POL00125210

Post Office Enforcement and Prosecution Policy for England and Wales

Comments on BAQC draft Policy.

GENERAL OVERVIEW

1. Any enforcement and prosecution policy may be subject to critical analysis by those to whom it is intended to apply. Such analysis may include the Judicial Review of a policy, or of a decision made following the application of that policy. Resort may also be had to the Abuse of Process jurisdiction[1] by those charged with offences following the application of a policy, for one aspect of that jurisdiction lies in the complaint that a policy has not been properly applied.

2. It is not only those who are the subject of such a decision who may seek the intervention of the court: others include such interested parties as the victim(s) of a crime; those with a legitimate interest in the proper administration of POL; and, given that POL is a publicly owned organisation[2], those members of the public who may consider that such a policy does not meet either the policy's aims, or does not meet the aims or standards to which a publicly-owned organisation should aspire.

Aims

3. Thus any policy should, in this context, seek to satisfy two objectives: a) to provide clarity, method and transparency in the application of a policy and any decision-making process engaged thereunder, and b) the elimination, or at least minimisation of, any 'hostages-to-fortune' which might otherwise appear.

4. On a separate point, as long-standing prosecutors to a number of national organisations we are acutely aware of the need to provide decision-makers with both general criteria and more detailed guidance with which to assist in the decision-making process, for ultimately an enforcement and prosecution policy must provide the necessary 'tool kit' with which to accomplish implementation and decision-making.

5. In considering the formulation of this policy, we observe that, whilst the principles to be applied are clear and concise, much of the policy is couched in terms of generality[3] so that a decision-maker is here granted a wide discretion in interpreting and applying those principles.

6. Such a wide discretion, whilst advantageous in some respects, may in fact provide unhelpful consequences, for any decision is open to review and the wider the discretion granted to decision-makers the more amenable to review the decision will be. We recognise that the intention here is to provide more detailed guidance to decision-makers in separate form outside of this policy document. Such an approach

[1] A Criminal Court jurisdiction under which the court may 'stay' or stop, a prosecution as being unfair.
[2] Judicial Review stands against the decision of a public body or a private body exercising a public function.
[3] – see e.g. paragraphs 3.1, 3.1.2 and 3.1.3 of the Policy.

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has the potential to raise difficulties however, for guidance or other material taken into consideration in the decision-making process but outside of the policy itself would be neither visible nor transparent and accordingly would defeat the aims of clarity and transparency and could become the subject of challenge.

Civil/Criminal overlap

7. A further issue is that of the degree of interplay between the Civil Enforcement option and the criminal process. Here the risk arises where the benefits provided by the operation of a largely civil enforcement-based policy, as may be the case here, conflict with the procedural and evidential demands of a properly formulated criminal investigation process. Such benefits as are imported by the largely civil enforcement-based policy will of course include the use of informal discussions and problem-resolution; speed of determination; and effective recovery of losses. The problem in this context lies with the need for the early identification of loss-causing factors and individual responsibility and the consequent informality of such processes.

8. Such necessary informality[4] conflicts with the need for properly regulated evidence-gathering in the criminal process. An example of this tension may be found where the loss is caused by some deliberate and dishonest act on the part of the suspect and recovery *via* the Civil process is both possible and desirable, but which subsequently proves unattainable[5]. The difficulty arises in this scenario when the decision has been taken to engage the criminal process: the very informality upon which the Civil Enforcement process is founded (and which is so attractive to problem-solving) prejudices the criminal process. The obtaining of admission or confession evidence through the use of, *e.g.* "Reasons to Urge why the Contract should not be Terminated Interviews" and the proposed "Informal Discussions" [6]. fall outside of the protections provide by the PACE Act requirements and accordingly may well be inadmissible as evidence in criminal proceedings. This is not mere alarmism, for we have seen many a suspect provide qualified or complete admissions to wrong-doing in such informal environments, only to have that somewhat compelling evidence ruled as inadmissible in criminal proceedings by reason of the absence of the PACE protections.

9. We therefore consider it important that this Enforcement and Prosecution Policy provides a mechanism for the early identification of potential criminal cases and their consequent withdrawal from this policy's Civil Enforcement process. Allied to this should be a rigidly-applied information-recording policy.[7]

Review

10. We suggest that there should appear a brief reference to a policy of continuous review. A suggested formulation appears referenced paragraph 7.5 an the Annex below.

Acceptance of Guilty Pleas

[4] ….to the Civil Enforcement process

[5] This is not an uncommon scenario. Suspects may not have the wherewithal to repay losses; or may be disinclined to do so; or may simply be obstructive.

