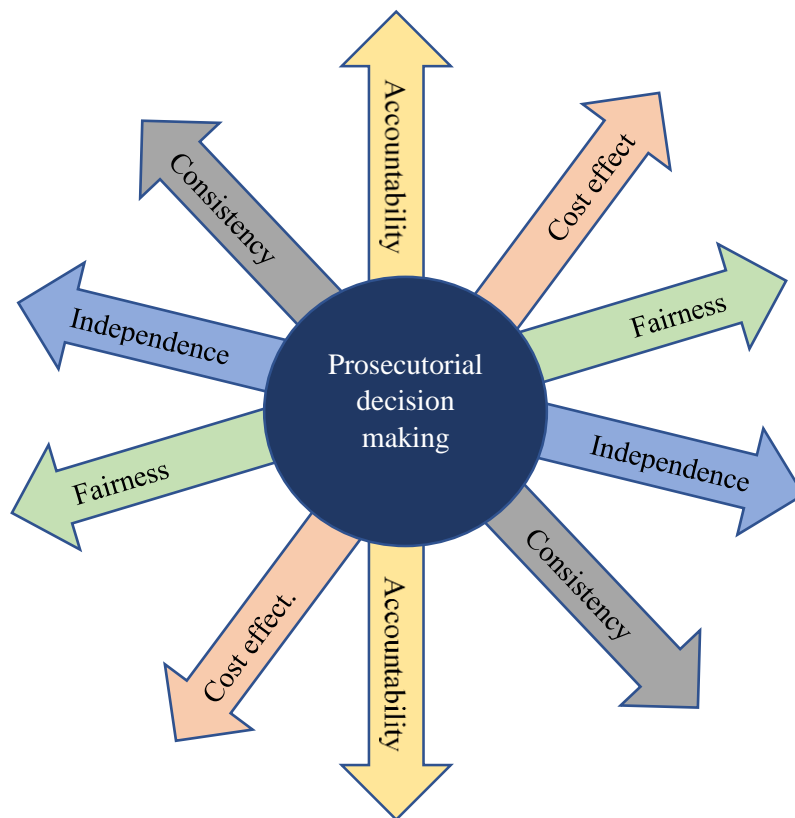
These principles add a complex dimension to prosecutor decision-making. Not only must a prosecutor interpret each principle for themselves, but the principles can conflict with one another and lead the prosecutor in different directions. For instance, prosecutors face a dilemma when trying to be both fair and consistent. Consistency suggests that one Area broadly takes the same approach as another, with each case being put through the same process of consideration and similar outcomes achieved. Yet fairness may lead to a different outcome – one in which the outcome of the process is seen as more important than the strictly equal application of the same procedure – once again we see the tension between procedural and substantive justice. Another example of a conflict between the principles is that of cost effectiveness and fairness. Prosecutors face a dilemma in cases that they feel fairness demands a prosecution but that might be deemed as not being cost effective due to the nominal nature of the likely penalty or the likely failure at court. The issue of how to factor cost into prosecution decisions without harming the principles of fairness and consistency is a

continual struggle for prosecutors. It will, for instance, be recalled from Chapter Three that Young and Sanders (2004) said that:

*'the criminal process involves many conflicting values, aims and interest...the reality is that choices have to be made over which are to have priority and such choices inevitably express a particular ethical or philosophical standpoint' (p. 191).*

The resolution of such conflicts is down to the individual prosecutor's ethical or philosophical standpoint. Each principle can be, and is, legitimately interpreted in different ways and from within different lenses – the clearest example, perhaps, being the principle of independence from the police, which can be interpreted weakly, as per Packer's (1964) model of Crime Control that suggests close working between the police and CPS, or strongly, as per his Due Process model. Each principle can be seen as an axis. Conceptually, CPS prosecutors can be seen as being held in a web of principles that continually pull them in different directions. Each prosecutor must decide where along the line or spectrum between two extreme interpretations of each principle they choose to place themselves when making a decision. This web of principles can be represented as follows:

Diagram 5: The web of principles



The principles, as concepts used to shed light on decision-making, are far from perfect. The definition of the principles is ‘fuzzy’ and indistinct. They are differentially interpreted and, as shown above, I go only so far as to present them as a set of axes, rather than providing specific definitions, thus inviting differences of opinion as to what each really means. Without doubt further work could be done to develop and explore the concept of the principles of prosecution and sharpen the focus upon them. Nonetheless, these principles of prosecution are a useful framework for a researcher to use when analysing prosecutor views on how and why they make case decisions because there is evidence that the principles are important to prosecutors themselves. The principles of prosecution are an important component of a richer and more complex description of prosecutor decision-making and do need to form part of any such description.

*The Prosecutor's Frame (2): Psychology*

The second important aspect of a prosecutor's Frame is the use of psychological shortcuts.

There was strong evidence from the interviews, discussed in Chapter Six, that prosecutors made use of 'gut feel' and 'intuition' (*'I always call it my wrinkly nose feeling.... So, if I read a case and then I go, hmmm, that's my wrinkly nose feeling'* (Prosecutor 14); *'It almost becomes a little bit of a gut instinct...because of your experience and because you've been doing it for so long, somehow, it's not even that conscious'* (Prosecutor 12)), or more generally, life experience to make quicker and (they argued) better case decisions (*'I do think that life experience is something that inevitably you bring to your decision-making'* (Prosecutor 31)... *'I'm a father of four kids. That's going to impact, I suspect, on some of the decision-making that I do'* (Prosecutor 13)). These findings again echo Hoyano et. al. (1997), who noted that prosecutors felt that *'the only way to acquire prosecution skills was through experience or through consulting a colleague'* (p. 559, emphasis added).

In addition to the finding that general gut feel and intuition plays a part in prosecutor decision-making, there was more limited evidence that certain specific mental shortcuts that were identified in the psychological literature were used by some prosecutors. One of the most common mental shortcuts that appeared to be used by prosecutors was the 'satisficing' heuristic - being satisfied with an outcome despite falling short of the maximum goal satisfaction (Simon, 1967). A fifth (5 out of 25) prosecutors who spoke about their interpretation of the Evidential Test suggested that they take a satisficing approach. In prosecutorial terms this is the 51 per cent approach; when it is just good enough, then run the prosecution: *'Well, I suppose the Code's right when it says you need to have a 51 per cent chance of getting a conviction or not.* (Prosecutor 13), and *'That you can present a clear case to the magistrate. That they will want to hear from the defendant, they'll take it beyond half*

*time, you're not going to have the defence putting a submission that there's holes in your case'. (Prosecutor 30)*

Another apparent mental shortcut described by prosecutors was the Affect heuristic, in which decisions are guided directly by feelings of liking or disliking rather than primarily by deliberation or reasoning. Often this was shown when prosecutors were discussing how their life experience affects their decision-making. Prosecutor 23, it will be recalled, reported *'things where instances happen in a city centre and you think that, if you've got children, that could be my child. So, you have a different view on that'*. Prosecutor 18 said *'I've got two relatively young kids now and the stuff that involves children you do treat differently, and I realised I was doing that a lot more strongly when the nippers popped up'*. This evidence suggests that prosecutors, at times, shortcut their rational and objective decision-making to get to a decision based at least in part on how the issues in the case engage feelings of like or dislike.

Other mental shortcuts were less frequently apparent – sometimes suggested or implied only by one prosecutor. The anchoring heuristic (forming a view based on the first piece of information, resisting change in the face of subsequent contradictory data) was observed when the order in which the prosecutor read the information appeared to impact the case outcome. For instance, when Prosecutor 20 said they used the police file as a way into the case file and a means to get to grips with the case fairly quickly. The argument here is that police summaries, if read first, 'anchor' the prosecutor's thinking in the manner that is suggested by the decision-making research discussed in Chapter Three. Other prosecutors consciously tried to avoid reading the Police summary first (for example, Prosecutor 04 said: *'[I]t's the officer's view and they don't necessarily summarise the same bits of evidence as I*

*might like to. That's how they see the case. I would prefer to hear what the other lawyer has to think about the case',* and Prosecutor 29 said: *'With experience I've learned not to read the police case summary first. I think that misleads and is basically based on hearsay'*). This may suggest an awareness of 'anchoring' and a desire not to be unduly influenced by the police description of events whilst forming their initial view.

The Representativeness heuristic (in which the probability of A causing B is judged by the similarity of between A and B) was apparent when Prosecutor 20 (again) suggested that *'People from a certain class and certain backgrounds may get involved more easily in disputes...'*. The implication being that people with similar class backgrounds will act similarly (i.e., criminally), and that the prosecutor factors this into their decision-making, based on the prosecutor's recollection of prior analogous cases with apparently similar defendants. A comment from Prosecutor 14 brought to mind the Halo Effect heuristic in which a decision-maker associates positive characteristics with other positive characteristics (i.e., innocence) more than they should be when they remarked: *'As human beings, we make judgements all the time, based on people's voices, people's appearance, eye contact they give'*. This observation is in line with Baldwin's (1997) finding that saw 'about a third of interviewees adopted a 'crude rule of thumb'' (p. 550) in making case decisions.

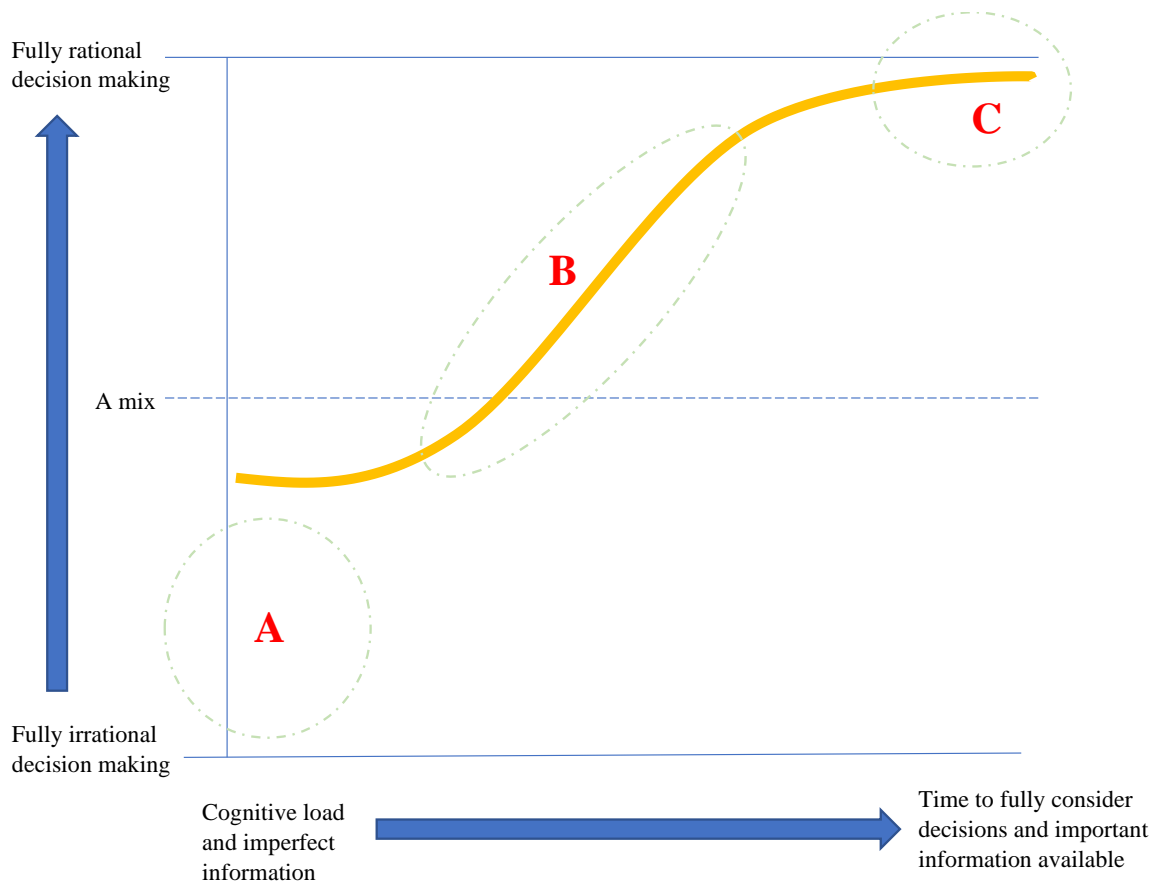
There is, then, strong evidence that prosecutors make decisions in ways similar to other professional decision-makers that have been studied in psychological research. These findings appear to be broadly applicable to prosecution decision-making. Gut feel and intuition play a part, as does life experience. Prosecutors can be seen to make use of the heuristic mental shortcuts one would expect of a decision-maker working under pressure and with incomplete information. A better, richer and more complex description of CPS

prosecutor decision-making must take account of psychology and the mental shortcuts prosecutors use.

