

Justice Committee

Oral evidence: [Private prosecutions: safeguards](#), HC 497

Tuesday 7 July 2020

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Members present: Sir Robert Neill (Chair); Paula Barker; James Daly; Maria Eagle; Dr Kieran Mullan; Andy Slaughter.

Questions 1 - 69

Witnesses

I: Ron Warmington, Managing Director, Second Sight; Ian Henderson, Director, Second Sight.

II: Alison Levitt QC, Barrister, 2 Hare Court, Private Prosecutors' Association, former Principal Legal Adviser to the Director of Public Prosecutions (2009 – 2014); Gareth Minty, Legal Director (Barrister), Mishcon de Reya LLP, Private Prosecutors' Association; and Sandip Patel QC, Managing Partner, Aliant La.

III: Professor Claire de Than, University of London and Jersey Law Commission; Dr Jesse Elvin, Senior Lecturer, City Law School, City University of London; Professor Peter Hungerford-Welch, City Law School, City University of London; and Dr Jonathan Rogers, University Lecturer in Criminal Justice, Faculty of Law at University of Cambridge, Director, Criminal Law Reform Now Network.



Examination of witnesses

Witnesses: Ron Warmington and Ian Henderson.

Chair: Welcome to this meeting of the Justice Committee, and welcome to our witnesses, whom we will come to in a moment.

As with all meetings of the Committee, we have to start with declarations of Members' interests. I am a non-practising barrister and consultant to a law firm.

Maria Eagle: I am a non-practising solicitor.

James Daly: I am a practising solicitor and partner in a firm of solicitors.

Chair: Paula Barker, do you have anything of relevance to declare?

Paula Barker: Nothing, thank you.

Chair: It looks as if Dr Mullan and Mr Slaughter have just joined us. No relevant interests, I think, Dr Mullan.

Dr Mullan: No, thank you.

Chair: Mr Slaughter, you are a non-practising barrister, are you not?

Andy Slaughter: I am, thank you.

Q1 **Chair:** We will add other people in as we go along.

The purpose of this meeting is to take evidence in relation to private prosecutions. It is triggered by cases involving the Post Office and private prosecutions, which have had some publicity, to put it mildly. We are not going to go into the detail of the cases, because the sub judice rule, which applies in Parliament as much as anywhere else, is engaged. Certain cases have been referred for appeal but not yet determined, so we cannot discuss the detail of them. We can talk about general principles. Civil litigation that has been concluded, which I know is the case in relation to the Post Office, is not covered by the sub judice rules. I hope that that makes the ground rules clear for everybody, Members and witnesses.

Will the first panel of witnesses introduce themselves?

Ron Warmington: Thank you, Sir Robert. I am a chartered accountant. I have specialised for years in fraud investigation, mainly in big companies. Ian and I headed up the investigation into the Post Office, which we will keep in the background.

Ian Henderson: I am a chartered accountant, IT auditor and director of Second Sight.

Q2 **Chair:** I shall start with a point that relates to the Post Office, but within



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those parameters—without going into the detail of particular cases. You were brought in to do an investigation of the way in which these private prosecutions were conducted. I would be grateful for some information on what your firm’s investigation revealed about the way in which the Post Office investigated and prosecuted alleged criminal offences. I know that it now no longer prosecutes offences itself, as I understand it, unless I am wrong. We are interested in what the system was.

Ian Henderson: I start with some context. The Post Office inherited procedures from the Royal Mail Group prior to the split in April 2012. We are not aware of any review of those protocols within the Post Office, which continued the previous policy of using private prosecutions to facilitate debt recovery.

The priority was very clearly the recovery of losses; private prosecutions were seen as a quick, cost-effective way in which to achieve that, either through proceeds of crime legislation or by putting pressure on defendants to make good the alleged losses. Defendants were routinely threatened with the charge of theft, which would not be proceeded with, provided they pleaded guilty to false accounting, made good all losses and did not mention any problems with Horizon.

The investigations were usually extremely limited. Problems with Horizon were effectively off limits to investigators, who, as a matter of policy, were not allowed to consider Horizon as the cause of the reported shortfalls.

The priority was finding evidence to support the prosecution case to the exclusion of all other possibilities. Both investigators and prosecutors routinely ignored their duty to pursue all reasonable lines of inquiry.

Furthermore, disclosure was often inadequate. Documents under the control of the Post Office that were relevant to the alleged offences were sometimes not obtained due to the cost of doing so. Once the sub-postmaster was suspended, they were not allowed access to their records and were prevented from conducting their own investigations.

We were so concerned about these issues that we told the Post Office that there was evidence of possible misconduct by prosecutors and miscarriages of justice. We reported those concerns in an evidence session to the Business, Innovation and Skills Committee in 2015. Those concerns, sadly, were ignored.

We said that the Post Office had demonstrated institutional blindness and was refusing to consider evidence of problems with Horizon. We now know that a decision was made by a sub-committee of the board of the Post Office to withhold evidence from us that would have dealt with those issues.

To sum up, there was not a single point of failure. Investigators failed to conduct thorough, impartial investigations; prosecutors failed to exercise



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their legal and professional obligations; and senior management failed to understand the legal and technology risks they were facing. The Post Office demonstrated institutional blindness: it was a perfect storm that existed for many years.

Q3 Chair: Thank you. That is very helpful. Were you able to ascertain what the oversight was of those investigations and decisions to prosecute? To whom were they referred, for example? Who had the ultimate charging decision?

Ian Henderson: The short answer is that there was very little oversight. Paula Vennells, the former CEO, has recently written to the BEIS Committee, making it clear that functions such as legal investigations operated in self-contained silos. There was little or no oversight of those functions; it was always somebody else's responsibility—there was no independent review of individual prosecutions or, indeed, investigations. We are not aware of any private prosecutions by either the Royal Mail Group or the Post Office ever being taken over by the Crown Prosecution Service, as it would have been entitled to do, or any applications for it to do so.

We were told by the Post Office that an external law firm had reviewed some of the prosecutions being considered by the mediation working group in 2013 and that no problems were identified. The validity of that advice is now highly questionable.

The chairman of the mediation working group and a former lord justice of appeal, Sir Anthony Hooper, reviewed seven pending prosecutions by the Post Office in 2014; none of those cases was proceeded with. With the exception of four private prosecutions in 2015, the Post Office stopped using private prosecutions at about that time. Previously, approximately 50 private prosecutions were brought every year between 2000 and 2012.

Q4 Chair: I take it that they now refer allegations of this kind to the Crown Prosecution Service, with the police carrying out the investigations.

Ian Henderson: The short answer is that I do not know. We have not had any recent contact with the Post Office. We just know, in a statement that it has made, that it is no longer using private prosecutions.

Q5 Chair: That is what we know, too. You talked about disclosure. As far as you could ascertain, were proper disclosure schedules prepared in the way that you would normally expect in cases of this kind?

Ian Henderson: In some cases there were limited schedules produced, but the real problem was the fact that investigations were so inadequate. Material that was not found in the course of an investigation clearly was not entered on the schedule and was not considered by the prosecutor.

Q6 Chair: The acceptance of a plea to false accounting is not of itself unusual, you would agree, in cases of this kind, if the Crown Prosecution



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Service thinks that the sentencing powers of the court will be adequate to meet the gravamen of the offence. So that of itself is not unusual. Was there anything unusual about how it was used in this case?

Ian Henderson: What was unusual was the combination of multiple charges, one of which, typically, would be theft, which usually would probably lead to a custodial sentence—and, of course, it was the fear of that that drove many of the decisions by defendants.

Q7 Andy Slaughter: Mr Henderson, you said something about speaking to the chief executive. I think from the answer that you have given we can see that this is an extraordinary way of conducting a prosecutorial process in this country. Who made the decision to allow this to happen? Are you saying that senior management did not know what was going on? Are you therefore saying that the decisions on how to conduct these prosecutions were taken lower down, or that it was just a culture and it just happened in that way?

Ian Henderson: It was largely just a culture. There was a head of group legal and, under the head of group legal, there was a senior prosecutor. We met a number of in-house prosecutors and formed the view that they operated pretty much independently. I do not know to what extent there was internal review of their work; there certainly did not appear to be any.

Q8 Maria Eagle: Mr Henderson, you have just set out an extremely sobering and serious set of concerns in respect of what you found when you had a look at the Post Office's way of doing things. I am not talking about that, but, in your experience of doing this kind of work, what steps should an organisation take to ensure that it conducts an objective investigation into alleged crimes when it is itself also the victim, as the Post Office was?

Ian Henderson: In short, it is about having the right people doing the right thing. There must be an element of independent oversight of the work performed. Independence, of course, is as much a state of mind as anything, and can be exercised on an internal basis, within a large organisation. But having the right people doing the right thing is absolutely vital.

There should also be clear terms of reference, policies and procedures governing investigations and prosecutions. If investigations are being conducted internally, individual cases should be subject to occasional independent scrutiny and audit. Investigators should be professionally qualified and subject to a code of conduct.

Q9 Maria Eagle: Do you think that, when cases are not being investigated and prosecuted independently, the alleged offenders ought to be informed of that fact?

Ian Henderson: Yes. A detailed reading of the case papers should make that clear. I also think that consideration should be given to certification



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by a responsible, named person that all reasonable lines of inquiry have been pursued. That is what strikes us now as being a significant oversight in everything that we have found.

It may also be appropriate that all decisions to prosecute are signed off by the head of legal or an appropriate member of the board. After all, prosecutions are being brought, in effect, on behalf of the organisation.

Q10 Maria Eagle: There does not seem to have been any oversight on the basis of what you have said. To what extent might legal or regulatory safeguards limit the ability of an organisation to use the right to bring a private prosecution? Do you think that there is scope there to make sure that the potential conflict of interest between a victim and being a prosecutor of an offence might be mitigated?

