

Written evidence from the Centre for Women's Justice (PPS0019)

I. INTRODUCTION AND SUMMARY

- 1. The Centre for Women's Justice ("CWJ") provides this evidence based on the experience of having assisted a number of women charged with perverting the course of justice ("PCJ"), including by allegedly making false allegations of rape, and, in particular, in relation to the case of Eleanor de Freitas. Eleanor was privately prosecuted for alleging that she had been raped in 2013 (on behalf of the subject of the allegation she had made). The private prosecution was subsequently taken over and continued by the Crown Prosecution Service. Eleanor tragically committed suicide three days before her trial was due to start. CWJ has identified a number of problems with the way in which private prosecutions work in the jurisdiction of England and Wales and wish to share their learning and make recommendations to the Committee.**
2. It should be noted, in relation to the case of Eleanor de Freitas, that the alleged rape has been at all times strenuously denied by the subject of the allegation. As a result, and in light of the (unsuccessful) libel proceedings brought by him against Eleanor's father, it should be made absolutely clear that this evidence is given about the problems which arise from private prosecutions in these circumstances. No assertions are made about the veracity of the original complaint, which was never proven either way. This is also the reason that it is requested that, if the Committee seek to publish this evidence, we are given sufficient advance notice in order to consider any redactions or edits which might be prudent before publication.

II. THE LEGAL FRAMEWORK FOR PRIVATE PROSECUTIONS

(i) Private Prosecutions

3. Under s10 of the Prosecution of Offences Act 1985 (the "1985 Act"), the Director of Public Prosecutions ("DPP") is required to issue a Code for Crown Prosecutors giving guidance on the general principles to be applied as to whether proceedings for an offence should be instituted.

4. Under the Code, prosecutors must only start or continue a prosecution when a case has passed two stages of the Full Code Test. Those stages are, first, the “Evidential Stage”, under which prosecutors “*must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge*”, and second, the “Public Interest Stage”, under which prosecutors “*must go on to consider whether a prosecution is required in the public interest*”.
5. When the CPS brings a prosecution, usually the investigation has been carried out by the police, who are subject to statutory requirements as well as national and local guidelines and codes of practice about case investigation, evidence collection and the treatment of witnesses and defendants.
6. Under s6(1) of the 1985 Act, subject to specific exceptions, private individuals may also institute or conduct criminal proceedings. For certain offences, specified by statute, a private prosecution cannot be brought without the consent of the DPP or the Attorney General. These include offences under the Bribery Act 2010 and the offence of corporate manslaughter. However, for the majority of offences, including PCJ, there is no requirement to obtain the DPP’s consent before bringing a private prosecution.
7. Any person, whether represented or unrepresented, can commence a private prosecution against another person. In order to bring a private prosecution, all that has to be done by the private individual or his / her lawyers is to satisfy the Court that (i) the allegation is an offence known to law; (ii) the essential ingredients of the offence are *prima facie* present (which is a very low threshold); (iii) the offence alleged is not time barred; (iv) the court has jurisdiction and (v) the individual has the necessary authority to prosecute (which is rarely an issue for the Court, as explained in the following paragraph). If so, generally the Court ought to issue the summons requiring the accused person to appear in Court, unless there are compelling reasons not to do so, for example, if the application is vexatious (*R (Johnson) v Westminster Magistrates Court* [2019] EWHC 1709).
8. A prosecution for PCJ starts in the Magistrates’ Court and is then sent to the Crown Court for trial. When the private prosecution is in the Magistrates’ Court, an unrepresented person can conduct his/her case without a lawyer (*R v George Maxwell (Developments) Ltd* [1980] 71 Cr App R 83). When the private prosecution is in the Crown Court (the higher Court), the Crown Court may permit an unrepresented person to represent him or

herself but such a discretion will be exercised only rarely (*R v Southwark Crown Court ex parte Tawfik* [1995] Crim LR 658: Archbold 2-28). There is no statutory prohibition on a private prosecutor representing him or herself at the trial nor any further statutory or common law guidance about when the Crown Court should exercise this discretion.