Concluding that there is some evidence that prosecutors use mental shortcuts is not to say that prosecutors act irrationally, or that logic is not part of the prosecutors' decision-making. The argument is not that the prosecutors are irrational, only that their decision-making often contains an element of irrationality through use of psychological shortcuts, akin to Dhimi and Thompson's (2012) model of quasi-rationality.

To illustrate this, Dhimi and Thompson's (2012) model of quasi-rational decision-making can be adapted and developed to apply more specifically to CPS prosecutor decision-making:

Diagram 6: A representation of decision-making under cognitive load and imperfect information



The three points – A, B and C – are important.

Under conditions of high cognitive load and imperfect information (point A) prosecutors act not wholly, but largely, irrationally with far greater use of heuristics, shortcuts and assumptions in order to deal with the work and make the necessary decisions quickly under pressure.

When prosecutors are not working under heavy cognitive load (i.e., they have time) or with imperfect information (they have a detailed case file) they are working at point C and will make decisions that are largely rational and therefore act in a manner much closer to the

assumptions underpinning the Code. But they will still not be making decisions in a completely rational manner. The literature on decision-making research suggest that to some extent mental shortcuts are present in all decision-making.

Yet few (if any) prosecutorial decisions fall at either extreme of the figure. Most are likely made under some time pressure and often with limited case information (point B). In these instances, my fieldwork suggests that prosecutors mostly make rational decisions but fall back on some shortcuts. This is the ‘quasi-rational’ decision-making of Dhimi and Thompson (2012) and is part of a better and more realistic description of prosecutor decision-making.

What can be said with some certainty is that any account of decision-making that does not consider the psychological factors will be inaccurate. The prosecutor’s thoughts, feelings, perceptions, background and outlook all colour their decision-making to some degree. We need to put the prosecutor back in the picture.

### *The Prosecutor’s Frame (3): Case Factors*

The third important part of the prosecutor’s decision-making ‘Frame’ is the set of factors that are particularly important in shaping their decisions. The interviews showed that CPS prosecutors identified previous convictions, defendant age, offence seriousness, CPS Area, defendant mental health, complainant credibility, local issues and defendant background as important in their decision-making. The statistics in Chapter Five supported the interview observations in certain important respects: previous convictions, defendant age and offence type and CPS Area all appeared to affect case outcome (and therefore, by extension, prosecutor decision-making), and, therefore, for these factors the interview observations were

usefully triangulated by the statistical findings.<sup>59</sup> Further, the statistical analysis in some respects went further than the interview data in showing that defendant ethnicity and prosecutor ethnicity also affected case outcome also, despite CPS prosecutors (unsurprisingly) not suggesting in interview that these factors were important to their decision-making.

Table Ten draws together these findings from the statistical analysis and the factors reported during the interviews to present an overall list of factors that appear to be of particular importance to prosecutor decision-making:

*Table 10: Factors that are important to prosecutor decision-making<sup>60</sup>*

<b>Prosecutor interviews</b>	<b>Statistical analysis</b>
Previous convictions	
Offence type	
Defendant age	
CPS Area	
Mental health issues	
Credibility of the complainant	
Defendant background	
	Defendant ethnicity
	Prosecutor ethnicity

Four of the 10 factors listed in Table 10 were identified as important in both the interviews and the statistical analysis (and in prior research). Given that the importance of these four factors was apparent from both methods, focus should be placed on them as being factors particularly important to prosecutor decision-making. Within these four factors, the stronger findings related to previous convictions and offence seriousness: the weaker two to age of the defendant and CPS Area.

<sup>59</sup> Mental health, complainant credibility and the defendant's background could not be tested statistically (as was discussed in Chapter Four).

<sup>60</sup> Does not include spurious statistical findings.

The statistical analysis suggests that previous convictions is a strong indicator of likely case outcome and in interview prosecutors described a defendant's previous convictions as being one of the most important factors that informed their decision-making, for a range of reasons, including evidential reasons (convincing the jury) and moral reasons (a sense of fairness or considerations of character). Prior research suggest that previous convictions are important to prosecutor decision-making in other jurisdictions (and at other times), so it is not at all surprising that CPS prosecutors also feel this is important. The findings from the two parts of my fieldwork therefore support each other on the importance of previous convictions to prosecutorial decision-making. In broad terms, then, more previous convictions increase the likelihood of conviction. Even if a case is destined to be discontinued, having more previous convictions increases the likelihood of being charged and only discontinued later in the process (post-charge) following a fuller file review.

The statistical findings found that offence type (a proxy for seriousness) was also a strong indicator of case outcome and the interviews also suggested that offence seriousness was an important consideration for prosecutors when deciding whether or not to prosecute. Both factors affect the decision on either when and/or why to discontinue, with previous convictions affecting when the discontinuation is likely to take place (pre- or post-charge) and offence category affecting the reasons why discontinuation may take place (evidential vs public interest).

The second two of the four main factors that were found to be important to prosecutor decision-making across both the statistical analysis and the interviews were youth or old age of the defendant and CPS Area. They should not, however, be considered to be quite as

important to prosecutor decision-making as previous convictions or offence type. This is because the statistical and interview data showed that these two factors did not affect the decision to prosecute to a significant extent but only to the decision to discontinue either pre- or post-charge. As such, this factor, whilst being supported across both the statistical data and the interview observations to some degree cannot be considered to be as directly relevant to the primary research question as the first two factors identified.

CPS Area was shown to affect prosecutor decision-making during the interviews (prosecutors spoke about how local issues informed their decision-making on cases) and though the statistical analysis. The analysis showed, however, that regarding the statistical analysis, CPS Area only exerts an influence on case outcome when considering the point at which the case is discontinued and the reason for the discontinuations and not the more central, overall question of prosecution versus discontinuation.

The findings relating to these four factors make intuitive sense, and those familiar with prosecuting would no doubt generally recognise and accept the findings as being a valid representation of everyday practice. Previous convictions are a longstanding consideration in criminal justice decision-making and sentencing, for instance. Nor is it surprising that offence type affects case decision-making as offence type relates broadly to seriousness and seriousness is a notion that intuitively connects to notions of the rightfulness of punishment.

The finding that a defendant's age is an important consideration (albeit not as strong a factor as the first two) is also not surprising. For instance, the existence of a separate youth justice system and alternative disposal and sentencing proposals for youths compared to adults mean that prosecutors must consider whether they are dealing with a youth or adult case as one of

the first facts of the case of which they take account. It is no use considering aspects of a case and determining whether or not to charge only to find out at later on that the defendant is a youth and must be dealt with in a certain way, constraining the prosecutor's scope of action with regards to picking a prosecution route. In light of this it is unsurprising that prosecutors say a defendant's age is one of the most important factors.

The variability of CPS decision-making between Areas is also neither new nor surprising. Geographic variability in prosecution approaches was one of the ills that The Royal Commission on Criminal Procedure (1981) sought to solve by creating a national prosecution agency. Previous analyses have highlighted variation between CPS Areas. For instance:

*Regional variations also suggest that these factors are at play to a larger extent in some Areas than in others. For instance, Merseyside saw no further action in 36 per cent of its pre-charge decisions, compared with Dyfed Powys, where only 15 per cent of pre-charge decisions resulted in no further action (Sosa, 2012, p. 10).*

Other than the four factors that were identified across the statistics and interviews, Table Ten showed that some factors were identified as being important to case outcome in either the statistical analysis or the interviews, but not both. Prosecutors suggested in interview that there were three factors that were important to their decision-making that were not able to be tested as part of the statistical analysis. These were the importance of considering a defendant's mental health at the time of the offence, issues of complainant credibility and aspects connected to the defendant's background. These factors, given that they were reported directly by prosecutors as being very important to them, must be considered as part of the overall picture of important factors forming a prosecutor's 'Frame', although there is

less evidence than for the first four factors discussed above. Nor was there much mention of these factors in the prior research.

The final two factors were identified as being influential to case outcome in the statistics and interviews were defendant ethnicity and prosecutor ethnicity. These were a surprise, and rather shocking.

There are some grounds to say that these two factors are the least influential to CPS prosecutor decision-making of all those identified. This is because neither defendant or prosecutor ethnicity demonstrated a strong and statistically significant effect on the overall decision to prosecute or discontinue but only on the timing of the eventual discontinuation or the reasons of discontinuation (and, as mentioned above, were not touched upon by prosecutors during interview). The statistical findings do not indicate that the CPS prosecute black and minority ethnic defendants at a different rate, only that they discontinue at a different stage and for different reasons.

Despite perhaps not being among the most influential factors the suggestion that ethnicity is a factor, however slight, in decision-making should be a cause for concern. This finding suggests that the difficulties identified in the MacPherson Report (1999) may still be at play.<sup>61</sup> However, any conclusion drawn from the data in this study must be reached with care.

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<sup>61</sup> The MacPhearson Report (1999) suggested that the Metropolitan Police Service was institutionally racist, defining this as ‘The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people’ (para. 6.34). The suggestion of institutional racism was later extended to incorporate the Crown Prosecution Service, following an independent report by an academic barrister Sylvia Denman, and a further report by the Commission for Racial Equality (CRE)<sup>61</sup>. Most recently, the Lammy Review (2017) of the treatment and outcomes of BAME defendants in the criminal justice system, did not support the findings of LaFree (1980) or the findings of Denman or the CRE. It states that, for instance, in relation to disparities between black and white defendants dealt with by the CPS ‘[o]verall, the charging decisions taken by the CPS are broadly proportionate’ (2017, p. 17). The Lammy Review, it should be noted, used a different data set and methodology to LaFree and the Denman/CRE reports, so the findings are not directly comparable. The fact the Lammy Review concluded that there is broad proportionality does not counteract the finding from my research that ethnicity of the defendant and prosecutor has some effect on eventual case outcome. The Government published an update to the Lammy Review (‘Tackling Racial Disparity in the Criminal Justice System: 2020 Update’) that claimed that ‘As recognised in the Lammy Review, in most cases, defendants’ ethnicity does not affect

The defendant ethnicity findings related only when the case is discontinued (i.e., a comparison of pre- or post-charge discontinuance by ethnicity). Whilst this difference is of interest, both discontinuance outcomes are just that: discontinuances. This finding does not, therefore, tell us why a prosecutor might choose to discontinue or prosecute this case (the principal research question). As discussed in chapter 5, one plausible explanation is the greater reticence some ethnic minority defendants appear to have in pleading guilty early in the criminal justice process, which may contribute to the discontinuance of cases at a later date (although CPS prosecutors could still discontinue earlier on a weak case irrespective of defendant actions of course).