Ian Henderson: I am reluctant to say that we should ban all private prosecutions. In the austere environment and times in which we now find ourselves, I can see them being a useful function for all sorts of reasons. But there need to be greater safeguards to make sure that the obligation to pursue all reasonable lines of inquiry has actually been met.

The right to bring a private prosecution could be removed in circumstances where there is no element of independent review or investigation. That does not necessarily mean moving the entire investigation or prosecution outside the organisation but perhaps introducing some element of independent oversight of those internal actions. The right to conduct private prosecutions could be subject to occasional spot checks by an external body, such as the CPS, which I think is available under current legislation.

Q11 Maria Eagle: Do you think legal safeguards or regulatory safeguards are the best way of going about creating such a failsafe?

Ian Henderson: I think probably both. The function has to be available through the law. What has been conspicuous by its absence throughout every case that we looked at was any exercise of regulatory oversight of the relevant professionals. That is a separate issue, which perhaps needs to be covered.

Q12 Maria Eagle: Mr Warmington, have you encountered potential misuse of investigations and prosecutions in other organisations? We have just referred to the work that you did about how the Post Office was conducting itself, but have you encountered this potential misuse of investigations and prosecutions in other organisations?

Ron Warmington: Certainly, there is misuse of investigations. Organisations often conduct—and rightly should, occasionally—limited-scope investigations. Sometimes there are good reasons for limiting scope in that way.

More worryingly, organisations also conduct limited investigations based on assumptions that could be flawed or simply untested. The obvious



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suspect in the case is not necessarily the perpetrator of the crime, particularly in evidentially complex cases. A package of evidence, therefore, prepared on a false premise, or on the results of a flawed investigation, cannot be remedied at the prosecution stage unless the prosecutor is alert to the possibility that key lines of inquiry have not been pursued and then is prepared to challenge the investigator on that point.

That can be difficult to do in practice, which demonstrates why a strong, independently minded and professionally qualified investigation team is an essential component in any organisation considering using private prosecutions.

All too often we must be aware that the test applied by the prosecutor is solely one of sufficiency—in other words, whether the evidence produced by the investigation team provides a realistic prospect of conviction. The prosecutor also needs to question, as a preliminary issue, whether all reasonable lines of inquiry have been pursued. If he or she is not satisfied with what has been done, the risk of a miscarriage of justice is significantly increased.

We all know that investigations supporting private prosecutions in a sense therefore require special care. Pressure on police resources obviously means that, increasingly, in an in-house investigation, company investigators are conducting investigations that in the past would have been carried out by the police and no longer can be.

We are all aware of cases involving private investigations where the CPS has decided not to prosecute. That puts the victim in a difficult position, because a successful criminal prosecution is often seen as the first step in the recovery of losses, and that can lead to private prosecutions being undertaken either using in-house legal resources or by referral to one of the specialist law firms that offer private prosecutions as a service, sometimes with their own investigative team as part of the arrangement.

Private prosecutions are being widely promoted these days by law firms as a cost-effective alternative to civil debt recovery, which is fine—but even the most skilled and ethically sound prosecutor cannot disclose what has not been discovered by the investigators. In other words, if you will forgive me for using the vernacular, you cannot make a silk purse out of a sow's ear.

That is all I have to say. In the absence of a really effective, thorough, competent, ethically sound and open-minded investigation, the prosecutor is in a rather difficult situation—and, therefore, so is the defendant.

Q13 Maria Eagle: Thank you, Mr Warmington. You said that there was potential for misuse in the nature of the beast, but you have not said that you have encountered it in any other organisations. Can I press you on that point, as my final question?



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Ron Warmington: You most certainly can. My experience as an investigator covered 100 countries, generally for American organisations, which are unfamiliar with using private prosecutions. They are not allowed in many States.

My debt recovery experience was almost always effected through civil claims. Personally, I have never initiated or instigated a private prosecution. That is why, in a sense, what Mr Henderson and I came across in the Post Office was so weird and shocking to us. I am sorry that I cannot answer your question more effectively from personal experience.

Maria Eagle: That is fine.

Ron Warmington: I would add that a corporate investigator has enormous power and, if they follow a trail of breadcrumbs to the wrong person, who has been set up by the real crook, it is ever so easy for the innocent person to be fired and their whole career to be trashed, only for the company two years later to suffer an identical fraud and realise that it has nailed the wrong person.

Chair: Thank you, that is helpful.

Q14 **James Daly:** I worked in the criminal courts for many years, and I want to understand the process as I experienced it.

The in-house legal department would authorise, charge and provide the statements, other undisclosed evidence and various other bits of evidence to an agent prosecutor, who would then prosecute the matter in the criminal courts on behalf of the Post Office. I fully accept the point about the prosecutor not knowing about any legal issues, but if the defence solicitor had issues they would write to the agent prosecutor, who would then write to the legal department in the Post Office, who would investigate and produce further evidence. Is my recollection of how these matters were prosecuted incorrect, or is that what happened?

Ian Henderson: If I may answer that, I was in a fortunate position in the early stages of our investigation to be given access to the legal files within the Post Office, and I met its senior prosecutor and a number of its other lawyers. The process that you have described was, broadly speaking, followed, for the simple, practical reason that prosecutions were occurring all over the country. The Post Office head office was based in London and, as a matter of sheer practicality, instructions would normally be given to a criminal team in the relevant jurisdiction, which could be in the north of England or wherever. However, there was close contact between the senior prosecutor within the Post Office, who provided support.

My experience was that there was very little challenge to the evidential package that was prepared by the Post Office, possibly for the reasons that we have outlined: a wholly inadequate prosecution package and investigation and, possibly, because of the Post Office's policy of offering, in very many cases, this plea bargain—that it would drop or not pursue



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the charge of theft if people put their hands up to false accounting. False accounting is a very easy charge to prove. I felt on many occasions that defendants were being bullied into accepting what was perceived as a lesser charge, thereby avoiding a custodial sentence.

In practice, that is what sub-postmasters were frightened of. The defence in many cases was possibly not as effective as it could have been, because they were bullied into accepting a plea.

Q15 James Daly: I want to understand why you say that it is bullying. Who is doing the bullying? Are you saying that it is the Post Office, or is it the lawyer who is the agent lawyer in court? I never personally experienced this bullying when I was involved in these cases.

Ian Henderson: I am referring to that because it is how it has been described to us by victims, in the sense of defendants. They felt that they were being bullied by the Post Office into accepting what they felt was a lesser charge and would be less likely to attract a custodial sentence.

Q16 Chair: I understand—that is helpful. Were most of these cases resolved in the magistrates courts?

Ian Henderson: Perhaps the majority. However, some moved on to the higher courts, depending on the severity and range of offences on the charge sheet. We typically saw a very large number of charges being considered, and some charges were left to lie on the file, particularly if a guilty plea was eventually offered.

Q17 Chair: Again, that of itself is not unusual. When it went to the Crown court, I assume, picking up Mr Daly's point, that the agent prosecutor would normally have instructed counsel, or perhaps their own in-house advocate.

Ian Henderson: Yes, we are aware that counsel was instructed in some cases, but by all means not necessarily all.

Q18 Chair: We talked about the disclosure failures and the failure, as Mr Warmington said, to pursue all relevant lines of evidence. When we talked to the Crown Prosecution Service, it was thinking of applying the full code test, as it put it, for charging decisions and disclosure. Do you think that was being done in those cases?

Ian Henderson: Of course, the preliminary stage prior to considering the full code test was to consider the adequacy of the investigation. A prosecutor could apply the full code test only based on the material made available to him or her. That was the major failing that we came across: the prosecutor, whoever they were, was being denied the full facts due to this inadequate evidence and investigation.

Ron Warmington: It is probably worth mentioning that what we saw—and later it proved to be the case—was a quite inappropriate reliance on the system having unquestionable integrity. It was thought to be so good and so reliable and operated in so many places without a problem that it



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could not possibly be responsible for any of the aberrations that we encountered. The investigators seem to have taken that on board, and we found no evidence of any capability or readiness to challenge the system or, for that matter, any back-office processes in any way whatsoever.

Ian Henderson: I think I also mentioned that the conditional plea usually offered was conditional on no challenge being made to the effectiveness of the Horizon system. By doing that, the Post Office effectively removed Horizon from being properly considered by the courts during the prosecution.

Q19 **Chair:** So it was dictating the factual basis of the plea.

Ian Henderson: Yes. It would not accept a plea if the defendant raised Horizon as an issue.

Chair: I see.

Dr Mullan, you wanted to come in.

Q20 **Dr Mullan:** Ian, I think you mentioned that no one made use of their right to refer these cases to the CPS for its take on whether to continue. Would I be right that you said that and, if so, why do you think that was? Why do you think nobody undertook what many witnesses have told us is a key safeguard?

Ian Henderson: That is certainly my understanding. Based on all the files that I looked at, I never saw any reference to a referral to the CPS. Clearly, individual defendants may well not have been aware of that right or opportunity.

A number of factors may have been relevant to why they did not exercise that right. First, these prosecutions typically took many months, if not years, to get to court. Postmasters were suspended, were prevented from earning any money from their business and were refused access to their business records. They were in a desperate position, and the only prospect of relief was getting the case dealt with as quickly as possible. Once they realised the possibility of a plea bargain, and what they no doubt perceived as a reduced sentence, or threat of a non-custodial sentence, it became very attractive to them. So, frankly, they were probably not looking at the most effective defence; they were looking at what the best deal was that they could get in the circumstances.

Dr Mullan: Ron, do you have anything to add to that?

Ron Warmington: No.

Q21 **Chair:** I have one final thing to ask, unless any other colleagues have questions for this panel. We know from when we did an inquiry last year into disclosure more generally that the College of Policing, for example, has undertaken a lot of work to make sure that police officers carrying



out investigations are aware of their responsibilities in pursuing all relevant lines of inquiry, and thereafter disclosure. As far as you could ascertain, had any of the Post Office investigators been given any training on what those responsibilities were and how to carry them out?

