

Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The European Commission has published proposals to expand the remit of the European Public Prosecutor to include terrorism, even before that ground-breaking office is even operational.**
- **The UK Parliament's Home Affairs Committee has published a sobering report on the future of policing in England and Wales, with far-reaching proposals for more centralisation, enhanced cyber-technology skills and capacity, more inter-agency cooperation, more buy-in from the private sector and more funding**
- **The DPP has published a revised code for crown prosecutors in England and Wales, incorporating more attention on the disclosure of evidence favourable to the defence, a more rigorous approach to the application of the 'Threshold Test' for early charging and more emphasis on the importance of recovering the proceeds of crime.**

European Public Prosecutor

The European Public Prosecutor's Office (EPPO) is surely one of the most fundamental and ground-breaking innovations in criminal law and procedure. It can be traced back at least as far as 1997 when Professor Mireille Delmas-Marty and others published the *Corpus Juris* project on a model criminal code for the protection of the financial interests of the EU through the criminal law. Critically, it included a proposal for the establishment of a centralised EU public prosecutor. It was not until November 2017, however, that the necessary legal infrastructure was provided by Council Regulation (EU) 2017/1939 which was adopted through the EU's enhanced cooperation procedure. Twenty-two EU Member States are participating; the exceptions being the UK,

Ireland, Denmark, Sweden, Poland and Hungary.

It is anticipated that the EPPO will become fully operational by the end of 2020. Already, however, the European Commission has published legislative proposals to expand its remit to terrorism (see COM(2018) 641 final). This signals the unprecedented transfer of responsibility for the investigation and prosecution of much serious crime with a cross-border dimension (including cybercrime) from national criminal law enforcement agencies to a supranational authority. It also anticipates a notable deepening of the broader European integration project.

The uniqueness of the EPPO lies in the fact that it incorporates a centralised, independent, EU public prosecutor mandated to investigate, prosecute and bring to justice crimes against the financial interests of the EU. This will include the

power to coordinate police investigations, the rapid freezing and seizure of assets and the ordering of arrests across the EU. It is composed of a European Chief Prosecutor and European Prosecutors, based in Luxembourg, and European Delegated Prosecutors based in each of the participating Member States. The European Delegated Prosecutors will investigate and prosecute the relevant offences before their national courts. To this end, they will direct the work of their national law enforcement authorities, such as the police. Critically, however, they will be monitored, directed and supervised by the Chief and European Prosecutors, thereby ensuring a consistent, centralised, investigation and prosecution policy across Europe in respect of crimes within EPPOs remit.

In essence, the EPPO constitutes the first supranational authority with the competence and responsibility to harness and direct national law enforcement agencies in combating crimes that are considered harmful to the interests of the EU as a sovereign entity. It differs markedly from Eurojust, an EU body of national prosecutors based at The Hague. While Eurojust also promotes greater coherence and effectiveness in the prosecution of crimes affecting two or more Member States, it operates through the traditional methodology of cooperation between national prosecution authorities and lacks a centralised directive competence. EPPO, by comparison, represents a landmark pooling of sovereignty in the interests of developing a supranational criminal law and procedure.

EPPO's remit is prescribed in the Treaty on the Functioning of the European Union as being confined to crimes affecting the financial interests of the EU. Nevertheless, these encompass a very wide range of

fraudulent activities, extending also to associated offences such as corruption and money-laundering, as prescribed in Directive (EU) 2017/1371. Most unusually, the European Council is given a power to amend the Treaty to extend the EPPO's remit to serious crime having a cross-border dimension. Now, before the EPPO is even operational, the European Commission, with the support of President Macron among others, is pushing for an amendment extending EPPO's competence to terrorism.

Given the nature and extent of the terrorist threat, the Commission argues, reasonably, that “.. a stronger European dimension is needed to ensure a uniform, effective and efficient judicial follow up to these crimes across the entire European area of freedom, security and justice.” EPPO is very well designed to meet that need. It must also be appreciated, however, that the Commission's proposal will trigger a major expansion of EPPO's remit, status and significance.

Terrorism embraces a wide range of offences, many of which are defined in very broad and loose terms. In addition to the mainstream offences concerning firearms, explosives and offences against the person and property, it encompasses offences encroaching severely on freedoms of expression and association. Most controversially, some of the offences push criminal law beyond the traditional confines of prohibited acts, omissions, attempts, conspiracies and secondary participation to reach 'precursor' offences. These penalise otherwise lawful activities that can be far removed from the completion of any substantive offence. A particularly controversial example is possession of an article that gives rise to a reasonable suspicion that it is possessed for a purpose connected with the commission,

preparation or instigation of an act of terrorism. Another is engaging in any conduct in preparation for giving effect to an intention to commit an act of terrorism; and there are many others. Obviously, the parameters of these offences are extremely vague and porous. Some might be described more accurately as the penalising of intentions or thoughts. Most of them also impose an evidential burden on the accused to establish that his otherwise lawful conduct was not for a purpose connected with terrorism.