The data I gathered on the effect of prosecutor and defendant ethnicity on case decision-making is limited. The conclusion to be drawn is that ethnicity of the defendant and prosecutor does have a statistically significant effect on case outcome, but the reasons for this remain unclear, especially as there is no interview data with which to investigate more deeply, because prosecutors did not mention race as being important to their decision-making.

Overall, it is worth remembering that there has not previously been an analysis conducted of the important factors in CPS prosecution decision-making that has been based on such a comprehensive set of CPS data or so many CPS prosecutor interviews. Analysis of the available CPS data (combined with the interview data) has been able to identify a list of core factors that do appear to affect case outcome more than other factors. Knowledge of these factors represents the second component of a prosecutor's 'Frame' and is therefore in turn an

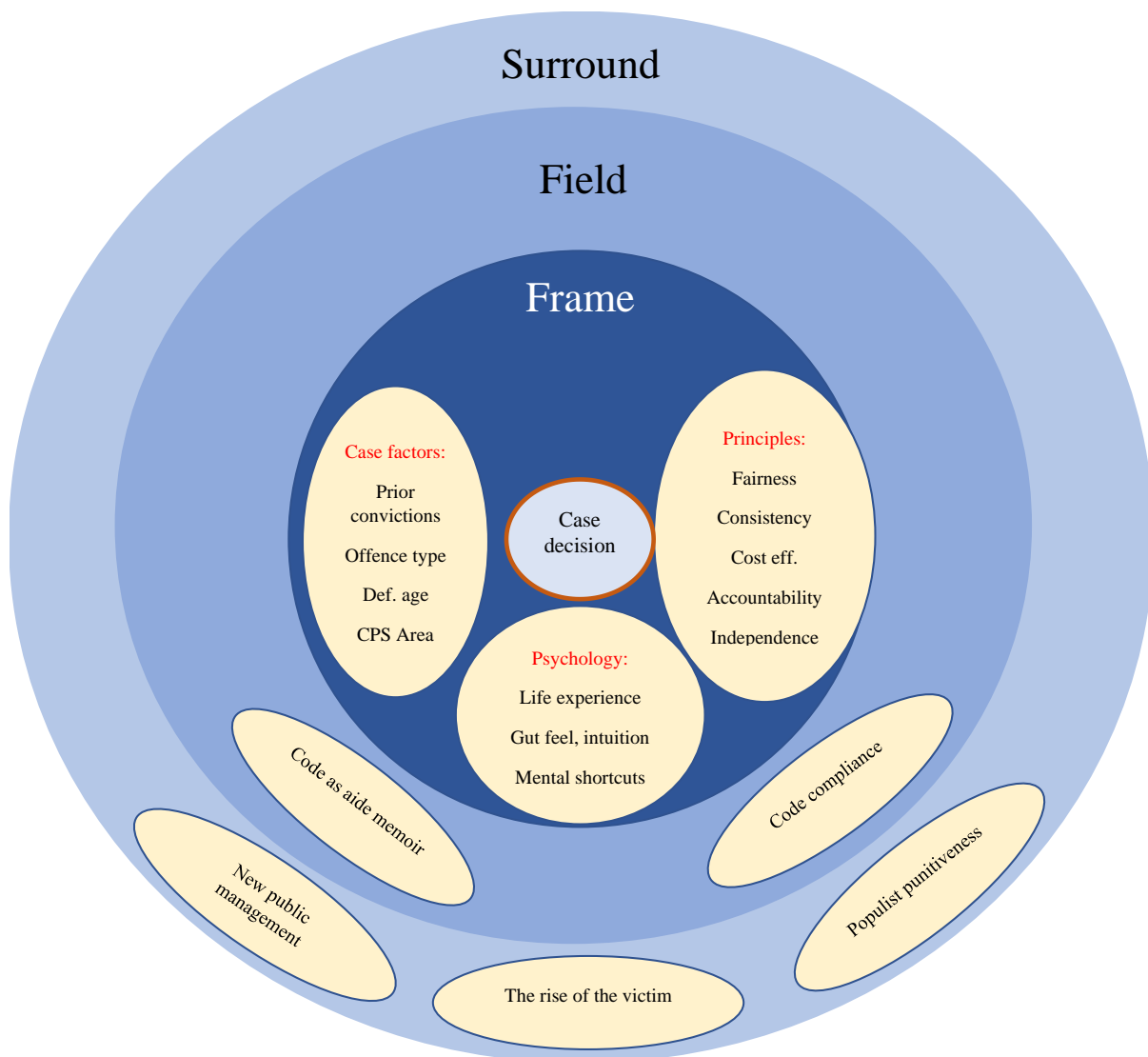
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the likelihood that they will be charged by the CPS. The CPS has continued to take significant further steps over the last 12 months to promote fairness and equality across the Criminal Justice System.' (MoJ, 2020, pg. 38).

important component necessary to build a richer description of how prosecutors make case decisions.

It is at this point that I am able to pull the strands together into one place and attempt to populate the prosecutors' 'Surround', 'Field' and 'Frame'. In doing so, I consider the aspects of case decision-making that have been identified as being important. These factors together are the necessary components to describe a richer and more accurate model of how prosecutors decide whether to prosecute or discontinue a case in practice, rather than how the 'law in books' suggest they do. This is best captured in one place diagrammatically:

Table 11: The ‘Surround’, ‘Field’ and ‘Frame’ of a CPS prosecutor



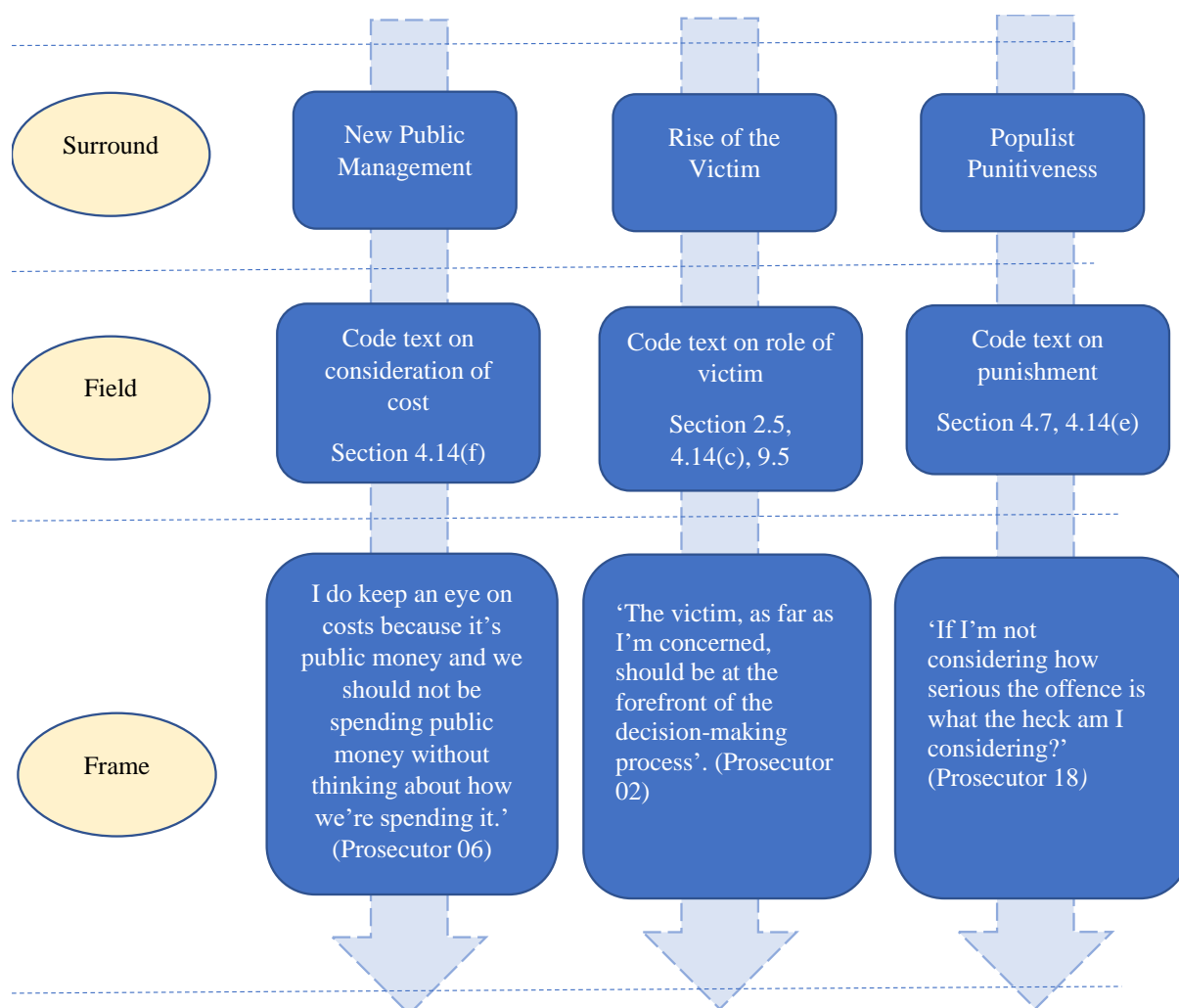
**Stepping back: towards a richer understanding of prosecutor decision-making**

Having directly addressed the primary research question, the next section of this chapter stands back from the detail of the findings. It considers some of the wider aspects of the research in order to offer, by way of conclusion, three overarching observations about CPS decision-making.

The first observation is on the value of Hawkins's (2002) three-part theoretical model of decision-making. Hawkins's model was central to this research. It helped structure my areas of enquiry and pointed to the importance of looking to the wider political 'Surround' as well as the importance of focusing on the micro-level of decision-making psychology of the prosecutor's 'Frame'. I show that a more realistic, richer and more nuanced description of CPS prosecutor decision-making should take account of the 'Surround' and 'Frame', as well as the 'Field' - in which the Code sits. My work supports the value of Hawkins's model in structuring empirical findings, thinking about and interpreting them and ultimately about understanding prosecutor decision-making.

My findings also show, however, that Hawkins's model can be critiqued and potentially improved upon. Hawkins conceives of the three parts of his model as fairly distinct and separate, with content residing in either the 'Surround', 'Field' or 'Frame' depending upon their characteristics. My work shows that there are a number of core themes that, in different ways, exhibit themselves in each of his three levels simultaneously. For instance, cost - the clearest such example - can be described and located in the 'Surround' (the concept of New Public Management), the 'Field' (in that the 2018 edition of the Code deals with it specifically) and in the prosecutor's 'Frame' (with prosecutors demonstrating that they interpret and apply the principle of cost effectiveness in different ways). Rather than conceiving of Hawkins's model as having three fairly distinct parts that contain phenomena that are largely different in nature to one another - as Hawkins seems to - a more accurate theory might describe the parts as much more closely linked and aligned in their content; as sharing a set of cross-cutting themes. This would be a conceptually more accurate position - at least for the prosecutor - than the 'classic' Hawkins position. The following diagram depicts how Hawkins's model might be better represented in a CPS context:

Diagram 7: Broad themes cutting across the ‘Surround’, ‘Field’ and ‘Frame’



In summary, whilst Hawkins’s three-part model is of great use in conceptualising decision-making and sorting and arranging the various concepts to stand better in relation to one another, my argument is that Hawkins’s model is best applied without a such a distinct separation being made of the ‘Surround’, ‘Field’ and ‘Frame’. The boundaries between the parts are porous, and important concepts and principles that affect and inform prosecutor decision-making are to be found, in different guises, at each of the parts. To understand prosecutor decision-making more deeply one must not only identify what is important to prosecutors in the ‘Surround’, ‘Field’ and ‘Frame’, but also how the expression of those

factors changes and emerges in different ways at each of the different parts, as my fieldwork and analysis has done. This makes for a messier, less clear-cut picture of decision-making, but one that ultimately reflects the reality of decision-making on the ground.