Ian Henderson: We did not look into this in detail, but, based on the case papers that we saw, a number of things struck us. First, none of the investigators that we came across was professionally qualified. They may have had a great deal of experience of working within the Post Office and they knew the procedures in considerable detail, but we saw no evidence of professional training at all. Therefore, it is highly likely that they were not aware of best practice in criminal procedure, evidence, and so on.

Chair: Thank you very much, Mr Warmington and Mr Henderson. Your evidence will be considered, as well as your written evidence, which has been most helpful to us. We are extremely grateful to you for your time and trouble in giving evidence to us this afternoon.

Examination of witnesses

Witnesses: Alison Levitt, Gareth Minty and Sandip Patel.

Q22 **Chair:** I ask you to introduce yourselves. Ms Levitt, we are of course old friends and colleagues from practice at the Bar. It is nice to see you.

Alison Levitt: It is nice to see you, Sir Bob. I am Queen's counsel in self-employed practice and a member of the committee of the Private Prosecutors' Association, but I am also a former principal legal adviser to the Director of Public Prosecutions.

Gareth Minty: Good afternoon. I am a legal director at the law firm Mishcon de Reya. Like Alison, I am a committee member with the Private Prosecutors' Association. I am an employed barrister and, also like Alison, my former role was at the Crown Prosecution Service, before I joined private practice.

Sandip Patel: I am a partner at Aliant Law and a practising barrister, and have been for about 30 years. For the last 10 years, I have been involved in a number of private prosecutions in the capacity of counsel.

Q23 **Chair:** Those witnesses who do not have a legal background, or those who are going to read our inquiry, we hope, who may not have a legal background, probably will not understand the difference between a private prosecution and what they might perceive as a public prosecution—one undertaken by the Crown Prosecution Service or one of the other state agencies with the power to do so. Can somebody encapsulate for us the difference in nature and process?

Alison Levitt: In essence, in practice, there are far more similarities than there are differences. Once the case starts, it runs through the criminal courts in exactly the same way as a public prosecution would, including the sentences at the conclusion, with exactly the same



sentences being available as there would be for public prosecution.

One major difference is obviously in how it starts off. A second major difference is that, in our view, private prosecutions are probably—at least these days—subject to greater scrutiny by the courts even than public prosecutions are. That is to say, the courts are aware that there may be things that they want to take a particular look at, such as disclosure, or how things have been handled.

Q24 Chair: Is that because the court may have concerns about the adequacy of the internal procedures?

Alison Levitt: I know that one of the things that you may ask us later is about the tension that exists when somebody is the victim but also the prosecutor. That tension obviously does not exist in public prosecutions; there may be different problems with public prosecutions, but that tension is not there. But all courts will be aware of the fact that this has not been through the processes of the public investigation and public prosecution, and that therefore it needs to be watched. The court will be looking for reassurance that things have been done properly.

Q25 Chair: Mr Minty and Mr Patel, do you have any other observations?

Sandip Patel: In my experience, the root problem, which has already been touched on, is that the various participants wear different hats. In a public prosecution, the victim is a witness and no more; they have no say in the investigation or prosecution and do not control the findings.

The investigation is invariably carried out independently by the police and the prosecution by the Crown Prosecution Service, independent of the police and of the victim.

In a private prosecution, as we know, the victim is invariably the private prosecutor, which in my experience causes real problems, because of the wearing of multiple different hats.

As for further distinctions, the level of scrutiny in public prosecutions is greater than in a private prosecution. Alison has obviously touched on the courts, which can only play the role they play by being given disclosure of all material. In my experience, a court is unlikely to want to know the minutiae of how an investigation started, progressed and culminated in a charging decision, because the courts are not necessarily concerned with that. If it is a public prosecution, they have the reassurance built into the system in any event.

That is a real problem, which I have encountered as a prosecutor in prosecuting private prosecutions. We will touch on privilege later, and privilege and public prosecutions are very different.

Those are some of the differences. Public bodies are subject to scrutiny by the High Court in the form of judicial review, with decisions and so forth. Private bodies are not.



Gareth Minty: I add a further point, which may assist the Committee. We have talked about some of the distinctions, and I am sure we will continue to do so, between a public prosecution and a private prosecution. It would be helpful going forward to look at the potential sub-categories of private prosecutions.

The label of private prosecution can be applied to different scenarios. Here, we have heard evidence in relation to the Post Office as a private prosecutor, which is one of many public authorities that brings prosecutions, many of which are subject or are part of the Whitehall Prosecutors' Group and many of which will enjoy close working relationships with the Crown Prosecution Service and consider themselves bound by, or will at least apply, the code for Crown prosecutors, and therefore the full code test, as well as the code of practice that governs the conduct of investigations.

That is, potentially, a different scenario to an individual or a corporate body that is a one-time private prosecutor, which may not have those existing systems but has a choice at that point about whether to apply that full code test. We can obviously develop that further—and, likewise, in relation to the CPIA code, which I suspect we will touch on as well. I hope that is helpful, just to recognise that there are different types of private prosecutor.

Alison Levitt: The Private Prosecutors' Association is a fairly recent body. It is not just individual prosecutors—a lot of our members defend as well as prosecute. We have investigators, lawyers and all sorts of people who have an interest in how private prosecutions are conducted as part of our membership. The idea was to formulate best practice in what can, on occasions, appear to be a bit of an ungoverned space.

As I think you know, because it is in our written evidence, the first thing that we did was to draft and put into practice a code for private prosecutors; it does not have legislative force, but we hope that adoption, first by those involved in bringing private prosecutions but also by the courts, would lead to it getting universal acceptance.

One thing that our code does is a recognition that our members may not be governed by the CPIA code for investigators but, if they are members of our organisation, they may agree to be bound by the CPIA code. That is a way of trying to achieve parity and best practice in both kinds of prosecution.

Q26 **Chair:** We heard from our previous witnesses and the other evidence we have had that there has been an increase in private prosecutions in the last few years. That generally seems to be accepted. If that is the case, what do you think drives it? Would there be a reason that pushes that along?

Alison Levitt: Our first observation about that is that it is peculiar that there is no data in relation to this. Whether or not there has been an



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increase in private prosecutions is entirely anecdotal, because nobody gathers the data. If you were to ask us for our recommendations, one of ours would be that HMCTS really needs to start gathering information about private prosecutions—the number, whether they increase and what happens to them, particularly if numbers fall and, if so, for what reasons.

That being said, our experience is that there has been an increase and that a different kind of private prosecution has started to take place. When I first started at the Bar, private prosecutions were often quite small affairs, involving things like neighbour disputes over somebody having cut down somebody's clematis, and somebody bringing a private prosecution for criminal damage.

Increasingly, they are being brought for large-scale dishonesty offences, particularly fraud. On the reasons why, possibly increased awareness is one reason, but it would be impossible not to conclude that there is a degree of frustration at what is perceived to be the underfunding and therefore the inability of public authorities to bring as many prosecutions as victims would like to see. In some cases, the private prosecution may provide the only remedy through the criminal courts that a victim may have. I shall pass it over to the others to see what they think.

Chair: Of course, in the criminal courts you can use the Proceeds of Crime Act and other things as a means of making recovery.

Gareth Minty: The only thing I would add is a recognition that there are specialisms that have arisen, whether that is in relation to the creative industries, for example, and potential bodies there that know their industry particularly well and may be in a position to bring a properly objective and informed prosecution.

Subject to that, I endorse the same points that Alison has made. Yes, partly it may be an increase, but it may also be an increased awareness. I would echo what she said in relation to data, for a whole host of reasons.

Sandip Patel: I can only repeat that. Anecdotally, in my experience there are greater *[Inaudible]* for the reasons so far given.

I think it should be possible to cater for those who may wish to launch a private prosecution through a closer collaboration with public authorities and the Crown Prosecution Service. One thing that I have learned in my experience is that it would help private prosecutors, in an ideal world, that no person should have to dip into their own pockets to seek justice. We know that resources are stretched, but there may be some means, or a scheme, whereby those who choose to go down the private prosecution route where it could be prosecuted by the Crown Prosecution Service would possibly have to contribute to the funding of that process to receive the facilities of the Crown Prosecution Service, and possibly also the police in investigating a crime.



Q27 **Chair:** Off the top of my head, would the objection taken be that that funding potentially compromises the independence of the Crown Prosecution Service in those circumstances?

Sandip Patel: I do not think that it would, if it was properly structured. As was touched on, there has been a recent increase in prosecutions involving large substantial cases of fraud, by huge and well-resourced organisations. A question that you may wish to consider is whether, in the circumstances where we have an overloaded criminal justice system, where the inspector says that the existing backlog will take a decade to clear, private prosecutors should have access to the same public facilities as the courts and so forth, while other cases—burglaries, and so forth—have to wait.

One thing that arises from the Post Office experience is that, if there was greater collaboration between the Crown Prosecution Service, the police and so forth, a lot of the risk of miscarriage of justice would be reduced.

Q28 **Chair:** Does anybody else have any observations on that point before I move on?

Alison Levitt: Only to echo part of what Sandip has said. In our experience, there is no rivalry between the public and private parts of the system, and often it is a collaborative working arrangement. There is an acknowledgment by most players in the criminal justice system that, even if the entire resources of the welfare state were put into the investigation of the prosecution of fraud, the fraudsters might still be two steps ahead of everybody. Therefore, it is not unreasonable for the state to ask the private sector to play its part, partly in resourcing it but partly also in contributing its expertise and sharing the risk involved.

Q29 **Paula Barker:** Thank you, Chair, and thank you to our panel members for being here today. Do you think that effective safeguards are in place to prevent the right to bring private prosecutions being misused by public and private organisations?