Inevitably, such broad and loosely-defined terrorist offences might be used oppressively against individuals or communities. Whether, or the extent to which, that is realised depends heavily on police and prosecutorial discretion. Expanding EPPO's remit to include terrorism will place that discretion in the hands of a supranational prosecutor freed from the constraints of domestic political and criminal justice norms and accountability. It will also provide a foundation for the expansion of EPPO's remit to all serious crime with a cross-border dimension. Accordingly, the Commission's proposal constitutes a major landmark in shaping the future of criminal law and procedure, not to mention the development of the EU project itself.

The Future of Policing

Only five weeks after the publication of the report of the Commission on the Future of Policing in Ireland (covered in the October issue of these Notes), the UK Parliament's Home Affairs Committee (HAC) has published a report on *Policing for the Future* in England and Wales. However, the context and content of the two reports are strikingly different. The

HAC report makes sobering reading. It calls into question the capacity of the police to cope with the alarming increase in 'volume' crimes (such as robbery and theft), and the very sustainability of our current policing model. Severe financial cutbacks are combining with an exponential rise in cybercrime (most notably online fraud and online sexual offences involving children) to overwhelm police capacity which is hampered by systems, structures and methods that have barely changed over the past 50 years. The HAC warns alarmingly that policing is at risk of becoming irrelevant to most people.

A failure to provide a funding uplift for policing will, in the Committee's words, have dire consequences in that the police will not be able to fulfil their duties in delivering public safety, criminal justice, community cohesion and public confidence. Equally, however, the Committee cautions that more funding will not be sufficient in itself. More radical innovation and surgery will be needed in the form of cyber-technology skills and capacity, enhanced inter-agency cooperation, more buy-in from the private sector and major structural and governance reform.

Lack of digital capabilities is identified as a systemic problem throughout the police service. Investment in and adoption of new technology is described as "a complete and utter mess", and a contrast with criminals who are exploiting new technology to the full. Innovative responses could include the recruitment of young cyber experts from outside policing, the development of distinct cyber units within forces and even the transformation of the special constabulary to include "cyber specials". The HAC, however, emphasises the need for greater cooperation with, and reliance on the tech giants and other private sector operators.

Taking their lead from counter-terrorism policing and the GCHQ, the HAC proposes the establishment of a National Digital Exploitation Centre for serious crime, including online fraud and online sexual child abuse. It envisages that such a body would be better able to attract and retain talent and would have the purchasing power to invest in innovative methods of digital forensics and analysis from which all forces could benefit. Surprisingly, perhaps, the HAC does not advert to the implications of this for the mainstreaming and normalisation of counter-terrorism policing, or the civil liberties and accountability challenges that it would inevitably pose.

Inter-agency cooperation is now a standard and essential aspect of policing in the community, especially for promoting community safety, safeguarding and neighbourhood policing generally. Nevertheless, the HAC found that its potential is being seriously hampered by fragmentation, duplication and a practice of relying on the police as an emergency social service. It recommends that the government should undertake a review of models that enable the police to pool resources with other public agencies to deliver a more joined-up, effective and cost-efficient response to the safety and safeguarding issues. No mention is made of the knock-on consequences for a blurring of the police role and the associated implications for transparency, democratic scrutiny and accountability.

The most radical aspect of the HAC report is its vision for tackling the structural and operational weaknesses presented by the fragmentation of police technology and data systems across the 43 forces in England and Wales. The Committee comments that “[i]t is astonishing that, in 2018, police forces are still struggling to get crucial real-time information from each

other, and that officers are facing frustration and delays on a daily basis.” It also asserts bluntly that the current allocation of police responsibilities at a national, regional and local level is broken and in dire need of review.

The HAC stops short of advocating the merger of police forces or the development of a national force. However, it does propose a fundamental reallocation of responsibilities at local, regional and national levels. Local policing should focus on community relations, and local crime and safeguarding issues. At national and regional levels, forces need to pool resources and capabilities, especially in response to cybercrime and cross-border crimes such as organised crime, county lines and modern slavery. Once again, it identifies the current structure for counter-terrorism policing as a model that could serve other areas of policing.

Critically, the HAC signals a switch from the current policy of devolving responsibility to local, directly elected, Police and Crime Commissioners, to a greater concentration of power and responsibility in the hands of central government which must demonstrate clear ownership of policing policy and funding. The Home Office, in particular, must step up to the plate and take a much stronger lead in policing policy to deal with the threats of the 21st century. To this end it must move swiftly to launch “a transparent, root-and-branch review of policing”. In addition, the government should establish a National Policing Council, chaired by the Home Secretary, to formulate reform proposals on key policy areas which would be put to a National Police Assembly for adoption as binding on all forces.