The second observation is how well some of the prior research into the CPS remains relevant to contemporary CPS practice. This is not always the case with all the prior academic research; some is clearly of the time and place it was conducted and suffers from quickly becoming less relevant to the contemporary organisation. My main aim was to explore afresh the phenomena of contemporary CPS decision-making, recognizing that little major empirical research had been conducted on the CPS since the late 1990s, the two major pieces being the work of Hoyano et. al (1997) and Baldwin's (1997) examination of CPS decision-making. What was surprising was the degree to which the conclusions drawn by both of these pieces of research, now over twenty years old, still 'ring true' in today's CPS. Some things have of course changed in CPS practice. Sanders (2016) identified two particular changes: that the CPS took on responsibility for all charging decisions in 2006 (before handed back some responsibility for charging to the police in 2013) and that the CPS responded to the Government's 2010 austerity agenda by beginning to move to digital working. Despite those twenty years, and the reforms and changes to the CPS in that intervening period, it is striking how the attitudes of prosecutors reported by Hoyano et. al. and Baldwin are similar to those found in my work. I have examined very similar issues to Hoyano et. al. and Baldwin, albeit some two decades apart, and draw the conclusion that the findings are still reasonably accurate descriptions of contemporary CPS practice. Going even further back, what is also striking is the way in which Packer's (1964) two models of criminal justice still resonate in much of contemporary prosecutor thinking with regards to the police. Chapter six showed how some prosecutors view the aims of the criminal justice system – and therefore the

prosecutors' most appropriate relationship with the police – to demand close working with the police in a partnership arrangement, whilst others were much more guarded about police information and focused more on testing the quality of the police evidence. So, whilst certainly dated, Packer's work on the two ideal-type models – or, in my words, the two ends of the spectrum of the axis of the independence principle – remain valid and meaningful lens through which to view contemporary prosecutor decision-making.

The third observation about my work is how little value the statistical analysis added to the understanding of prosecutor decision-making. In beginning my work, I reviewed the relevant literature on prosecution decision-making. The quantitative studies I came across initially made a big initial impression on me. The studies, such as Forst and Brosi (1977), Albonetti (1986), Albonetti and Hepburn (1992) and Weenink (2009) seemed to hold out much promise for answering a research question such as mine. These quantitative research pieces appeared to avoid some of the difficulties posed by interview research: they did not, for instance, rely upon the faulty memories of prosecutors (introspection) or risk having prosecutors tell me what they think they should say (social desirability), or indeed what they only hoped might be true about their decision-making. Further, the conclusions these studies drew appeared clear cut and suggested a level of certainty that is often not possible to present using other research methods. A quantitative approach promised clarity and insight. The apparent clarity of the conclusions these authors drew were a major reason why I incorporated a quantitative approach into my research design (the other main reason being one of simple opportunity to work with a virgin data set, as discussed in Chapter Four). As far as I could, I used comparable methods to those I had seen in these wider studies, noting, for instance, that logistic regression was the most common mode of analysis of factors in decision-making across the studies I reviewed.

The value of my statistical results was disappointing, largely due to the gaps in the data that the CPS collected. It became apparent as I cleansed the data and prepared it for analysis that some categories of data were patchy and included so many missing data points that robust analysis would be difficult. The categories of data that were most affected by missing data points were those that I hoped most to explore, namely the aspects connected to the prosecutor (such as gender, sexuality, religion). The data collected by the CPS was therefore extremely unlikely to allow me to isolate prosecutors' idiosyncratic or biographical factors to a standard that allowed robust statistical analysis.

Also of little value was the analysis of timing of discontinuance (pre- versus post-charge discontinuance) and reason for discontinuance (evidential versus public interest discontinuance). There was no variable that exhibited a statistically significant and strong effect on case outcome in such a way so as to lead me to draw from the data insight into when or for what reason prosecutors discontinue particular types of cases. At best, these analyses supported and developed the more general finding that a particular factor affected the overall decision to prosecute or discontinue a case but did not shed any light on specific aspects of decision-making beyond that.

Further, and more fundamentally, I have come to realise that statistical analysis, even had the CPS collected more complete data and had I been in possession of a full data set, would still be of limited value in understanding a phenomenon such as decision-making; no light would be shed on why or how these factors are important, only that they correlate with outcome. All that could be ascertained from a statistical analysis of a full data set is that a case outcome correlates with a case factor or set of factors. A finding of this type does not shed light on

why or how a decision is made. By its nature, decision-making is a mental and therefore internalised exercise. The case outcome is of interest but is only an external expression of a series of internal thought processes. It is the internal thought process used to get to the case outcome that is the core focus of my research. This is a fundamental limit to using statistical data to research decision-making.

The initial promise offered by a statistical approach to decision-making and my expectations about the power of the analysis for peering behind the veil of prosecutor decision-making proved to be over optimistic. Overall, the statistical work did not deliver the return on the investment in time that I devoted to collecting, cleansing and analysing the data. Around nine-months of this eight-year piece of research was spent conducting the statistical analysis. The earlier sections showed that factors such as previous convictions, offence type and defendant age are among the most important factors to determining a case outcome. These I could have guessed at prior to the statistical analysis; none of the results were counter-intuitive or worthy of close attention. Whilst the statistical data adds to the research I would not advise other researchers to invest heavily in conducting statistical analysis using CPS data.

### **Implications for the CPS**

It was not my intention for this work to serve as if it were a CPS inspection report whereby following the 'Findings' section there comes a list of 15 Recommendations for Improvement for the CPS to implement. Research does not always have clear or practical implications for the organisation concerned. Nonetheless, there are some implications from this research for the CPS that are worth identifying and reflecting upon, and this section considers how the

CPS might take account of the fieldwork findings and analysis, and the broader reflections on the research.

Overarching principles are absent from the Code. I have shown that, among other important components of decision-making, some principles of prosecution hold continued relevance for prosecutors. Whilst prosecutors did not expressly talk during the interviews in terms of the five prosecution principles that I have identified as a useful framework, they did have much to say about the importance of those principles in their thinking and how they go about variously interpreting and applying notions of cost, consistency, independence and so on. The principles are the means by which many prosecutors navigate their way through the difficulties of case decision-making, seemingly much more relevant and immediate to prosecutors than the specific text of the Code. Yet the Code does not provide a set of general principles of prosecution but rather focusses more narrowly on the Code Test and other procedural considerations.

The lack of explicit reference to the prosecution principles in the Code not only lessens the Code's descriptive accuracy but contributes to the variation in prosecutor decision-making. I have shown that CPS prosecutors are able, in their day-to-day decision-making, to take very different, indeed almost incompatible positions to one another on certain key factors.

The variety of interpretation of these principles suggests a lack of clarity or consensus about what the principles of the CPS should be. This is the question of 'organisational philosophy' defined by Gelsthorpe and Giller (1990) as 'the system of ideas and procedures for constructing and implementing decision-making under the specific organisational conditions of the Prosecution Service' (p. 153). The conclusion is that as much as the principles are

important factors in decision-making, the ‘hole’ in the middle of Dworkin’s discretionary doughnut remains large, so large that almost contradictory positions can continue to coexist between CPS prosecutors. The Code might better fulfil its purpose of explaining to Parliament and the wider public how and why prosecutors make case decisions if it made greater reference to the underlying principles of prosecution decisions – the ‘system of ideas’ - rather than focussing on the strictly rational and process centred Code Tests. Doing so might also improve consistency across CPS Areas as some of the wide variation in how prosecutors make case decisions might lessen, moving toward a more consistent position between prosecutors. The Code would also then better articulate an organisational philosophy toward prosecution and hence better communicate to Parliament and the public the perspectives that prosecutors more consistently bring to their case decision-making.

The second implication for the CPS relates to the weighting of the factors listed in the Code Test. The Code lists a series of questions in the public interest stage that prosecutors should take into account when deciding upon a case, but it does not provide any weight or priority to the questions or the factors therein. It has been seen that in practice prosecutors apply weights to the factors themselves, with some, such as previous convictions or seriousness, seeming to weigh more heavily in prosecutors’ minds than, say, local or national issues. The CPS may wish to consider providing some greater indication of the de facto position of primacy that some of these factors have. After all, without such ‘official’ weighting, prosecutors will, and do, weight them for themselves. The CPS may see some value in taking the opportunity to spell out why it considers some to be more important than others and in doing so to support a greater measure of consistency amongst prosecutors, and transparency to the public.

The third implication concerns the role of mental shortcuts in prosecutor decision-making and poses a question of what (if anything) this implies for the CPS. I have offered a more psychologically informed view of prosecutor decision-making, showing that prosecutors make use of mental shortcuts when making case decisions. This research therefore raises a question – one that is hard to answer – about what the CPS could or should do to take account of this. The role of heuristic decision-making in criminal justice is not unfamiliar within the CPS. It has, for instance, embraced the concept of mental shortcuts and use of intuition in jury decision-making as part of the training for its Rape and Serious Sexual Offences (RASSO) prosecutors to understand, identify and as far as possible counteract the effects of unconscious mental shortcuts by jury members with regards to ‘rape myths’. But this training is aimed at jury psychology primarily and not expressly aimed at prosecutors. Might something be done to better recognise and where necessary address the use of mental shortcuts? As was discussed earlier in the chapter, the use of mental shortcuts (which are by definition irrational) is not necessarily negative. They can help decision-makers to arrive at quick and expert decisions. But use of heuristic mental shortcuts can also be problematic, for instance when assumptions about defendants are made based on socio-economic background or ethnicity. Perhaps, therefore, there is a cause for a greater focus being put on induction and ongoing training for prosecutors that draws out some of the psychological research and brings to the fore for prosecutors the ways in which their choices over which pieces of evidence to read first might affect their decision, or how the (often unconscious) effect of their life experiences or intuition may also affect decision-making. I am not suggesting that prosecutor behaviour need necessarily change in all or even most instances, but the CPS could be more explicitly aware of the psychological factors affecting decision-making and make a greater attempt to engage prosecutors in discussion on this, perhaps through induction courses or refresher training.

The fourth implication for the CPS concerns data collection and availability to external researchers. As was noted in Chapter Four, my work was enhanced by access to CPS data that had not been accessible by any other researchers to the same extent. This was undoubtedly connected to my status as a CPS employee. One hopes, however, that the CPS will see my work as holding value for the organisation and, therefore, might see the value in other researchers continuing to work on aspects of CPS policy and practice. To encourage this and to help foster a greater research culture in the CPS, the organisation might do more to provide easier access to the data it collects. The CPS already provides some data on its website (and more at the time of writing, 2021, than it did when I began eight years ago), but more could be done. The Ministry of Justice has launched a valuable initiative called ‘Data First’<sup>62</sup> that links datasets across the justice system and allows direct access to accredited researchers from within and outside government. The current data sets included in this initiative focus on court outcomes and defendant ‘pathways’ through the court process but does not yet include any prosecution-centric data drawn from the CPS (although it is suggested that a link to CPS data is planned). The CPS may see value in mirroring the Ministry of Justice’s approach and broadening prosecutor related data that is released for research purposes, although, as this study has shown, the data collected by the CPS is not collected for research purposes and has significant limitations when used for the basis of research, so simply releasing more of it without altering and improving (from the perspective of the researcher) would add less value.