Alison Levitt: Yes, on balance, we believe that there are in broad terms. Our experience has been—and we have nothing to go on other than that—that weak cases and unmeritorious cases are successfully weeded out at an early stage.

The same is also true of the public sector, where there are systems of checks and balances in place to make sure that unmeritorious cases and weak ones are got rid of fairly early on. We are not aware, for example, of there being, the Post Office cases apart, a deluge of appeals for allegedly wrongful convictions involving private prosecutions. We do not think that anything suggests that there is any greater danger from private prosecutions than from public ones; the dangers are common to both types. Of course, we do not need to make the obvious point that all the big miscarriage of justice cases have in fact been public prosecutions.



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One thing that we would like to point to is the importance of a well-resourced defence. It is often going to be the defence team—and, as I say, many of our members defend as well as prosecute—which is needed to point out to the prosecutor, “You could have done this,” or, “You could have done that,” or say to the court, “You really need to examine the circumstances of this.” That is a really important safeguard.

Q30 **Chair:** Who else would like to make any other observations?

Gareth Minty: On the safeguards that exist in relation to private prosecutions, the Committee has already touched on those, partly in relation to the role that the CPS can play in that—and that is an important safeguard. It is a right available to every single defendant, and an unfettered right, and a right of review that for potentially perfectly understandable reasons would not apply in an equivalent public prosecution. So there is that safeguard.

As the Committee will be aware, private prosecutions will start through a judicial process. Obviously, there is a debate about that process, and the checks and balances within the process itself, but, nevertheless, the application goes through a judicial process.

There is scope within that process for the defendant to be made aware of that application and invited to make representations on the case, which could be on the evidence but could also be on the motive, circumstances or wider background.

The defendant has the right to seek to have that summons set aside, and it is appropriate to seek judicial review of any refusal to grant that right.

Those procedures are not available in a public prosecution, for reasons we understand, but once a public prosecution has started the stepping-off points are relatively limited.

I think there should be some reassurance that the Committee can derive from the fact that there are those additional measures in place for a private prosecution. That is before the matter gets into the full-blown proceedings stage, when the defendant will have available to them the application to dismiss the charges; to seek to stay the proceedings, if they consider them to be an abuse of the court’s process; or to suggest that there is no case to answer when the matter goes to trial.

Those all follow—but, even at those early stages, there are safeguards that seem to me, I would hope, to go some way to balancing the interests of all interested parties at that stage.

Sandip Patel: I think that additional safeguards could be introduced. Touching on what has been said about inadequate investigations, a private investigator is at a disadvantage compared to a public investigator. They do not have the same resources or powers to obtain material that might show a defendant’s innocence. That is a concern that



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I think the Committee may wish to consider.

The idea of notifying the Crown Prosecution Service of a private prosecution has already been touched on. I am unaware of a central register. The Committee may want to consider whether there should be mandatory notification of a prosecution to the Crown Prosecution Service. At the moment, the position is that the Crown Prosecution Service might or might not adopt the case for review; it is discretionary. Perhaps a proposal that you would want to consider is the mandatory review of private prosecutions by the Crown Prosecution Service in serious cases—those that might result in a loss of liberty. Those are the types of additional safeguards that might improve the system as it is.

Alison Levitt: Speaking as a former Crown prosecutor, I think there are real problems with there being mandatory referrals to the Crown Prosecution Service. They can broadly be split into three areas: added bureaucracy, added delay and added cost.

The Crown Prosecution Service would not thank anybody for landing all the private prosecutions on its desk, whether or not there was any particular need for it to look at them. At the moment there is the ability for the Crown Prosecution Service to review when three sets of people ask them to do so. It could be the private prosecution itself, and the court has the power to do so, if it has any concerns—but most importantly, it is the defence. If the defence thinks that something has gone wrong, it can ask the CPS to review it. It would be a retrograde step to make it more expensive for any kind of prosecution to be brought, because you run the risk of then making private prosecutions a tool only for the very wealthy.

Q31 **Paula Barker:** How can an organisation conduct an objective investigation into alleged crimes when it is also the victim?

Sandip Patel: That is the inherent dilemma in these matters, as I have found in my experience. Ultimately, if it is the private prosecutor, the victim craves retribution, and that is the victim's objective. That touches on the duplication of roles, and the question is how it is eliminated. Really, in an ideal world, those roles would have to be separated so that the private prosecutor and victim would not have control over the prosecution in the way a private prosecutor does.

Another issue is privilege. Communications between a client and lawyer are covered by privilege. Let us say that a private prosecutor says to the lawyer, "You can't disclose that material, because that would be the end of the prosecution." I accept that the proposal made is that the lawyer can withdraw, but that is unsatisfactory, for two reasons. The defendant will never know why the lawyer withdrew, because that would be covered by privilege.

Secondly, that could be at any stage in the proceedings. Let us say that it is in the middle of a trial; it may result in delay, which I would say is



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unsatisfactory. It may be a controversial proposal, but I would say that, perhaps, a private prosecutor should waive privilege from the outset. That is something that, if it had happened in the Post Office cases, might have concentrated the Post Office's mind in advance of making certain decisions. I just throw that out for your consideration.

Gareth Minty: As Mr Patel says, there is no doubt that the role that privilege has to play in a private prosecution is a delicate one. I revert to a topic that Alison touched on, in relation to our code, which gives guidance to private prosecutors and, in fact, anyone involved in a private prosecution on the treatment of privileged material. Broadly, that results in a proposition that, if material meets the test for disclosure, the mere fact that it is also privileged would not be a shield to that item being disclosed. Ultimately, as Mr Patel says, that is still a decision for the prosecutor to take, and those who are instructed by him or her will have professional obligations that they will need to discharge at that point. Certainly, our advice on best practice would be that any investigation or private prosecution should start on a footing that that material may well fall to be disclosed, and to prepare and conduct oneself accordingly.

An interesting point to keep in mind throughout is that, with the role that privilege has to play in a public prosecution, if someone is receiving legal advice, that material does not have the same treatment as it would if the person was the private prosecutor. There are different considerations according to whichever scenario we are addressing. I am speaking only personally, but I would not support a complete waiver of privilege. I believe that schemes, systems and processes can be put in place that could ably manage that process.

Alison Levitt: I have nothing much to add. There is a gold standard that can be achieved in some prosecutions where, in effect, you mirror what happens in the public sector. You have independent investigators, in the way that your first two witnesses described, and then you have independent lawyers brought in as prosecutors and, in effect, there is a series of reviews.

That is quite resource-intensive, but it is a way in which an organisation that has concerns about its independence can ensure that the gold standard is met.

Our experience has been that large organisations are usually extremely anxious to adhere to best practice; they are very respectful of the courts' powers and processes, and they do not want to be seen to have in any way defied them—and certainly not to be responsible for any miscarriage of justice.

We understand that this Committee is concerned not with those necessarily that are interested in the gold standard, but how to protect against those who do not really care about such things, if indeed there be such people.



Q32 **Dr Mullan:** This is for all the witnesses, but perhaps you could start, Alison. Are there any particular concerns over how disclosure works? We have touched on privilege, but this is a slightly different area in terms of the evidence gathered in relation to private prosecutions.

Alison Levitt: Disclosure problems have bedevilled the criminal justice system for years or decades, probably as long as there has been any kind of criminal justice system, in both public and private prosecutions. The Committee will be aware that the Attorney General is looking at disclosure in criminal cases at the moment. The Private Prosecutors' Association has submitted evidence in relation to that.

There is an argument that in some ways disclosure is easier for the courts to police with private prosecutions, because there can be literally no argument about what is in the possession of the private prosecutor. With public prosecutions, the police are dependent on witnesses handing things over or volunteering things, whereas, with the private prosecutor, it is there—you know that they have got it and it is just a question of getting them to dislodge it.

Again, the code that we have drafted we think provides guidance not just for how prosecutors should adopt best practice but so that defendants can look at it and say, "These are the standards that should be adhered to," and try to use that to get the courts to enforce it.

Q33 **Dr Mullan:** Does anybody else want to comment?

Gareth Minty: The only observation that I would make follows on from Alison's point about disclosure being a universal issue, and the fact that the Attorney General is once again—and understandably so—looking at the evolution of disclosure, particularly when it comes to technology and the amount of data that can be generated in criminal investigations.

As the Committee will be aware, with the Attorney General's guidelines, it was only in 2011 that a supplementary set of guidelines was issued specifically to deal with digital material. Subsequently, that has quite sensibly been consolidated into the main body of the guidelines—but that just shows the evolution.

To look at the timeframe the Committee is considering, from the perspective of the Post Office case, there have been a number of revisions to the Attorney General's guidelines and changes in the disclosure law. The Chair alluded to the review in the last couple of years in relation to disclosing from a police perspective.

That sets into context that there will be issues, which will beset private and public cases. What is in those documents, of course, is a clear set of principles and guidelines, which, if one frames one's case around those, at least gives one a fighting chance of proceeding fairly and proportionately forward.



Q34 **Dr Mullan:** Would you have any sympathy with the idea that individuals working on traditional prosecutions via the police and CPS—public bodies—are held to a higher standard than just Joe Bloggs working in a company who happens to be embarking on a private prosecution?

Gareth Minty: Of course, I recognise that, whether it is the Crown Prosecution Service or any of the other Whitehall prosecutors, they will be subject to, for example, the civil service code, if that is appropriate in those particular situations. Many of them will have their own professional obligations that they need to discharge—but then so do we in a private context.

Yes, I accept that those are additional considerations that will fall into play in those circumstances. However, unfortunately, history teaches us that we cannot rule out that, notwithstanding those guiding principles, like the civil service code, problems will arise. That comes back to culture in many respects, and we have touched on that already in the course of giving this evidence. The right culture and all these systems will work, whether that is public or private. There might be different levers in play and different considerations but, ultimately, it will come back to that central question.