[6] We have advised on this topic separately – see Advice "MATERIAL BREACH OF CONTRACT APPROACH" dated 2nd June 2014.

[7] See Annex, paragraph 8.

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11. In the context of POL prosecutions it is not unusual for a defendant to seek POL's agreement that they admit guilt to a charge on a basis other than that advanced by POL. Most frequently this occurs where a SPMR admits false accounting but denies having taken money perhaps in the belief that his counter-staff or others have stolen.

12. There appears to be no reference in the policy to POL's approach to the acceptance or rejection of a defendant's guilty plea(s) offer.

13. We suggest that some reference be made to the principles to be applied where a defendant indicates that he or she will admit a charge on a qualified basis or will plead guilty to an alternative offence. A suggested formulation appears referenced paragraph 7.6 in the Annex below.

14. We also suggest several amendments, which appear below.

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ANNEX

PROPOSED AMENDMENTS AND ADDITIONS

Paragraph 4 – ENFORCEMENT OPTIONS

We would suggest that the title of this section be re-titled to more accurately represent its import for in reality criminal proceedings are also an enforcement tool. We identify this otherwise minor detail only because, later in the Policy, a distinction is made between civil enforcement and criminal enforcement proceedings *e.g.* Section 5 Heading; and paragraph 7.1.1. We suggest:

'Non-Criminal Enforcement Options'

'Civil Enforcement Options'

Such a title will then lead more easily into Section 5: ENFORCEMENT ACTION OTHER THAN CRIMINAL ENFORCEMENT.

Paragraph 4.3

The first bullet point makes reference to "The seriousness of any offence…." but it is not clear how such a criterion is to be measured.

An alternative construction which meets the objective of rendering the measure more-readily defined and thus permitting those charged with the implementation of the Policy and those against whom it is to be tested to be in no doubt as to the parameters to be applied should be formulated. We would suggest that the paragraph be amended so as to identify those features in the latter part of the first bullet point and those appearing in the subsequent points as being the criteria against which 'seriousness' is to be measured, *i.e.:*

"4.3 In particular, POL will consider the seriousness of the offence and in doing so will have regard to the following matters;

- The culpability of the offender;
- The extent of the harm caused;
- The extent of any shortage or losses to POL;
- *Etc*……."

By amending paragraph 4.3 in the manner suggested, clarity is added to the use of the word 'serious' in other paragraphs *e.g.* 4.4; 5.2; 6.6 *etc*.

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Paragraph 5.4.

"**Civil Action** will be considered where…..POL……does not consider formal action is required…..to punish for criminal misconduct."

The antitheses of this formulation is problematic, for the suggestion here is that prosecution will follow where POL considers that a suspect is worthy of punishment. Such an approach may be fraught with danger, for punishment is a matter entirely for the court, and a prosecutor must act impartially and without seeking any particular outcome other than one which is just. Thus a defendant who is subsequently acquitted of any wrong-doing by the court may well seek to suggest that POL had pre-determined the defendant's guilt and need for punishment and accordingly had not acted in accordance with a fair policy.

Accordingly we suggest that any reference to punishment be removed from this policy.

Paragraph 7.

Paragraph 7.1.1 does not sit comfortably with paragraph 5.5, as the latter posits a scenario where criminal enforcement action may be taken in parallel with civil proceedings whereas the former appears to exclude such a scenario. We suggest substituting the word "inadequate" for the presently-used word "inappropriate".

Paragraph 7.

We suggest the following be inserted:

"7.5 Once the decision to prosecute is taken, we will keep the case under a process of continuous review. Where at any time it appears to us that a case will not meet the Evidential Stage of the Full Code Test in the Code for Crown Prosecutors, or concludes that a prosecution is not, or is no longer in the Public Interest, we will discontinue the prosecution without undue delay."

"7.6 In appropriate cases we will consider whether any offer of plea(s) to particular charge(s) meets with the aims of this Policy. In cases where a defendant seeks to admit guilt on a basis other than that advanced by POL, we will only consider an offer of plea(s) where the offer is expressed in writing and in the form of a recognised 'Basis of Pleas' document signed by the parties. In any case where a defendant seeks to enter guilty pleas on a basis not agreed by Post Office Ltd., we will invite the court to hear evidence to determine the facts upon which the defendant is to be sentenced.

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Paragraph 8.

DECISION MAKING

We suggest the following be inserted:

"8.5 The decision to prosecute will be taken in an open and transparent manner and should be readily-justifiable on both the facts of a case and in terms of those matters set out in this Policy. Best practice dictates that the decision itself and the reasons behind it are recorded in writing and retained on the file until the conclusion of a period ending 6 -years after the end of the case.

Simon Clarke