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<sup>62</sup> [Ministry of Justice: Data First - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

## Thoughts on future research

The conclusions in this chapter go some way to providing a richer description of prosecutor decision-making. Inevitably, there are areas of enquiry that remain untouched by my research, and that would benefit from further work.

The first and principal area in which further research would be of use is in developing our understanding of the prosecutor's 'Field'. Chapter Three quotes Hawkins as describing the 'Field' as 'a defined setting in which decisions are made...The 'Field' contains sets of ideas about how its ends are to be pursued. These may exist at a formal level in the form of policies, expectations, and the like about the organisation's mandate and how it should be attained' (p. 50). Certainly, the Code fits this description and as a key policy and a manual to structure practice it is an important part of the 'Field'. But, as mentioned above, I was not able to examine in any great detail the wider aspects of the CPS prosecutor's 'Field'. Further work that examines the effect of, for instance, different office layouts on CPS decision-making would be of value (do prosecutors in open plan offices consult with each other more and come to more consistent decision-making across the Area?) as would, perhaps, a greater focus on the ongoing training and performance management arrangements used in the CPS and the effect they have on shaping prosecutor decision-making. An ethnographic approach<sup>63</sup> may have been of particular value here; I did not observe prosecutors in their environment doing their jobs and making case decisions, I only spoke to them in interview. Observation of how prosecutors learn their craft, adopt their daily routines and a comparison of what prosecutors say about their decision-making practices in interview with those observed in practice by an ethnographic researcher would be a fascinating way of investigating the

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<sup>63</sup> That is, one that 'involves a researcher participating, overtly or covertly, in people's daily lives for an extended period of time and collecting whatever data are available to throw light on the issues that are the focus of the research (Noaks and Wincup 2004, p. 90)

prosecutor's 'Field', as well as simply broadening and enriching the data upon which to draw develop our understanding of CPS prosecutor decision-making.

The prosecutor needs to be put more centrally into picture; that both the characteristics and to an extent the background of prosecutors have a bearing on the outcome of the case decision. Prosecutors reported during the interviews that not only 'life experience' matters to their decision-making, but some also spoke of how their socio-economic position often contrasted with that of the defendants and commented on how that might affect their decision-making. It would be of value to test further the relationship between a prosecutor's background and characteristics. It is not methodologically straightforward to move from collecting biographical information (such as, say, education background or parental occupation) or consumption habits (newspaper readership and so on) making a classification of 'prosecutor type', but one wonders if, for instance, the higher the socio-economic level of the prosecutor the more the (often lower) socio-economic factors connected to the defendant matter in the case decision-making. Put more crudely, how much does a defendant being poor matter to the CPS decision-making? Alternately, one might look at whether prosecutors who grew up in large city view cases differently to those who grew up in rural settings. Do CPS prosecutors who grew up in the city look less punitively on the low-level drugs and disorder type crimes that one generally becomes more familiar with in the city? Other questions of this type can be readily conceived. Further work on the effect of socio-economic and biographical characteristics of prosecutors and defendants would have added to this study but must now wait for future research.

I have made the case for paying greater attention to the subjective biases that prosecutors bring to decision-making and has highlighted how life experience, 'gut feel' and intuition all

have a role to play. Yet this research has only scratched the surface in terms of building a psychologically informed view of prosecutor decision-making and much more could be done to enrich this picture. Further research into the creation, self-awareness of, and effect of prosecutor attitudes would be one of the next steps in developing a richer understanding of decision-making research. For instance, the German social psychologists Gawronski, Hoffmann and Wilbur's (2006) research into implicit and unconscious attitudes prompts questions about how prosecutor attitudes are formed, whether the prosecutor is aware of having them, and, even if they are aware of them, question whether and how such attitudes affect behaviour and decision-making outcomes. Future researchers could complement and develop the work presented here through focussing on how prosecutor attitudes are formed, and the effect attitudes have on case decision-making.

Connected to this is the question of how prosecutor attitudes change over time. I was only able to capture how each prosecutor reported their decision-making process at a single point in time. A longer-term study would help develop and enrich this view by revisiting prosecutors some years later to understand, for instance, how their attitudes to cases have changed, how their understanding and definition of concepts such as 'fairness' and 'consistency' have changed and how they might put different weight on different factors in the Code as they grow older. Similarly, a study with a focus on examining differences between prosecutors of many years' experience and those new into the Service might provide insight into the effect of continual exposure to cases on prosecutor attitudes. This reflects the concept of 'case hardening' often levelled at the judiciary, but do prosecutors get tired, cynical and more liable to prosecute (or persecute...?!) as their careers progress?

Further work could usefully be done to explore, refine and critique the role that the principles of prosecution play in prosecution decision-making. Work that more directly engages prosecutors on the five principles would be of value in particular if it looked at whether the interpretation of the principles changes from case to case or remains stable over time for prosecutors. Also of interest would be further study into how the principles conflict and how prosecutors resolve such conflicts before coming to a decision. Last of all, it would be of value to explore the balance of effect between the principles and the important factors I identified: is it possible to draw out more on how the two interact?

### **Final thoughts**

I can claim that my work makes a novel contribution to our understanding of decision-making in the criminal justice system, in three distinct respects.

First, the research identifies some of the factors that appear to influence CPS prosecutor decision-making. The Code has been shown to present an idealised description of CPS prosecutor decision-making, based on inaccurate assumptions about prosecutor rationality and to be incomplete in its description of the factors that prosecutors consider. Yet the Code still has a part to play as part of the prosecutor decision-making, with some prosecutors reporting using the Code in the manner the Code suggests it should be, and still more describing how they made sure that whatever decision they arrived at was demonstrably compliant with the Code. I show that prosecutor decision-making is influenced by wider political and social changes that affect criminal justice as a whole. I have identified a set of prosecution principles that, whilst being ill-defined in themselves, have been shown to be important points of orientation for prosecutors when they are deciding on what they consider the right decision to be. CPS prosecutors rely on gut feel and intuition and making use of

some mental shortcuts to arrive at case decisions and any accurate depiction of CPS prosecutor decision-making needs to include a psychological dimension. Certain specific factors have been identified as being more influential than others for prosecutors making case decisions.

Second, I extend and develop Hawkins's three-part framework. His work has been usefully and convincingly applied to other areas of criminal justice decision-making (see Gelsthorpe and Padfield 2003, for instance), but only very seldomly to prosecutor decision-making (Fairclough 2018). I extend the use and applicability of Hawkins's work to a new area of the criminal justice system, both enhancing our understanding of CPS prosecutor decision-making but also enhancing the value of Hawkins's theoretical perspective as it is shown to be of value to understanding another part of the criminal justice system.

Third, I have developed Hawkins's theoretical work by identifying not only where his work can be applied to prosecutor decision-making but critically the ways in which his framework could be developed better to reflect the reality of CPS prosecutor decision-making. I have offered, therefore, new empirical insights combined with development, critique and extension of existing theory.

Finally, the introductory chapter to this thesis argued that the workings of the CPS and the decisions its prosecutors make should be better understood. This, it was argued, would lend the CPS's decisions a greater level of trust and lead to its decisions being more readily accepted and considered fair and reliable. This would increase the sense of legitimacy enjoyed by the CPS and therefore the wider criminal justice system. The Code was an attempt by the CPS to provide an explanation of its inner workings and to gain that trust and sense of

legitimacy. My work argues that the Code paints a largely false picture, and that the reality of decision-making by CPS prosecutors is rather different. But that does not mean that the CPS decision-making process that I have described in this research is biased, unfair or unjust; my description is more complex and nuanced, and realistic, than the description found in the Code. The literature review discussed Lacey's (1992) view that a greater understanding of decision-making would help ensure a sense of legitimacy in criminal justice organisations and in doing so make social control mechanisms more effective. Also discussed was Tyler's (2013) argument that if criminal justice organisations were seen as legitimate this would raise general compliance with the criminal law. This research sheds light upon the inner workings of the CPS and its prosecution decision-making. In doing so, it is hoped, as Lacey (1992) suggested, that my work contributes in some small way to increasing the knowledge and understanding of how CPS prosecutors make decisions, and thereby contribute in some way to the continued sense of legitimacy enjoyed by the CPS.

The natural inclination to want to define, clarify and simplify a description of CPS prosecutor decision-making needs to be resisted. Prosecutor decision-making is not easily understood or tidy. It is an inconsistent, sometimes contradictory and all-too human endeavour. My conclusions capture some of that messiness.

## References

- Albonetti, C. (1986) Criminality, prosecutorial screening, and uncertainty: Toward a theory of discretionary decision-making in felony case proceedings, in *Criminology*, Vol. 24, No. 4., 623-644.
- Albonetti, C. and Hepburn, J. (1996) Prosecutorial Discretion to Defer Criminalisation; The Effects of Defendant's Ascribed and Achieved Status Characteristics, in *The Journal of Quantitative Criminology*, Vol.12, No.1 (March 1996), pp 63-81.
- An Independent Prosecution Service for England and Wales (1983). *Command Paper 9074*. HMSO. Author
- Asch. S. (1951) Effects of group pressure upon the modification and distortion of judgments, in H. Guetzkow (eds.), *Groups, leadership and men; research in human relations*, p. 177–190, Carnegie Press.
- Ashworth, A. (1987) The 'public interest' element in prosecutions, in *Criminal Law Review*, 1987:595
- Ashworth, A. (2000) Developments in the Public Prosecutor's Office in England and Wales, in *The European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8/3, 257-288.
- Atkinson, P., in Searle, C. (eds) (2004) *Social Research Methods*. Routledge.
- Bachman, R. and Schutt, R. (2014) *The practice of research in criminology and criminal justice*, 2014, Los Angeles, Sage.
- Baldwin, J. (1997). Understanding judge ordered and directed acquittals in the Crown Court, in *Criminal Law Review*, Aug. 1997, 536-555.
- Banks, J. (1998) The lives and values of researchers: Implications for educating citizens in a multicultural society, in *The Education Researcher*, 27(7), 4-17.