Q35 **Dr Mullan:** Does anyone want to add anything before I move on?

Sandip Patel: I agree with that, but there is also the inherent tension, to which we alluded, that a public body is not invested in a private outcome. You speak about the Crown Prosecution Service—their statutory duty and mandate is to act as ministers of justice. It is a very different role than is played out by a solicitor for a private prosecutor, that of minister of justice. Inherently, that is the tension in the process, which needs to be reconciled.

Q36 **Dr Mullan:** Yes, but some of the evidence suggests that counsel for a private prosecution is acting as a minister for justice and should behave in accordance with that. Is anyone aware of any examples where a case has been thrown out when it has been found that a prosecution was not valid? Has any action been taken to hold that individual to account, to suggest that the mechanism has any teeth?

Chair: Does anybody have any experience of that?

Alison Levitt: No, I do not think so.

Gareth Minty: Not personally, no.

Sandip Patel: I am not aware of any such circumstances. It goes back to the fact that the counsel or independent advocate can only carry out his or her obligations and duties if fully informed.

Q37 **Dr Mullan:** Yes, I understand that.

Another safeguard that we have talked about is the CPS and its ability to



take over or discontinue a prosecution. Alison, what are your views on the effectiveness of that? I do not know whether you heard the previous panel, when we were talking about the Post Office. The evidence that we were given was that, as far as our witnesses were concerned, no one, despite the volume of cases concerned in that instance, had actually sought the support of the CPS as a mechanism by which to protect themselves from an inappropriate prosecution.

Alison Levitt: No doubt the Court of Appeal will want to consider that when it looks at those cases. I do not know enough about the cases, so I cannot comment on that.

The ability of the CPS to scrutinise cases is a vital safeguard, particularly for defendants. The defendant who is facing a private prosecution can ask the CPS to review the case at any stage, not just before it starts or even just after it starts. The reason it matters is that, as I think is known, the CPS applies something called the full code test of whether prosecutions should be allowed to start or continue. It has two stages to it—not just whether there is enough evidence for the case to be brought at all but whether there is what is called a realistic prospect of conviction and it is more likely than not that the defendant will be convicted.

Even if it passes that stage of the test, the public prosecutor goes on to consider whether the prosecution is in the public interest. At the point at which the defendant facing a private prosecution asks them to take it over, they will look at both stages of that test.

I have heard it suggested that there is no remedy for a defendant facing a private prosecution to say, “Well, it’s not in the public interest.” That simply is not right. You can say to the CPS, “Please look at the public interest test.”

That protection was increased in 2009 by the then Director of Public Prosecutions, who changed the test. The original test for the CPS to take over and discontinue was merely whether there was not enough evidence to provide a case to answer. The then DPP said that it should be the same test as for public prosecutions—namely, the one I have just described.

Q38 Dr Mullan: On that point, and looking at it from the other angle, on some of the evidence that we have received, there is a kind of flip concern. One of the arguments put forward for the benefit of private prosecutions is that it might be seen as a prosecution that, for broader reasons, would not meet a public interest test, but that is not to say that an offence has not been committed and a private individual has not got the right to pursue that. As it stands, the CPS can take over a case and agree that it was a legitimate case, shut it down because it does not meet the public interest test and, but for going to judicial review, the private prosecutor just has to accept that. Are there downsides to that as well?



Alison Levitt: There is also something called the victim right of review scheme, which again was put in some years ago, and it does not require having to go through all the expense of a judicial review. So there are a number of safeguards. The CPS does not just get to do it on a whimsical or capricious approach; it is according to legal principles.

But it is true that there can be disagreement between responsible prosecutors. The test of whether there is a realistic prospect of conviction is an objective one, but it requires an exercise of judgment, which can often be very finely balanced. On the whole, most people would say that the ability of the CPS to look at this is an important safeguard to making sure that nothing has gone wrong with bringing the case in the first place.

Q39 **Dr Mullan:** Thank you. I think you are right. The evidence we heard might identify that people are ignorant of that safeguard. Do you have any ideas about how we might tackle that gap in defendants' knowledge? They do not get legal advice—they just do not know that they can do that.

Alison Levitt: We mention it in our code, and you know that one of our recommendations will be that our code, or something that looks very like it, should have legislative force, because it is a simple, concise document that draws everything together.

For example, one problem with disclosure is that sources of information are often in an awful lot of different places. If lawyers cannot easily access this, what hope does the poor layperson have, confronted with it? If something like our code had legislative force—in there, there is an entire chapter on the Crown Prosecution Service, how it gets to hear of it and what happens when it does—that would definitely be one way of making sure that laypeople understood it, with or without the benefit of legal advice.

Q40 **James Daly:** I think that you have made this clear, but could you explain how the Private Prosecutors' Association has been formed and, apart from your good selves, who is involved in it? What is the basis of your—I will not say authority, but standing? Is it simply that you are the only people who have come together to form an association, or is there some other reason for you doing it?

Gareth Minty: As we have set out, it was formed in 2017. Its membership is broad. It involves practitioner lawyers on both sides of the case, investigators, accountants and anyone who has an interest in bringing private prosecutions. Its authority, if I can call it that, is derived from a shared interest and, frankly, commitment, to making sure that cases are brought properly, in accordance with well-recognised principles. As we made clear, our code is voluntary but, for those who wish to be part of the association, we ask that they follow the code wherever they can, in accordance with their professional obligations. Whether it is for everyone is obviously a matter for them to decide.



It is important to stress that the code is not a manual but an attempt to articulate some guiding principles that cross over a number of other sources of information scattered across the criminal justice system, which people can then draw on if they require further assistance. There are elements of that which will not be novel to many people who are practising, but it is that idea of bringing it all into one place and not a number of disparate, different sources, so you can have ready access to those principles.

That is how it has come about—and I suppose that it intends to evolve in that way with inquiries like today's, and hopes to bring about changes that should then be reflected in an updated code in due course.

Q41 **James Daly:** I shall move on, because time is ticking on.

I worked in the criminal courts for 16 years. Sometimes when we have this discussion in the Committee, the impression that is given is that this has been an issue before the courts for 16 years and has been discussed by lawyers. My experience of dealing with these matters, in magistrates courts in particular, was that the vast majority of cases appeared to be conducted appropriately. Obviously, we do not want to discuss the ongoing litigation, but organisations such as the RSPCA and others who prosecuted carried out investigations in a proper way, whereby evidence was disclosed and the case was prosecuted by qualified solicitors and barristers. Is my recollection of that incorrect, or is this a serious problem that has been bedevilling the courts for the past two decades?

Alison Levitt: We would want to endorse what you are saying. Whatever happens in the Post Office case, we would want to make sure that it was not seen as representative of an endemic problem across private prosecutions. We have alluded to a number of tensions in private prosecutions, but in our view the courts are alert to them and well equipped to deal with them. It is very important not to remove or reduce access to a remedy that may be the only remedy that some victims can get.

It also has quite an important deterrent effect. For example, copyright offences may not seem that serious to ordinary members of the public, but they are very specialist, they are a form of theft and they affect a lucrative industry. They are often brought as private prosecutions and those who are tempted to contravene copyright need to know that there will be those who will not accept the theft of their intellectual property.

Q42 **James Daly:** I have just one final very quick point to clarify. You have been practitioners for many years, and perhaps you cannot answer this question, but why are some of these organisations not referring matters to the police? Why are they carrying out private prosecutions, given that a theft is a theft and a fraud is a fraud? For the Post Office, the Royal Mail or other organisations, do you know why these matters are not referred to the police and the Crown Prosecution Service?



Alison Levitt: Often it is referred to the police. I do not want to be critical of our friends and colleagues in law enforcement, but I think that they would accept that it is very difficult for them to take on board every single case that is referred to them. Sometimes the risk and the financial outlay involved in the investigation and prosecution is too great, or the waiting list is too long, and that can lead the victim to say that they are going to look at a private prosecution route. Sometimes they have particular expertise within the organisation. I have just given the example of copyright theft, which is quite a specialist area. Those are part of the reasons. The others may have other things to contribute to that.

Gareth Minty: I would echo what Alison has said. We go back to our data point, as well. One of the recent changes has been the evolution of the application form, which one needs to complete to launch a private prosecution, which now collects more information and involves declarations on the part of the private prosecutor. Discharging their duty of candour should properly include explaining whether the matter has been brought to the attention of the law enforcement authorities and what decision they have made.

Again, depending on how ambitious you were in relation to trying to collect that data, it would make an interesting study to see how many matters had been through that route but had nevertheless ended up with a private prosecution, and to see how they had ended up—both in relation to whether the CPS had become involved and to the outcome of the case and the sentence.

As I say, potentially a very interesting project could be done to understand those behaviours a bit more, and perhaps what could be done to change or improve the situation—I do not know. But there is the potential to collect it and get far greater insight than we already have.

Sandip Patel: I echo what Gareth said. I think it would be a very useful exercise to gather data on why an organisation has or has not chosen to refer a matter to the police, for instance, and for what reason the police did not adopt the case. It would also be very interesting to know why an organisation should choose not to refer a matter to the police. At the moment, as the rules stand, no legal rule compels an organisation to notify the police or the Crown Prosecution Service at all. So that would be a very useful exercise.

Q43 Andy Slaughter: You have been saying that there are opportunities for private prosecutors, either through specialist knowledge or possibly just space, to fill the gap that the CPS may not have the resources to do. Do you think that there is therefore any room for the expansion of private prosecution? An example is the SFO, which has prosecuting rights at the moment. One issue that we often get raised is that of online fraud, which the police and CPS seem singularly not unwilling but unable to deal with. Would you see a possibility of expansions along those lines?