Several aspects of the HAC proposals are not entirely new. In total, however, they signal a radical departure in how policing

has been delivered in this country since at least the 1960s. The Committee's vision for responding to the enormous and rapidly changing threats posed by cybercrime could result in: much greater flexibility and innovation in police recruitment, education and training; the adoption of national standards on police digital technologies and databases; and much more emphasis on collaboration with, and reliance on, the private sector as a policing resource. The proposals for addressing the police role in safeguarding vulnerable persons (and in neighbourhood policing more broadly) will entail a blurring of lines between the police and some other public services. Most dramatic of all is the envisaged switch from local to central direction and the extension of the counter-terrorism model to the policing of a much wider range of crime. Surprisingly, and disappointingly, the HAC report makes no attempt to engage with the knock-on consequences of these changes for transparency, democratic scrutiny, accountability and how we conceive of police and policing. The report will undoubtedly trigger a debate that will rage among the police and policymakers. It is vital to ensure that it is not confined to those vested interests.

Crown Prosecutors Code

The DPP has just produced the 8th edition of the Code for Crown Prosecutors in England and Wales. The first edition was published in 1986 following the establishment of the Crown Prosecution Service. It sets out the general principles that Crown prosecutors should follow in the discharge of their functions. So, for example, in deciding whether or not to prosecute (or continue the prosecution of) a person for a criminal offence, the

prosecutor must normally apply a two-stage test: 1. Is there a realistic prospect of securing a conviction against the suspect for the offence in question? 2. Is it in the public interest to charge the person? There is also provision for a 'Threshold Test' which envisages the possibility of charges being preferred against a suspect even before the requirements of the two-stage test are fully satisfied. This applies where the suspect is considered to present a substantial bail risk (such as a serious risk of harm to the public) and it is expected that further evidence satisfying the two-stage test will be produced shortly by the police while the suspect is remanded in custody. The Code sets out considerable detail on the factors that a prosecutor should take into account in the application of these tests. It also sets out principles on a range of other matters under the headings of: the selection of charges; out of court disposals; choice of court venue; accepting guilty pleas; and reconsidering a prosecution decision. The key changes included in the 8th edition concern: disclosure of evidence favourable to the defence; the requirements of the Threshold Test; and recovering the proceeds of crime.

The inclusion of express reference to prosecutors' disclosure obligations can be seen as a response to the recent collapse of some rape prosecutions due to the failure of the prosecution to disclose to the defence evidence which undermined the prosecution case. So, for example, additions to the Code emphasise the obligation on prosecutors to be even-handed in every case. This includes protecting the rights of suspects and defendants, as well as providing the best possible service to victims. More particularly, when preferring charges, the revised Code expressly requires the prosecutor to consider whether there may

be material in the possession of the police or elsewhere (in addition to that already supplied by the police) which may affect the evidential test for the charges. Equally, the Code now requires prosecutors to advise the police on appropriate disclosure management in a criminal investigation and prosecution. This aspect is becoming increasingly complex and important given the explosion in the availability and use of digital evidence, such as mobile phone records and internet trails. Surprisingly, perhaps, the Code still does not include an express obligation to disclose relevant evidence to the defence where that evidence may be helpful to the defence or undermine the prosecution case.

The changes to the threshold test may reflect a perception that it is being used too loosely by the prosecution to the prejudice of due process and respect for the right to liberty. The overall thrust of the changes is to require prosecutors to be more objective and questioning of the need to resort to the lower threshold test in individual cases, rather than accepting the police case at face value. In particular, they must conduct a "rigorous" examination of the prescribed conditions for resorting to the lower threshold standard to ensure that it is only applied when necessary and not prematurely. This must include consideration of evidence that points away from guilt as well as towards guilt. Emphasis is placed on the importance of an objective consideration of the need for immediate charging and for objecting to bail. Prosecutors are also obliged to keep those decisions under review and to be proactive in securing the necessary evidence for them from the police.

Targeting the proceeds of crime through the criminal (and civil) process is now an established method for tackling crime, especially organised crime. This is now

reflected in specific provisions in the Crown Prosecutors Code. When deciding whether the public interest test for a prosecution is satisfied, the prosecutor must consider, among other things, the extent to which the suspect has benefited from the criminal conduct. Similarly, when taking certain other key decisions (such as the selection of charges, the trial venue and accepting guilty pleas), the prosecutor must be careful to avoid prejudicing the possibility of the court making a confiscation order in an appropriate case. The combined effect of these provisions may well be to establish the confiscation of criminal assets as a core or focal point of prosecutions in certain types of crime.