- Bauman, Z. (2012) *Liquid Modernity*, Polity Press.
- Baumgartner, M. (1992) in Hawkins (1992) *The Uses of discretion*, Oxford, Clarendon Press.
- Beck, U. (1992) *Risk Society: Towards a New Modernity*, Sage
- Beresford, B. and Sloper, T (2008) *Understanding the Dynamics of Decision-Making and Choice: A Scoping Study of Key Psychological Theories to Inform the Design and Analysis of the Panel Study*, DHP 2215, Social Policy Research Unit, University of York.
- Brannick, T. and Coghlan, D (2007) In Defence of Being ‘Native’: The Case for Insider Academic Research, in *Organizational Research Methods* 10(1):59-74, January 2007.
- Block, B., Corbett, C. and Peay, J. (1993) *Ordered and directed acquittals in the crown court*. HMSO.
- Bottoms A (1995) ‘The Philosophy and Politics of Punishment and Sentencing’, in C. Clarkson and R. Morgan (eds.), *The Politics of Sentencing Reform*, Oxford: Oxford University Press
- Chavez, C. (2008) Conceptualizing from the Inside: Advantages, Complications, and Demands on Insider Positionality, in *The Qualitative Report*, 13(3), 474-494
- Clarke J, Fitzgerald M, Greenwood V and Young J (eds.) (1980) *Permissiveness and Control: the fate of sixties legislation*, MacMillan
- Creswell, J. (1998) *Qualitative inquiry and research design: Choosing among five traditions*. London: Sage Publications.
- Creswell, J. and Piano Clark, V. (2011) *Designing and Conducting Mixed Methods Research*, Sage
- Davis, K. (1969) *Discretionary Justice: A preliminary inquiry*. Baton Rouge, Louisiana: Louisiana State University Press.
- Daw, R and Solomon, A. (2010) Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute, in *Criminal Law Review*, 2010 October

- Dhami, M., (2003) Psychological models of professional decision-making, in *Psychological Science*, Vol. 14, pp. 141-68.
- Dhami, M. and Thomson, M. (2012) On the relevance of Cognitive Continuum Theory and quasi-rationality for understanding management judgment and decision-making, in *European Management Journal*, 30 (4). pp. 316-326.
- Dhami, M. and Belton, K (2017) On Getting Inside the Judge's Mind, in *Translational Issues in Psychological Science*, 2017, Vol. 3, No. 2, 214 - 226
- Dworkin R (1977) *Taking rights seriously*, London Duckworth
- Fairclough, S. (2018) Using Hawkin's Surround, Field and Frames Concepts to Understand the Complexities of Special Measures Decision-making in Crown Court trials, in *The Journal of Law and Society*, vol. 45, no. 3, pp. 457-485.
- Forst, B. and Brosi, K. (1977) A theoretical and empirical analysis of the Prosecutor, in *The Journal of Legal Studies*, Vol.6, No.1 (Jan. 1977), pp. 177-191.
- Garland D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*, OUP
- Gawronski, B., Hofmann, W., and Wilbur, C. (2006) Are 'implicit' attitudes unconscious?, in *Consciousness and Cognition: An International Journal*, 15(3), 485-499.
- Gelsthorpe L. and Giller, H. (1990) More justice for juveniles: Does more mean better? in *Criminal Law Review*, 153-164.
- Gelsthorpe L. and Padfield, N. (2003) *Exercising Discretion: Decision-making in the Criminal Justice System and Beyond*, Willan.
- Giddens A (1990) *The consequences of modernity*, Stanford University Press
- Giddens (1991) *Modernity and Self-Identity: Self and Society in the Late Modern Age*. Cambridge, England: Polity Press.

- Gigerenzer, G. and Gaissmaier, W. (2011) Heuristic Decision-making, in *The Annual Review of Psychology*, 62, 451-82.
- Gilbert, D. and Gill, M. (2000) The momentary realist, in *Psychological Science*, Vol. 11, No.5, p. 394-398
- Greene, M. (2014) On the Inside Looking In: Methodological Insights and Challenges in Conducting Qualitative Insider Research. *The Qualitative Report* 19 (29), 1-13
- Greenwald, A. and Banaji, M. (1995) Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes, in *Psychological Review*, Vol.102, No.1, 4-27.
- Grieve, D. (2013) [Dominic Grieve – 2013 Speech on Prosecution Policy – UKPOL.CO.UK](http://www.ukpol.co.uk)
- Griffiths, D. and Sanders, A. (2012) The road to the dock: prosecution decision-making in medical manslaughter cases, in Sanders, A. and Griffiths, D. (eds) (2012) *Bioethics, Medicine and the Criminal Law: Medicine, Crime and Society*. vol. 2, p. 117-158. Cambridge University Press.
- Hall, M. (2018) *Victims of Crime – Policy and Practice in Criminal Justice*. Willan Publishing
- Hansard – [www.hansard.parliament.uk](http://www.hansard.parliament.uk).
- Hawkins, K. (1992) *The Uses of Discretion*, Oxford: Clarendon Press
- Hawkins, K. (2002) *Law as a last resort: prosecution decision-making in a regulatory agency*. Oxford: Oxford University Press.
- Hirschel, D. and Hutchison, I (2001) The Relative Effects of Offence, Offender, and Victim Variables on the Decision to Prosecute Domestic Violence Cases, in *Violence Against Women*, Vol. 7, No. 1, January 2001, pp. 46-59.
- Her Majesty's Crown Prosecution Service Inspectorate (2006) CPS Case Management System

- Her Majesty's Crown Prosecution Service Inspectorate (2020) *Charging Inspection 2020*,  
 HMCPSI Publication No. CP001: 1274
- Hodgson, J. (2020) *The Metamorphosis of Criminal Justice*. Oxford University Press
- Home Office (1990) Provision of Mentally Disordered Offenders, HO 66/90
- Howitt, D., and Cramer, D. (2017) *Introduction to SPSS in Psychology*. Pearson Education  
 Press.
- Hoyano, A., Hoyano, L., Davis, G., and Goldie, S. (1997) A study of the impact of the  
 revised Code for Crown Prosecutors, in *Criminal Law Review*, 1997, Aug, 556-564.
- Hoyle C and Zedner L (2007) Victims, victimisation and criminal justice, in *The Oxford  
 Handbook of Criminology* (eds.) 4<sup>th</sup> Edition, OUP
- Hoyle, C. (2012) Victims, Victimisation and Restorative Justice, in M. Maguire, R. Morgan  
 and R. Reiner (eds), *The Oxford Handbook of Criminology*, Oxford University Press.
- Ibbs R (1988) *Improving Management in Government: the Next Steps*, HMSO
- Iliadis, M. and Flynn, A. (2018) Providing a check on prosecutorial decision making: the  
 victim right to review, in *The British Journal of Criminology*, Vol. 58, No. 3 (May  
 2018), pp.550-568
- Kanuha, V (2000) *'Being' Native versus 'Going Native': Conducting Social Work Research  
 as an Insider*, National Association of Social Workers.
- Kahneman, D. (2011) *Thinking Fast and Slow*, Random House.
- King, R. and Wincup, E. (2008) *Doing research on crime and justice*, Sage
- Klein, G. and Kahneman, D. (2009) Conditions of Intuitive Expertise: A Failure to Disagree,  
 in *American Psychologist*, September 2009, Vol. 64, No. 6, p. 515–526
- Klein, G. (2016) The naturalistic decision-making approach, in *Psychology Today*, February  
 01 2016, found at <https://www.psychologytoday.com/us/blog/seeing-what-others-dont/201602/the-naturalistic-decision-making-approach>.

- Lacey, N. (1992) The Jurisprudence of Discretion: Escaping the Legal Paradigm, in Hawkins, K (ed.) *The uses of discretion*. Oxford: Clarendon Press.
- Lacey, N. and Zedner, L. (2017) Criminalisation: Historical, Legal and Criminological Perspectives, in Liebling, A., Maruna, S. and McAra, L. (2017) *The Oxford Handbook of Criminology*, 6<sup>th</sup> Edition, Chapter 2.
- LaFree, G. (1980) The Effect of Sexual Stratification By Race on Official Reactions to Rape, in *American Sociological Review*, Vol. 45, No. 5 (Oct., 1980), pp. 842-854.
- The Lammy Review: *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2017) Cabinet Office
- Lewis, C. (2006) 'In pursuit of the public interest', *Public Administration Review*, 694-701
- Lewis, J. (2003) in Ritchie, J., and Lewis, J. (eds) *Qualitative Research Practice; A guide for social science students and researchers*. Sage.
- MacLean, L., Estable, A., Meyer, M., Kothari, A., Edwards, N., and Riley, B. (2010) in Streiner, D., and Sidani, S. (eds) *When Research Goes Off the Rails: Why it happens and what you can do about it*. Guildford Press.
- Matthews, H. (2005) The myth of punitiveness; *Theoretical Criminology*; 9: 175 – 201
- McConville et. al. (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*. Clarendon Press.
- McConville, M., Sanders, A. and Leng, R. (1991). *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. Routledge.
- Mulcahy, A. (1994) The justification of Justice – Legal Practitioners' Accounts of Negotiated Case Settlements in the Magistrates' Courts', in the *British Journal of Criminology*, Volume 34, Issue 4, Autumn 1994, Pages 411–430.

White Paper, *Modernising Government*, (Cabinet Office, 1999).

Ministry of Justice, [Tackling Racial Disparity in the Criminal Justice System: 2020 Update](#)  
([publishing.service.gov.uk](#)) (HMSO)

Myers, A. and Hagan, J. (1979) Private and Public Trouble: Prosecutors and the Allocation of Court Resources, in *Social Problems*, Volume 26, Issue 4, 1 April 1979, Pages 439-451.

National Audit Office (1989) *Review of the Crown Prosecution Service*, HMSO

Naples, N. (1996). The outsider phenomenon. In C. D. Smith and W. Kornblum (Eds.), *In the field: Readings on the field research experience* (2nd ed., pp. 139-149). Westport, CT: Praeger

Naples, N. (1996). The outsider phenomenon. In C. D. Smith and W. Kornblum (Eds.), *In the field: Readings on the field research experience* (2nd ed., pp. 139-149). Westport, CT: Praeger

Newman, D. (2013) *Legal Aid Lawyers and the Quest for Justice*. Hart Publishing.

Noaks, L. and Wincup, E (2004) *Criminological Research: Understanding Qualitative Methods*, Sage

O'Malley, P (1999) Volatile and contradictory punishment, in *Theoretical Criminology*, Volume 3(2): 175-196

Pachur, T., and Hertwig, R. (2006) On the psychology of the recognition heuristic: retrieval primacy as a key determinant of its use, in the *Journal of Experimental Psychology*, Vol. 32, pp. 983-1002.

Packer H (1964) Two Models of the Criminal Process, *University of Pennsylvania Law Review*, Vol. 113, No. 1:1-68.

Paternoster, R., Brame, R., Bachman, R. and Sherman, L. (1997) 'Do fair procedures matter? The effects of procedural justice on spousal assault' in *Law and Society Review* 31:163–204.