Alison Levitt: Without question. There is quite a lot of appetite in government for considering public-private partnerships in relation to criminal prosecutions—what role, what safeguards and what risks there are, and what actions you could take to minimise those risks. For example, could you have memoranda of understanding between private law firms and public law enforcement, whereby law enforcement uses some of their specialist powers but they are compensated for doing so—that sort of thing? An adventurous and ambitious criminal justice system that is really serious about rooting out economic crime has to be prepared to take a fresh look at these things; otherwise you run the risk that the fraudsters continue to get away with it.

Gareth Minty: Online fraud is a very good example of what may be a perfectly benign reason why a matter proceeds down a private route. It may be as simple as evidence capture; that window is extremely small in many cases, as we all know. Whether it is tracing funds, freezing assets or whatever it might be, circumstances may not permit that all to have been done through a police route. That may not be anyone's fault but just a reflection of the systems and the way in which crime is reported. The matter may well proceed down that route.

I flag that, as I say, as a benign reason the matter might proceed down that route. That is not critical of anyone—it is just reflective of the need, in that situation, to protect a victim's interests. There are obviously a number of different scenarios that one can envisage here, and it does not necessarily reduce itself to one answer, but I thought that was a good example.

Chair: That is very helpful. Thank you all very much for your time and your evidence this afternoon. It has been very useful to us. I am grateful to you, and I look forward to seeing some of you again.

Examination of witnesses

Witnesses: Dr Elvin, Professor Hungerford-Welch, Dr Rogers and Professor de Than.

Q44 **Chair:** May I ask you to introduce yourselves?

Professor de Than: I am a professor of law and a law commissioner in Jersey.

Dr Elvin: I am a senior lecturer in law at the City Law School at City, University of London.

Professor Hungerford-Welch: I am also from the City Law School. I am a professor of law with a specialism in criminal procedure, and I contribute to *Blackstone's Criminal Practice*, one of the main practitioner works used in the criminal courts, and work on the *Criminal Law Review* as well.

Dr Rogers: I am at the University of Cambridge, Fitzwilliam College. I



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am on the editorial board of the *Criminal Law Review*. I am speaking to you today as the co-director of the Criminal Law Reform Now Network, because we have started our own project on private prosecutions.

Chair: The first case I did that was ever reported was in the *Criminal Law Review*, although that is a very long time ago. But I have a long-term affection for the journal.

Dr Rogers: I shall pass it on.

Chair: Thank you very much. Nobody there will remember it now, I am sure—but there we go.

Q45 **Kenny MacAskill:** What do you think are the advantages or disadvantages of the private prosecution model, and how would you compare it with my own jurisdiction, Scotland, which has a different way in which to deal with it, through the Crown? What are the pros and cons, and are there merits or demerits to the alternative methods?

Professor Hungerford-Welch: The main advantage of private prosecution is that it enables a citizen who feels that they have been a victim of crime to secure the bringing of a prosecution, even if the state, represented by the police or the Crown Prosecution Service, is unable or unwilling to take the case on.

As we have heard from other witnesses, resource issues for the police and CPS mean that a lot of crime, even where there is some evidence on who committed it, is not actually taken to the criminal courts—so it fills that gap.

The downside, as has been discussed by other witnesses, is that it is a little difficult when you have a prosecutor with a direct interest in the outcome of the case, because they are the victim. The idea of the prosecutor as a minister of justice is much more difficult to achieve if you are the victim of the offence and the one bringing the case.

I cannot profess to have detailed knowledge of the Scottish system, but I am aware that there is a process to be got through to bring a non-state prosecution. In a sense, what we have in England and Wales is similar in that, as we have heard, a private prosecution is commenced by applying to a magistrates court for a summons.

That used to be a rubber-stamp exercise. The divisional court, in a case called *Kay*, changed all that, reminding magistrates that it is a judicial function and giving them a list of things that they need to think about before issuing the summons. A lot of what the court said in that case has now been enshrined in the criminal procedure rules, so further emphasising the need for a judicial decision at the point of issuing proceedings. There is a safeguard that is different to what you have in Scotland, but it is certainly analogous to it.

Q46 **Chair:** Who else would like to help on this topic?



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Dr Rogers: May I say a couple of words? I have nothing much to add to the advantages of private prosecutions, because I think that they have been relayed to you clearly already. The police and CPS do not have the resources to prosecute everything, and there are some specialist prosecutors and some very rich private prosecutors who could arguably do the job better.

I should like to say a couple of words about the drawbacks of private prosecutions. A lot of people tend to think that there is something suspect about a private prosecution. To some extent, you have to be careful about people exaggerating the drawbacks. First, a lot of the things that can go wrong in private prosecutions can and do go wrong in CPS prosecutions as well. The first thing that you should think about when you hear a horror story about a private prosecution is whether it could have happened with the police and CPS. Often, the answer is yes.

Secondly, people often think that victims who privately prosecute cannot be objective about the strength of the evidence that a court will have to act on. One thing to say in response to that, which Alison Levitt mentioned earlier, is that there is no such thing as an objectively correct answer to whether a case should go ahead or not. If the evidence is unclear, Crown prosecutors could disagree among themselves about whether the case should go ahead. So to say that the CPS has an objective, correct answer and that the victim/private prosecutor must be wrong if he disagrees with it is clearly not correct.

Dr Elvin: Some of the advantages and disadvantages have already been mentioned, so I shall not repeat what other people have said.

One argument that is sometimes made in favour of the right to start a private prosecution is that it serves as a kind of safeguard against corruption in the police or CPS. I am not saying that there is a big problem with corruption or capricious action by the police or CPS, but I think that a lot of members of the public have that perception, and there are opinion polls that show that quite a large section of the public does not have trust in the CPS. In that sense, in so far as people are aware of the right to privately prosecute, you could say that it might reassure the public that there is an alternative way in which to bring a prosecution.

The gap-filling point is often the argument made for the right to privately prosecute. In terms of a potential drawback, although it takes quite a lot of money to start a private prosecution, often funds are recovered that are spent on a private prosecution from what are called central funds, as you are probably aware. So it is not necessarily the case that the state does not end up paying for a private prosecution. The state may end up paying more because of the right to privately prosecute.

Another point worth mentioning on potential drawbacks for private prosecutions is that, although it is hard to be sure how it is used in practice in the absence of any real, concrete statistics, there is a potential for what you might call wealth discrimination. It takes quite a lot of



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money to start a private prosecution, which is often why things like large organisations are bringing them rather than private individuals. You could ask whether it was appropriate that people with more money and resources were more able to make use of the criminal law.

Q47 Chair: What about crowdfunding? That seems to be a popular measure to bring private prosecutions.

Dr Elvin: Yes, as you have probably noticed, there have been a few crowdfunding initiatives in relation to certain individuals. Some of them do not seem to reach their targets for crowdfunding. I am aware of maybe two or three cases like that. Obviously, one of your colleagues in Parliament knows more about that. I am not sure how far that trend will take off, but it potentially gets around the wealth discrimination point, as long as you can attract enough attention to get the donations.

Q48 Chair: You might get your costs back from central funds, but I suppose that it is not guaranteed.

Dr Elvin: No, it is not guaranteed, but just because you do not actually win your case does not mean that you do not get your funds back.

Q49 Chair: Do you have anything to add, Professor de Than?

Professor de Than: No, we are basically working as a team today.

Chair: So whichever of you wants to is fine. Is there anything else for Mr MacAskill's question?

Kenny MacAskill: That is fine for me—it puts matters on the record.

Q50 Andy Slaughter: Good afternoon. You have touched slightly on the right or wrong views of the merits of private prosecutions as opposed to public ones. I do not know whether you were here for the first panel, when we talked about how the Post Office proceeded. You said that one obvious issue with private prosecutions was that the prosecutor may be the victim with an interest that goes just beyond the ordinary interests of justice but, in the case of the Post Office, it appeared to go much further. It appeared that this was a sort of manipulation in its own cause. Are you aware of other abuses of that kind—other prosecutors who have acted in that way, who have been identified or who you are aware of, who should be looked at again?

Professor de Than: Obviously, yes, we are all going to say the same thing many times about the absence of publicly available data. That makes it difficult to make generalisations, but we have quite a big pool of available data, because we have written several large articles about this and we have a research centre on private prosecution.

Particularly in cases involving large organisations as the victim/private prosecutor, we are aware of some very similar problems and patterns to those in the Post Office cases. I shall just run through some of the things that the first panel picked up, and confirm that we have evidence. I shall



not always say the name of the organisation now, in spite of privilege, but it is in our writings.

Chair: If it is anything that impinges on the sub judice rule, we cannot.

Professor de Than: Yes, exactly. So I may go vague and, if anyone wants to know more specific detail, they can of course contact us afterwards—and it is probably in something that we wrote earlier.

Subject to the problem of having a complete database on private prosecutions, first, we have evidence of cases where there have been significant failures to disclose relevant evidence to defendants in other contexts—in other cases involving large organisations as private prosecutors—and these have been within the vast majority of private prosecutions, which seem to be brought by well-resourced and vocal organisations protecting their commercial interests.

Q51 **Chair:** So you are saying these are commercial organisations rather than public bodies.

Professor de Than: Yes. So you have to be a little bit careful about the difference between at least three groups of large organisations. You have charities, public bodies and strong commercial bodies. They get conflated very often with the individual crime victim who has not had justice, and the benefits and detriments of what I think is a power rather than a right to private prosecutions are hugely different in a different context.

We have also got evidence, to move on from disclosure, of a lack of effective and fair investigations from large commercial organisations and charities. One of our other pieces of research is about the use of private investigators in private prosecutions and in public-private partnerships and how those private investigators are untrained and very often do not follow best practice—that would be a good way of putting it.

Building on from that, we have had a lot of cases where the threat of private prosecution is being used to leverage guilty pleas to lesser offences, often by large organisations of several types. We have cases where large commercial organisations have run dawn raids and threatened a prosecution unless personal or intellectual property is signed over to the potential private prosecutor.

We also have evidence of profit-making companies, some of them performing quasi-public functions, doing inappropriate plea bargaining on individuals. For example, to keep it vague, railway companies. This is with people who have not actually committed any offence but merely a ticket has blown out of their hand or they are unable to find it at the right time, who settle out of court by pleading guilty to a lesser offence when there would have been no prospect of proving a more serious offence, an intent-based offence, in a private prosecution.

Q52 **Chair:** That is going to be objective or subjective, whether or not there was no prospect of proving it. People might come to different views on



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that, might they not?

Professor de Than: Yes, of course.

Dr Rogers: I shall just say a word or two about these railway cases to which Claire refers. As you know, there are different types of criminal offences. There are strict liability offences whereby the person could be convicted even if they were not really at fault, and that can apply to railway evasion cases.

The real problem, which Claire refers to, with heavy-handed prosecutions of people who have technically committed a fare evasion case when they were not truly at fault, is that actually an offence is committed, so a private prosecution for the offence could in law succeed and the argument is that the companies that choose to enforce it are not keeping an eye on what you might call common sense, or the greater public interest. I think that is probably what Claire means.

Q53 **Chair:** You could apply a public interest test if you were a prosecutor, could you not?

Dr Rogers: You might hope that a responsible prosecutor might discontinue for lack of public interest.

Professor de Than: And further that defences are not examined, because the people initiating prosecutions are not concerned about potential defences.

Q54 **Chair:** Okay. Professor Hungerford-Welch, do you have any views?

Professor Hungerford-Welch: I defer to Dr Elvin and Professor de Than for the examples of poor practice. The only one I was particularly aware of was a charity involving animals. I shall say no more, beyond that it has a reputation for somewhat overzealous prosecution. I will not comment on whether that reputation is well founded.

Q55 **Chair:** There has been commentary around that, hasn't there?

Professor Hungerford-Welch: Picking up on one or two of the points that have been made, I think that the issue revolves around there being a lack of supervision of private prosecutions, as contrasted with public prosecutions.

On plea bargaining, for example, whether it is a private prosecution or a public prosecution, there is always scope for a conversation about the defendant pleading guilty to a lesser offence rather than having a trial. However, if you are a Crown prosecutor, you will know the rules that govern that process. Indeed, there is Attorney General's guidance on it with which, as a Crown prosecutor, you have to comply.

In a private prosecution scenario, it is a bit more open-ended. If lawyers are involved, they will have professional responsibilities, which will include responsible plea bargaining. Whether they are solicitors or



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barristers, there are professional codes that they should observe.

Of course, some of these conversations may well be conducted by people who are not lawyers, are not bound by professional codes and may not know where the line is drawn. Therefore, there may be cases where what would have been an entirely appropriate discussion about the potential of pleading to a lesser offence turns into what has been described by earlier witnesses as bullying. It is a fine line. I would like to think that practitioners know where it is, but non-lawyers may well not know.

Dr Rogers: I would like to say a couple of things, leading on from Peter's valuable observations. The first point is about oversight of prosecuting authorities. Only the CPS and the SFO are actually inspected. Other public bodies we refer to—that is to say, Government Departments—are not inspected. Other functions of public bodies may be reviewed and inspected, but their prosecutorial functions are not reviewed and inspected particularly and discretely.

The Committee may think that the best way forward is to have a more rigorous inspection system for large prosecutors, and you may well straddle the public-private divide. The RSPCA, from which I believe that you are going to hear evidence separately, invited in an inspector some five years ago, after it got some bad press, and has reformed its practices. The RSPCA may well turn out to be a good example of an organisation that responds well to inspection. However, there is no power to order inspections, other than for the CPS or the SFO.

Chair: That is very helpful.

Q56 **Andy Slaughter:** That all sounds rather grim. I will not ask you about reining in, as one of my colleagues is going to deal with regulation of private prosecutors. However, we seem to be bringing out a pattern where the CPS is stretched and does not have the capacity to deal with particularly specialist, niche areas or less serious crimes. Private prosecutors do have that, but they are liable to go astray—to go off on a frolic on their own.

What is the solution? Earlier you talked about the Scottish system. As I understand it, the Scottish system is that you have private bodies, but they have to refer through the procurator fiscal. Is there a middle way here, perhaps, where the private prosecutors prepare the cases and do the leg work, but there is still a filter to ensure that rules of evidence and things like that are obeyed—in other words, the CPS comes in at a later stage?

Q57 **Chair:** Do you have any thoughts? Who wants to start with that? Claire, do you want to have a go?

Professor de Than: Yes. We actually proposed that in one of the things that we wrote earlier. We proposed a compulsory regulator for any organisation bringing private prosecutions, because we are concerned about equality of justice and equal access to the law for people who may



not have had anything to do with an offence, but find themselves defending one against a very powerful organisation. We think that there should be inspections. Of course, some of our other recommendations, such as a compulsory code with real teeth, feed in.

Q58 **Chair:** Professor Hungerford-Welch, do you have anything to say on that?

Professor Hungerford-Welch: I can certainly see the advantage of some kind of approval process. However, if Alison Levitt were still present, she might wish to repeat a comment that she made earlier—that the CPS simply does not have the capacity to take on that role.

Another approach might be to look again at the stage when proceedings are initiated. I mentioned the High Court and the Criminal Procedure Rules Committee beefing up the scrutiny that takes place at summons application stage. It may well be that more detail could be required as regards the evidence in the case and why the prosecution is being brought. What the rules currently say is that you have to summarise the evidence that you have and, essentially, to confirm in writing that you have that evidence available and will be able to adduce it at trial. It would be possible, for example, to require draft witness statements, to show that there is sufficient evidence.

As far as the test to be applied is concerned, there has been a bit of discussion about the approach taken by the Crown Prosecution Service. Reference has been made to the full code test, which Alison kindly defined for us. As the law stands, the full code test does not apply to private prosecutions. Just to remind everyone, the full code test asks, first, is there sufficient evidence to give a realistic prospect of conviction, and, secondly, even if there is, is it in the public interest?

This is one of the controversies that arose when the DPP decided, when taking over private prosecutions, to apply the full code test. A case went all the way to the Supreme Court, where it was argued that, if the DPP can take over a private prosecution and apply the full code test, that subverts the right to bring private prosecutions. The Supreme Court disagreed with that argument and held that it is appropriate, if the DPP is taking over a prosecution, to apply the full code test. As has been said by several witnesses, whether there is a realistic prospect of conviction depends on your analysis of the evidence. There will be cases where two lawyers could come to opposite conclusions on that.

On the public interest test, I can see why it might be thought, “How on earth could that possibly relate to a private prosecution? By definition, a private prosecution is private, so why apply the public interest test?” The short answer to that is that the full code test in the code for Crown prosecutors makes the point that, if there is sufficient evidence and you have a realistic prospect of conviction, there should be a prosecution unless there is a good reason not to prosecute. Therefore, applying the full code test should not subvert the existence of private prosecutions.



The real problem that has been revealed by a lot of these cases is defendants who are the subject of a private prosecution not knowing what to do. Of course, they can go to see a solicitor and hope that the solicitor will give decent advice. However, perhaps when the summons is issued in a private prosecution the defendant can be given paperwork that includes explicit reference to the power of the DPP to take over prosecutions, so that someone who is in that situation knows that, if they feel that the prosecution is being brought or conducted inappropriately, they can refer it to the CPS, which can decide whether to take it over.

Were the Committee to go with the suggestion made by earlier witnesses of a statutory code, perhaps based on the Private Prosecutors' Association code, the defence in a private prosecution could receive a copy of that with the summons to the court, so that they knew what their rights were and what they could do if they felt that it was an improper prosecution.

Chair: That is very helpful.

Dr Rogers: I agree with Peter that it would be better if defendants to private prosecutions were made aware of their rights to ask the CPS to take over and discontinue those cases. It may well be that adding a couple of sentences on a summons sheet is quite practical and would help a lot.

The point that I was going to make is that sometimes the police are involved in the investigations in some minor way, perhaps to search premises or to effect an arrest. When the police are involved, the defendant is probably very prone to imagine that he is being prosecuted by the CPS. It may not be obvious to him even that it is a private prosecution, let alone that he can ask the DPP to take over.

Finally, I go back to the question that was asked of us: should everything go through the CPS? We have to look at its limited resources. Rather than have the CPS act in every single private prosecution, I would like the CPS to ask more questions when the defendant asks it to take over a case and to do that job properly.

Chair: That is helpful. Are you happy with that, Mr Slaughter?

Andy Slaughter: Yes.

Q59 **Dr Mullan:** We have touched on some of this already. Are there any key elements of the existing safeguards in place for private prosecutions that we have not discussed? On the issue of CPS referral, it occurs to me that you might find yourself in a situation where every defendant sent their case for review by the CPS. We have seen evidence in the Committee that that process adds many months to a prosecution, potentially. Do you think that that is a fair view? If you were a defendant, why would you not get the CPS to look at it, just on the off-chance that it discontinues the case?



Professor Hungerford-Welch: I agree. The more you publicise the ability to do something, the greater the take-up will be. My response would be, why should defendants be kept in the dark when it is there in the legislation? Why should we expect people to be familiar with the Prosecution of Offences Act 1985 when they are not lawyers? Putting it colloquially, I would say that we have to take that one on the chin. It is a suggestion not that we change the law, but simply that people know what that law is.

You started with a broader question, on a slightly more general level. One issue that has been raised by several witnesses is to do with disclosure. As far as a private prosecutor is concerned, they are not governed by the Attorney General's guidelines on disclosure, so they are not bound by the duty to pursue all reasonable lines of inquiry. It may not be practicable for a private prosecutor to pursue all lines of inquiry, whether reasonable or not. They may not have the resources to do it—although, as we have heard, some private prosecutors are extremely wealthy organisations that jolly well do have those resources. However, unless part of the investigation has been shared with the police, they do not have police powers of search, interview under caution and so on. Therefore, it may be difficult on a practical level for a private prosecutor to pursue lines of inquiry—at least, those that point against the suspect. Of course, that is the key to the Attorney General's guidelines. When you are investigating, you must look not just for evidence that confirms your suspect but for evidence that points away from him.