- Porter, A. (2019) Prosecuting Domestic Abuse in England and Wales: Crown Prosecution Service ‘Working Practice’ and New Public Managerialism, in *Social and Legal Studies*, vol. 28, issue 4.
- Ritchie, J., Lewis, J. and Elam, G. (2003) in Ritchie, J., and Lewis, J. (eds) *Qualitative Research Practice; A guide for social science students and researchers*. Sage.
- Roberts, J. and Bild, J. (2021) Ethnicity and Custodial Sentencing: A Review of Trends 2009-2019. Sentencing Academy
- Rogers, J. (2006) ‘Restructuring the Exercise of Prosecutorial Discretion in England’ 26 *Oxford Journal of Legal Studies* 775-803 .
- Rogers, J. (2017) A Human Rights Perspective on the Evidential Test for Bringing Prosecutions, in *Criminal Law Review*, 2017, Issue 9 678-695
- Royal Commission on Criminal Procedure (1981). *Command Paper 8092*. HMSO
- Royal Commission on Criminal Justice (1993). *Command Paper 2263*. HMSO.
- Salter, M., and Twist, S. (2007) The Micro-sovereignty of Discretion in Legal Decision-Making: Carl Schmitt’s Critique of Liberal Principles of Legality, in *Web Journal of Current Legal Issues*, Issue 3.
- Sanders, A. (1986) An independent Crown Prosecution Service?, in *Criminal Law Review*, 1986, Jan, 16-27.
- Sanders, A. (1987). Constructing the Case for the Prosecution, in *The Journal of Law and Society*, Vol. 14, No. 2, Summer.
- Sanders, A. (2016). The CPS – 30 years on, in the *Criminal Law Review*, 2016, 2, 82-98.
- Sanders, A. (2018) The CPS, Policy-making and Assisted Dying: Towards a ‘Freedom’ Approach, in Child, J. and Duff, R. (2018) *Criminal Law Reform Now*. Cambridge University Press. Schmitt, C., (2004) *On the Three Types of Juristic Thought*, trans. J. W. Bendersky, London, Praeger. Original publication: 1934

- Silverman, D. (2014) *Interpreting Qualitative Data*, Sage
- Simon, H. (1967) Motivational and emotional controls of cognition. *Psychological Review*, 74(1), 29–39.
- Skolnick, J. H. (1966) *Justice without trial: Law enforcement in democratic society*, University of California, Berkeley, John Wiley and Sons.
- Sosa, K. (2012). *In the public interest: Reforming the Crown Prosecution Service*. Policy Exchange.
- Soubise, L. (2017) Prosecuting in the magistrates' courts in a time of austerity, in *Criminal Law Review*, 11, 847 – 859.
- Stanko, E. (1981) The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office, in *Law and Society Review*, Vol. 16, no. 2.
- The Code for Crown Prosecutors 1986, 1994, 2000, 2004, 2010, 2013, 2018
- The Royal Commission on the Police* (1962), Cmnd. 1728, HMSO
- Travers, M. (1997) *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers*. Ashgate.
- Tyler T (2013) Legitimacy and compliance: the virtues of self-regulation, in Crawford A and Hucklesby A, *Legitimacy and compliance in criminal justice*, Routledge
- Tyler, T. and Jackson, J. (2013). Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement, in *Psychology, Public Policy and Law*; Yale Law School, Public Law Working Paper No. 306; *Yale Law and Economics Research Paper No. 477*.
- Welsh, L., Skynns, L and Sanders, A. (2021) *Sanders and Young's Criminal Justice* (5<sup>th</sup> edn). Oxford University Press

Weenink, D. (2009) Explaining Ethnic Inequality in the Juvenile Justice System: An Analysis of the Outcome of Dutch Prosecutorial Decision-making, in *The British Journal of Criminology*, Vol. 49, No. 2 (March 2009), pp.220-242.

Young, R. and Sanders, A 'The Ethics of Prosecution Lawyers' (2004) in *Legal Ethics* 190

## Annex A – Research undertakings

### RESEARCH UNDERTAKINGS

TO BE COMPLETED BY THE CPS:

1. **Researcher Name:** Ben Widdicombe
2. **Sponsor Organisation:** Crown Prosecution Service/University of Cambridge
3. **Purpose For Which Access is Granted:** In pursuance of a PhD in Criminology which aims to investigate the use of prosecutorial discretion when applying the public interest test.
  - Access is granted to view an unlimited number of files, excluding Central Casework Division file material.
  - Access is granted until the end of August 2018.

TO BE COMPLETED BY THE RESEARCHER:

#### 4. Conditions of Access

Access to Crown Prosecution Service (CPS) case files or the Case Management System (CMS) has been granted solely for the purpose of the research project referred to in section 3 above. I agree that:

- (i) only the information required for the purposes of my research may be examined and recorded from the file. The data may not be used in any way which will enable any individual on whom data is collected to be identified;
- (ii) documents, statements, exhibits and tape recordings may be removed from CMS but may only be stored on the researcher's CPS device. No data whatsoever taken from CMS can be moved to any other device without permission from the CPS. The researcher will anonymise any case information taken from CMS immediately after transfer to the CPS device, and keep a log of case number and nature of information removed covering all such instances, to be submitted regularly and/or when requested to the CPS.
- (iii) no unpublished information contained in CPS case files or databases (including the nature of those files or records) may be quoted or disseminated to individuals outside the Service without the prior approval of CPS Headquarters. Any written work making reference to CMS data, or documents that the researcher plans to use as a basis for discussion with supervising Professors, will be provided to the CPS for approval prior to submission to the supervising Professors.
- (iv) a list of all files examined by the researcher will be provided to the Chief Crown Prosecutor for the Area at the conclusion of the access visit;
- (v) any book, article, broadcast or lecture based upon the research findings and incorporating information derived from the files and records to which access has been granted will be submitted to the CPS prior to any publication for comment. The CPS retains the right to edit or otherwise restrict publication of any such information. A thesis made available for public inspection shall be deemed a publication;

- (vi) a copy of any final publication will be forwarded to the CPS;
- (vii) I will comply with all the requirements of the Data Protection Act 1998 and am fully aware that non-compliance of the Act may result in a criminal offence.
- (viii) I hereby confirm that I am fully aware of my continuing obligations regarding the protection of official information as laid down in the Official Secrets Act 1989 and that non-compliance of the Act may result in a criminal offence.

**5. Project Specific Conditions**

I agree that:

- (i) a draft copy of the PhD thesis will be forwarded to the CPS at least 3 months prior to the PhD deadline date. Comments will be provided back from the CPS to the researcher at least 2 months prior to the PhD deadline date. The deadline date is the date of submission of the written PhD thesis to Cambridge University.
- (ii) a copy of the final PhD thesis will be sent to the CPS within 2 months of the completion date.

..... **Signed**

..... **Signed**  
(Supervisor - if applicable)

..... **Date**

..... **Date**

## RESEARCH UNDERTAKING

TO BE COMPLETED BY THE CPS:

1. **Researcher Name:** Ben Widdicombe
2. **Sponsor Organisation:** Crown Prosecution Service/University of Cambridge
3. **Purpose For Which Access is Granted** In pursuance of a PhD in Criminology which aims to investigate the use of prosecutorial discretion when applying the public interest test.
  - Access is granted to interview an unlimited number of prosecutors in single or group session in any location.
  - Access is granted until the end of August 2018

TO BE COMPLETED BY THE RESEARCHER:

### 4. Conditions of Access

Permission to interview/question CPS personnel has been granted solely for the purpose of the research project referred to at paragraph 3 above. I agree that:

- (i) only the information required for the purposes of my research may be examined and recorded. The data may not be used in any way which will enable any individual on whom data is collected to be identified;
- (ii) consent must be obtained from the interviewee before proceeding to record an interview;
- (iii) any recording or transcript of interviews that are in my possession may only be used for the purposes of the research and will remain the property of the CPS;
- (iv) no unpublished information contained in recordings or transcripts of interviews may be quoted or disseminated to individuals outside the Service without the prior approval of CPS Headquarters;
- (v) any book, article, broadcast or lecture based upon the research findings and incorporating information derived from the interviews for which permission has been granted will be submitted to the CPS prior to any publication for comment. The CPS retains the right to edit or otherwise restrict publication of any such information. A thesis made available for public inspection shall be deemed a publication;
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..... **Signed**

..... **Signed**  
(Supervisor - if applicable)

..... **Date**

..... **Date**

## Annex B – Interview Plan

1. Understanding the case
  - 1.1. How do you go about making sense of the case?
  - 1.2. When you look at a case for the first time, what do you look at first?
2. Use of the Code/general decision-making/discretion
  - 2.1. How do you use the Code when making a decision?
  - 2.2. Do you use the Code to help justify your decision?
  - 2.3. Is your freedom to decide matters (within the Code) a positive or negative thing?
3. Cost
  - 3.1. How do you take account of costs and resourcing in case decisions?
4. Defendant
  - 4.1. How do you take account of the defendant when considering a case?
  - 4.2. How do you take account of defendant age?
  - 4.3. How do you take account of previous convictions?
5. Offence
  - 5.1. How do you take account of the offence type when considering a case?
6. Decision maker
  - 6.1. How important is your ‘gut feel’, ‘hunch’ or ‘intuition’ when deciding upon a case?
  - 6.2. Are there jobs, roles or experiences in the past that help you make decisions on a case?
  - 6.3. Who do you go to for help on a difficult case?
7. Victim
  - 7.1. How do you take account of the victim when considering a case?
8. Decision-making within a wider system
  - 8.1. Can you describe your relationship to the Police? Has it changed?
  - 8.2. Do you consider the decisions taken by others on a case prior to it coming to you?
  - 8.3. Do you feel that you make decisions, or do you ratify the decisions of others?
9. General
  - 9.1. What makes a good prosecutor?
  - 9.2. Who is the audience for your decisions? Who do you have in mind when taking a decision? Who do you worry about if you were to make a wrong decision?
  - 9.3. Do you consider local and national issues when deciding upon a case? How?

## Annex C - Participant Information Sheet

Institute of Criminology  
University of Cambridge  
West Road  
Cambridge

Mr Ben Widdicombe  
PhD candidate and CPS employee

March 2017

Dear Prosecutor,

### **Better understanding prosecutorial discretion: an invitation to participate in research**

I am a PhD student studying at the Institute of Criminology at Cambridge and am a CPS member of staff (having worked in HQ and CPS Surrey). As part of my studies I would like to interview prosecutors to understand better how prosecutorial discretion is exercised and the factors prosecutors consider when deciding upon a case.

Your CCP has very kindly allowed me to approach you to ask you to meet for an interview. If you were willing, I would like to ask you some questions about the factors you consider important when deciding upon a case, how you balance aspects relating to the offender, the offence, and the victim, and how you use the Code for Crown Prosecutors. The information I gather from your experience and knowledge as prosecutors would be of huge value in learning more about this under-researched area of the criminal justice system. It will, I hope, help improve prosecutorial policy and practice in future.

The interview would last around an hour and take the form of a fairly informal discussion prompted by the particular set of questions. I would travel to a meeting place convenient to you and speak to you whenever suits - perhaps your CPS office to speak over lunchtime, for instance? I would like to interview around 40 prosecutors in total, spread out over the coming six months. I would like to speak to all types of prosecutor: young/old, experienced/new, CPs, CAs – the more diversity the better...!

The interview is confidential. Neither your name, nor any other details by which you could be identified will be made available to anyone other than me (nobody in the CPS will know whether you participated or not). I would like permission to tape record the interview. The interview will be transcribed and I may use anonymised quotations from the interview in my final doctoral thesis. I will keep the transcripts and recordings secure at all times at the University of Cambridge (not on CPS systems). The research will be conducted in line with all ethical requirements set out by the British Criminological Society and Cambridge University (<http://www.britisoccrim.org/new/docs/BSCEthics2015.pdf>).

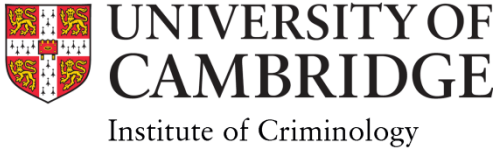
Volunteering for an interview does not guarantee one as if many more prosecutors volunteer than I expect I will need to take a sample from willing participants. However, I expect at this stage to interview almost all those that are willing to be interviewed.

If you do wish to volunteer for an interview, please contact me at [bjw60@cam.ac.uk](mailto:bjw60@cam.ac.uk).  
My phone number is 07765007542.

Thank you for your support. I hope we can meet for an interview soon!