If there were to be a code of a more binding nature than the Private Prosecutors' Association code, that could lay down certain requirements. It might not be as vigorous as the Attorney General's guidelines from a resourcing point of view, but it could certainly emphasise the importance of evidence gathering and not doing that in a way that is blinkered. Were that to be part of the private prosecution process from the beginning, the risk of people being prosecuted incorrectly would be reduced, at least to some extent.

Q60 **Dr Mullan:** What about the argument that, acting as law officers, counsel, the prosecution and the solicitor have a duty to say, "Before I move ahead and agree to prosecute this case on behalf of a client, I have to be satisfied that all reasonable lines of inquiry were considered"?

Professor Hungerford-Welch: I would certainly agree that that is an answer. However, I would say that it is possibly a partial answer, in that it depends on when the lawyers get involved. In an ideal world, the lawyers would be involved right at the outset, as the investigation is starting. Of course, that may well not happen. Lawyers may well receive the fruits of the investigation some considerable time after the investigation has taken place. It is certainly possible that evidence will no longer be available at the time when the lawyers get involved and realise that it should have been sought. I would therefore prefer those larger organisations that conduct a lot of private prosecutions to make sure that



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they are aware that, from the very outset, they should be looking at all reasonable lines of inquiry in order to achieve a safe conviction and a fair trial.

Q61 **Chair:** Would any of our other witnesses like to comment?

Dr Elvin: You asked about the power of the CPS to take over and either continue or discontinue private prosecutions. The CPS has said that it does not have a central database of how many cases are referred to it. As matters stand right at the moment, we do not know how often cases go to it. However, in 2013, I think, a question was asked in Parliament about how many cases were referred to the CPS, and it appears that back then the CPS had the central data. If I remember correctly, the figure was something like 55.

It seems pretty clear from the limited data that we have that there are thousands of private prosecutions each year, so it is very likely that a very small number of cases are referred to the CPS. Peter is right to say that a major reason for that may be that people simply do not know that they can refer a case to the CPS. However, without any further study into it, I do not see how we can work out why they are not referring cases to the CPS. It just seems clear to me that only a small proportion of cases are referred to the CPS.

Professor de Than: That data would be incredibly easy to generate. I have the template that I would use to do it on paperwork, all ready to go. It would cost almost no extra money and would probably save a lot of money by stopping unmeritorious cases going forward.

Dr Rogers: In our written evidence to the Committee, we made the point that, when the CPS is asked to take over a prosecution, its reviewing lawyer has to fill in a template. That always sounds like a kind of tick-box exercise, where you tick that you have thought about this or that. However, presumably these templates are returned to some official. The CPS ought to be able just to count the templates and say, "We have had x number of cases referred to us over a certain period."

It is true that the CPS is not well resourced if lots of defendants ask it to take over prosecutions. Rather than say the usual thing about the CPS needing more resources, I would go in a slightly different direction and say that it adds weight to the need for a more rigorous system of inspection. As I say, only the CPS and SFO must be inspected. Everyone else must invite inspectors in. However, that is the most rigorous way of getting to serial problems in large organisations.

Q62 **Dr Mullan:** We have touched on many of the other safeguards. One that we have not discussed is the summons—I think that that is right—that is issued by the magistrate. To what extent do witnesses feel that that acts as an effective safeguard, if at all?

Dr Rogers: I was going to be sceptical. I think that magistrates are as



under-resourced as every other part of the criminal justice system. As you know, many years ago we moved away from committal proceedings where magistrates are expected to scrutinise the quality of the evidence before trial. Although there is a list of things that magistrates must consider when they are issuing a summons, the main things are whether this is a proper, regular criminal offence and whether it sounds as if there is possibly enough evidence. However, they cannot scrutinise the evidence. It is necessarily a very impressionistic exercise. Whether the prosecution is one that should go ahead would be better decided by the CPS. It has its own resource problems, but at least the CPS, if properly resourced, is better suited to do it.

Q63 **Chair:** Fair enough. Does anybody else want to comment? Are people happy with that?

Dr Elvin: I was going to say something.

I agree with that point. Peter referred to Kay earlier. However, my reading of Kay seems to be slightly different from his. To me, it was largely reiterating what was already the law. It still seems to me that it is largely a case of just filling out the forms correctly and presenting them to the magistrate. Unless there is some glaring error, such as trying to charge someone with an offence that does not exist or that allegedly occurred outside the jurisdiction—

Professor de Than: Even then, you can find some paperwork available on the internet that discloses offences that do not exist in England and Wales having been rubber-stamped by magistrates.

Dr Elvin: In fact, there was a very recent example of that. It was not actually a private prosecution. It was by the railway police, to do with the Covid-19 regulations.

Chair: We have had some evidence around that.

Dr Elvin: Obviously, the problems there are not exclusive to private prosecutions. On the issue of whether magistrates act as an effective filter, I agree with what Jonathan said. In reality, they do not usually go into the details.

Q64 **Dr Mullan:** I am conscious of time, so I will ask the last question in a succinct way. When it comes to suggestions for reform going forward, we have covered better monitoring of cases going to the CPS, the possibility of having an inspection regime and mandatory disclosure of the ability to refer defendants to the CPS. Are there any other things that we have not covered that you think we should be considering as regards reform of this area?

Professor de Than: To save time, I will bullet-point it a lot and then say, "Read our written submission and our *Criminal Law Review* article, where it is bullet-pointed in much more detail at the end, as a



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comprehensive reform plan for all private prosecutions.”

First, there should be compulsory notification to the CPS—on the paperwork, every time a private prosecution is initiated.

Secondly, there should be a new form of initial hearing as a filtering mechanism, with some expertise built in, so that nobody has a prosecution go forward for an offence that does not exist in the jurisdiction in which they were arrested. That would allow you to get rid of potential abuse of private prosecutions at that stage sometimes.

Thirdly, we want clear legislative fixing of the CPS duty in relation to private prosecutions. In our view, there is too much discretion built in there. They can do what they like, essentially, on some of the matters.

Fourthly, we want the possibility of exemplary damages to be available for misuse of or malicious private prosecution, so that there is an effective deterrent for large organisations that are leveraging their weight and power in an inappropriate way and for a neighbour who hates another neighbour and decides to prosecute, which happens sometimes.

We have mentioned the compulsory regulator that we think should exist for large organisations. However, that has to go in tandem with a compulsory code for all private prosecutions that mirrors as far as possible the requirements of criminal evidence and procedure and has sanctions for non-compliance.

Q65 **Chair:** Would anybody else like to comment?

Dr Rogers: I have one further idea in response to the question, besides more resources for the CPS and mandatory inspection of large organisations.

Some attention may have to be given to police activities. As we have already said, the police sometimes assist private prosecutors in their investigations. It is entirely up to them whether or not they do so. There is no actual protocol that I can see. If they somehow trust a private prosecutor, they may help him with a search warrant or an arrest, but sometimes the scrutiny seems to be missing. As far as I can gather, there were some police officers at the scene of some of the Post Office investigations. What they were doing there was unclear. It seems most unlikely that they had asked the Post Office questions about how it had gathered its evidence.

First, you can wonder whether the police should be asking more questions when they are asked to assist a private prosecutor. Secondly, another point to make is that the police can actually nip a private prosecution in the bud. If they are made aware of a potential offence, they can investigate themselves and offer the defendant a caution. That nips any private prosecution in the bud. Therefore, the police have a sort of power on their own to nip private prosecutions in the bud by offering



cautions, but they can also help private prosecutors whom perhaps they should not be helping.

Q66 **Dr Mullan:** Can I clarify that? Forgive me for not understanding. In terms of the law, if the police disposed of the offence through a caution, would that prohibit a private prosecution on the same charge?

Dr Rogers: Yes. This is an abuse of process point. It depends on exactly what the police say to the defendant, but, in substance, it nips the thing in the bud. The CPS has said that it will probably take over and discontinue where the defendant has been offered a caution. Either through abuse of process or through the CPS, it should be discontinued.

Chair: That is very useful.

Q67 **Paula Barker:** Should the CPS or the Attorney General play a more active role in monitoring private prosecutions?

Q68 **Chair:** We have talked a good bit about the CPS. What about the Attorney General and the law officers?

Professor Hungerford-Welch: My instinct would be to focus on the CPS and the DPP, given that it is the DPP's power to take over private prosecutions. Of course, the DPP is line-managed by the Attorney General, so there is that kind of oversight in the system anyway.

Q69 **Chair:** There would be a political accountability through the law officers. Are there any other observations?

Dr Rogers: When we drafted our submission, we were going to write a paragraph detailing how small the Attorney General's office actually is. We deleted it because we were told that everyone in Parliament knows how small the Attorney General's office is and no one needs to be told about that.

I suspect that the Attorney General could be given powers to order inspections of private prosecuting bodies or other large prosecuting bodies that come to his attention, but I have to say that we have not yet thought through what he should do with the report when it lands on his desk. We are working towards that in our project that will complete next year. This is a "more work to do" point.

Where the money comes from is another question. Should the big organisation that potentially benefits from being inspected bear some of the costs of the inspection? There are quite a few questions yet to be answered.

Chair: No other members of the Committee have questions for our witnesses. We have covered all the ground, by the look of it. I thank our panel of witnesses for their comprehensive answers. Some of that discussion took some of us back a little bit. It was very helpful to us. We are all grateful to you for your time and trouble, with your written



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evidence and your oral evidence today. Thank you very much.