**Ben Widdicombe**

## Annex D – Participant Consent Form



### CONSENT FORM

#### Better understanding prosecutorial discretion

*Please answer the following questions by ticking the response that applies*

- |  | YES                      | NO                       |
|--|--------------------------|--------------------------|
| 1. I have read the Information Sheet for this study and have had details of the study explained to me.   | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. My questions about the study have been answered satisfactorily and I understand that I may ask further questions at any point.  | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. I understand that I am free to withdraw from the study within the time limits outlined in the Information Sheet, without giving a reason for my withdrawal, and that I may decline to answer any particular questions in the study without any consequences to my future treatment by the researcher. | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. I agree to provide information to the researcher under the conditions of confidentiality set out in the Information Sheet.  | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. I am content to participate in the study under the conditions set out in the Information Sheet.   | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. I am happy for the interview to be recorded and transcribed for research purposes.  | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. I consent to the information collected (suitably anonymised so that I cannot be identified), being used for research purposes.  | <input type="checkbox"/> | <input type="checkbox"/> |

**Participant's Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

\_\_\_\_\_

**Participant's Name (Printed):** \_\_\_\_\_

**Researcher's Signature:** \_\_\_\_\_

**Researcher's Name (Printed):** Ben Widdicombe

**Researcher's contact details:** Ben Widdicombe

**Tel:** 07765 007 542

**Email:** bjw60@cam.ac.uk

**Research Supervisor's contact details:** Prof. Loraine Gelsthorpe

**Tel:** 01223 335 377

**Email:** lrg10@cam.ac.uk

## Annex E – Data tables

*Annex table E1 - Logistic regression for cases prosecuted and discontinued*

Number of cases in analysis					
Cases analysed			3791		
Model predictiveness					
Baseline guess			68.30%		Block 0
With predictor variables			75.90%		Block 1
Important variables					
			Strong influence (Wald/sig < .05)	Direction (B)	Odds ratio (ExpB)
Defendant data	Significant variable 1	Defendant gender – male	0.24	Reference category	1
		Defendant gender - female	0.08	Towards discontinued	1.371
	Significant variable 2	Defendant ethnicity – White British	0	Reference category	1
		Defendant ethnicity – Any other background	0	Towards discontinued	1.696
	Significant variable 3	Defendant previous convictions – None	0	Reference category	1
		Defendant previous convictions – 3-6 convictions	0.23	Towards prosecute	0.683
		Defendant previous convictions – 7-16 offences	0.17	Towards prosecute	0.675
		Defendant previous convictions – No access (security)	0	Towards discontinued	4.789
Defendant previous convictions - Missing from system		0	Towards discontinued	2.788	
Crime data	Significant variable 4	Principal Offence Category – not recorded	0	Reference category	1
		Principal Offence Category - Off ag. person	0	Towards discontinued	3.656
		Principal Offence Category – Sex offences	0.001	Towards discontinued	3.088
		Principal Offence Category - Burglary	0.001	Towards discontinued	2.693
		Principal Offence Category – Theft and Hand	0	Towards discontinued	2.205
		Principal Offence Category – Crim. Damage	0	Towards discontinued	3.074
		Principal Offence Category - Drugs	0.001	Towards discontinued	1.957
		Principal Offence Category – Public Order	0	Towards discontinued	5.072
		Principal Offence Category – All other	0	Towards discontinued	6.2
	Significant variable 5	Area – London	0	Reference category	1
		Area – East Midlands	0.001	Towards prosecute	0.54
		Area – Eastern	0.016	Towards prosecute	0.626
		Area – Merseyside	0.002	Towards prosecute	0.521
		Area – North Eastern	0	Towards prosecute	0.449

		Area – North Western	0.004	Towards prosecute	0.61
		Area – South East	0	Towards prosecute	0.384
		Area – South West	0.016	Towards prosecute	0.61
		Area – Thames and Chiltern	0.009	Towards prosecute	0.6
		Area – Wales	0	Towards prosecute	0.483
		Area – Wessex	0	Towards prosecute	0.259
		Area – West Midlands	0	Towards prosecute	0.389
		Area – Yorkshire and Humber	0	Towards prosecute	0.373
	Significant variable 6	Date – March 2015	0	Reference category	1
		Date – September 2015	0	Towards discontinued	2.893
		Date – October 2015	0.042	Towards discontinued	1.45
		Date – December 2015	0.031	Towards discontinued	1.495
Prosec. data	Significant variable 7	Prosecutor gender ‘missing’	0.042	Towards prosecute	0.109
<b>Variation explained by predictor variables</b>					
16.6% - 22.2% - (Cox and Snell - Nagelkerke R Square)					
<b>Overall goodness of fit/how well the model performs</b>					
Good (sig. < .05) - (Omnibus goodness of fit)					
Good (sig. < .05) - (Hosmer and Lemeshow Test)					

Annex table E2 - Logistic regression for cases discontinued pre- and post-charge

Number of cases in analysis					
Cases analysed			2591		
Model predictiveness					
Baseline guess			60.30%		Block 0
With predictor variables			76.60%		Block 1
Important variables					
			Strong influence (Wald/sig < .05)	Direction (B)	Odds ratio (ExpB)
Defendant data	Significant variable 1	Defendant age – 10-13	0.042	Reference category	1
		Defendant age – 14-17	0.004	Towards post-charge	3.199
	Significant variable 2	Defendant age – 18-24	0.009	Towards post-charge	2.713
		Defendant age – 25-59	0.01	Towards post-charge	2.626
	Significant variable 3	Defendant ethnicity – White British	0.001	Reference category	1
		Defendant ethnicity – African/Caribbean	0.013	Towards post-charge	1.701
	Significant variable 4	Defendant ethnicity – Any other background	0.001	Towards post-charge	2.419
		Defendant ethnicity – Missing data	0	Towards post-charge	1.629
	Significant variable 5	Defendant previous convictions – No convictions	0	Reference category	1
		Defendant previous convictions – 1-2 convictions	0.007	Towards pre-charge	0.568
		Defendant previous convictions – 16-138 convictions	0.009	Towards post-charge	2.01
		Defendant previous convictions – Inaccessible (security)	0	Towards pre-charge	0.171
		Defendant previous convictions – Missing data	0	Towards pre-charge	0.118
Crime data	Significant variable 6	Area – London	0	Reference category	1
		Area – East Midlands	0	Towards post-charge	2.184
		Area – North East	0	Towards post-charge	2.59
		Area – North West	0	Towards pre-charge	0.491
		Area – South East	0.014	Towards post-charge	1.82
		Area – South West	0.008	Towards post-charge	2.061
		Area – Wessex	0.001	Towards post-charge	2.54
		Area – West Midlands	0	Towards post-charge	2.252
		Area – Yorkshire and Humber	0.005	Towards post-charge	1.815

	Significant variable 7	Date - March 2015	0.032	Reference category	1
		Date – September 2015	0.018	Towards pre-charge	0.579
Prosecutor data	Significant variable 8	Prosecutor grade – Crown advocate	0.041	Towards post-charge	1.545
		Prosecutor ethnicity – White	0	Reference category	1
		Prosecutor ethnicity – BME	0	Towards post-charge	2.244
	Significant variable 9	Prosecutor gender - Male	0.001	Reference category	1
		Prosecutor gender – Missing data	0	Towards post-charge	65.335
	Significant variable 10	Prosecutor religion - Christian	0.003	Reference category	1
		Prosecutor religion – Pagan	0.012	Towards pre-charge	0.298
		Prosecutor religion – Prefer not to say	0.001	Towards pre-charge	0.421
	Significant variable 11	Prosecutor disability -Status undeclared	0.046	Towards post-charge	1.44
	Significant variable 12	Prosecutor sexual orientation - Heterosexual	0.002	Reference category	1
		Prosecutor sexual orientation – Missing data	0.001	Towards post-charge	2.288
	Significant variable 13	Prosecutor age – 26-40	0	Reference category	1
		Prosecutor age – 50-54	0.001	Towards pre-charge	0.502
		Prosecutor age – 55-70	0.042	Towards pre-charge	0.658
Prosecutor age – No data		0.006	Towards pre-charge	0.044	
Significant variable 14	Prosecutor career – 0-11 years	0	Reference category	1	
	Prosecutor career – 14-16 years	0.003	Towards pre-charge	0.568	
	Prosecutor career – 26-31 years	0	Towards pre-charge	0.457	
<b>Variation explained by predictor variables</b>					
29.5% - 39.9% - (Cox and Snell - Nagelkerke R Square)					
<b>Overall goodness of fit/how well the model performs</b>					
Good (sig. < .05) – (Omnibus goodness of fit)					
Poor (sig. < .05) – (Hosmer and Lemeshow Test)					

Annex table E3 - Logistic regression for cases discontinued on evidential and public interest grounds

Number of cases in analysis					
Cases analysed			2196		
Model predictiveness					
Baseline guess			54.10%	Block 0	
With predictor variables			68.40%	Block 1	
Important variables					
			Strong influence (Wald/sig < .05)	Direction of relationship (B)	Odds ratio (ExpB)
Defendant data	Significant variable 1	Defendant gender - male	0.027	Baseline reference	1
		Defendant gender - female	0.035	Towards public interest	1.322
	Significant variable 2	Defendant age – 10-13	0	Baseline reference	1
		Defendant age – 14-17	0.004	Towards evidential	0.26
		Defendant age – 18-24	0	Towards evidential	0.095
		Defendant age – 25-39	0	Towards evidential	0.095
		Defendant age – 60-69	0	Towards evidential	0.12
		Defendant age – Missing data	0	Towards evidential	0.188
	Significant variable 3	Defendant ethnicity – White British	0.001	Baseline reference	1
		Defendant ethnicity – African Caribbean	0.005	Towards evidential	0.535
		Defendant ethnicity – Asian	0.057	Towards evidential	0.639
		Defendant ethnicity – Missing data	0.12	Towards public interest	1.395
	Crime data	Significant variable 4	Principal offence category – Not entered	0	Baseline reference
Principal offence category – Sex offences			0.029	Towards public interest	2.571
Principal offence category – Theft and Hand			0.024	Towards public interest	1.586
Principal offence category – Crim.damage			0	Towards public interest	2.776
Principal offence category – Drugs			0	Towards public interest	4.008
Principal offence category – Public order			0	Towards public interest	3.653
Principal offence category – All other			0.048	Towards public interest	1.943
Principal offence category – Motoring			0	Towards evidential	0.345
Significant variable 5		Area – London	0.04	Baseline reference	1
		Area – East Mids	0.008	Towards public interest	1.738
		Area – South West	0.001	Towards public interest	2.279
		Date – April 2015	0.041	Towards public interest	1.648

	Significant variable 6	Date – July 2015	0.015	Towards public interest	1.778
		Date – August 2015	0.04	Towards public interest	1.524
		Date – September 2015	0.03	Towards public interest	1.664
		Date – November 2015	0.0047	Towards public interest	1.604
Prosecutor data	Significant variable 7	Prosecutor gender – Male	0.018	Baseline reference	1
		Prosecutor gender – Missing data	0.005	Towards public interest	13.321
	Significant variable 8	Prosecutor ethnicity - White	0.019	Baseline reference	1
		Prosecutor ethnicity - BME	0.033	Towards evidential	0.644
		Prosecutor ethnicity – Missing data	0.038	Towards evidential	0.663
	Significant variable 9	Prosecutor religion – Prefer not to say	0.002	Towards evidential	0.43
	Significant variable 10	Prosecutor sexual orientation – Hetero.	0.08	Baseline reference	1
		Prosecutor sexual orientation – Gay	0.03	Towards public interest	2.118
		Prosecutor sexual orientation – Missing	0.039	Towards public interest	1.712
	<b>Variation explained by predictor variables</b>				
19.1% - 25.5% - (Cox and Snell - Nagelkerke R Square)					
<b>Overall goodness of fit/how well the model performs</b>					
Good (sig. < .05) – (Omnibus goodness of fit)					
Good (sig. > .05) – (Hosmer and Lemeshow Test)					