9. Private prosecutions are not subject to the Code for Crown Prosecutors, or the codes of practice applying to the investigation of criminal offences by the police (such as the Police and Criminal Evidence Act Codes of Practice). Although private prosecutors are supposed to act as “*ministers of justice*” (*R (Kay) v Leeds Magistrates Court* [2018] EWHC 4 WLR 91), there is no mandatory training for those conducting private prosecutions nor is there effective ongoing supervision by the Court (or any other body) to ensure that their duties - e.g. to conduct a fair and impartial investigation or disclose material which assists the defence - are complied with. There is no requirement that a suspect is interviewed by the private prosecutor to obtain his or her explanation or response to the allegations.¹ Eleanor, for example, was never interviewed as a suspect; she sat in the dock without having ever been arrested, or her rights explained to her as a defendant, and without having had the opportunity to respond to the allegations against her.
10. Crucially, the decision to bring a private prosecution does not have to satisfy the Full Code test set out above: i.e. there does not need to be a realistic prospect of conviction nor does the prosecution have to be in the public interest.
11. The mechanism by which control is exercised over the bringing of such offences is *ex post facto*: the DPP can take over a prosecution under s6(2) of the 1985 Act, and discontinue that prosecution under s23 of the 1985 Act. There is no formal system by which private prosecutions are brought to the attention of the CPS for review. It requires them to be referred either by the private prosecutor, the defence or the trial judge or by some other means. This means that there is no system in place to ensure that the quality of private prosecutions is reviewed or supervised by the CPS.
12. There is specific guidance regarding when the DPP should take over such proceedings, which provides that this should only happen if both stages of the Full Code test are met

¹ There is now a “Code for Private Prosecutors” published by the Private Prosecutors’ Association, which is an association of lawyers who conduct private prosecutions. It is a voluntary and not a mandatory code, and recognises that many private prosecutions will not involve the interview of suspects: §3.5.1 of the PPA Code of Practice.

and there is a particular need for the CPS to take over the prosecution. If (which is not guaranteed), prosecutions are brought to the attention of the CPS, the guidance provides that the DPP should take over and stop a private prosecution under s.6(2) of the 1985 Act, if the Full Code test is not met.

(ii) Perverting the course of public justice

13. PCJ is a common-law offence that requires the prosecution to prove that a person acts or embarks upon a course of conduct which has a tendency to and is intended to pervert the course of public justice. It is a very serious offence, carrying a maximum sentence of life imprisonment.
14. There is specific CPS Guidance on Perverting the Course of Justice – Charging in cases involving rape and/or domestic violence allegations. That Guidance makes clear that these cases, by their nature, ‘will be complex and require sensitive handling’. As a result, it is mandatory that they are dealt with by trained RASSO prosecutors and tried by Rape Specialist Advocates. Charging decisions must be ratified by local Chief Crown Prosecutors, and the Director of Legal Services must be notified.
15. Even with these safeguards in place, research has shown that *public* prosecutions of this nature risk prosecuting genuine rape complainants, for the crime of simply reporting their rape.² Despite this, PCJ is not an offence which requires the prior consent of the DPP or the Attorney General, and it can be commenced by a private individual at any time.
16. The CPS Guidance does not apply to private prosecutions. All that needs to be put before the Court in order for a summons to be issued is a *prima facie* case. This could be limited to an assertion by the alleged perpetrator that he did not rape the complainant and that she is, therefore, lying. There is no authority to suggest that, in principle, an alleged rapist bringing a private prosecution against the complainant would be considered “vexatious”.

(iii) Effects of prosecution

17. A person who is subjected to a private prosecution is not protected by the same procedural safeguards around the investigation and prosecution of crimes as a person who is subject to a public prosecution. For example, there is no interview procedure to obtain

² Avalos, Lisa: ‘The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting,’ [2018] 83 BLR

the Defendant's explanation and there are no mandatory codes of practice governing the proper approach to investigation.

18. Moreover, where an alleged victim of rape is prosecuted (whether privately or by the CPS) for PCJ on the basis that she has made a false allegation, she automatically and immediately loses the protection to which she is entitled as a rape complainant. In particular:

- a) **Anonymity:** Under s1 of the Sexual Offences (Amendment) Act 1992, rape complainants are entitled to lifelong anonymity. However, where a prosecution is brought for PCJ, the rape complainant loses her anonymity when the proceedings are brought and prior to any conviction: see *R v Jemma Beale* [2017] EWCA 1012 (Crim);
- b) **Cross-Examination about past sexual history:** s.41 of the Youth Justice and Criminal Evidence Act 1999 prevents a complainant in a rape trial being cross-examined about her past sexual history unless very strict criteria are met. However, where a rape complainant has been accused of PCJ and is herself on trial for that allegation, there is no such statutory safeguard;
- c) **Cross-Examination by alleged rapist:** Where a woman is a complainant in a rape trial, s.34 Youth Justice and Criminal Evidence Act 1999 prevents the alleged perpetrator of the rape from cross-examining her. Instead, a court appointed lawyer will conduct the cross-examination, even if the alleged perpetrator has chosen to represent himself at trial. However, where a rape complainant has been accused of PCJ and is herself on trial for that allegation, if the Court permits the alleged perpetrator from conducting the prosecution himself without legal representation, then there is no identical statutory safeguard to prevent the alleged perpetrator of the rape from cross-examining her. Although it is recognised that it would be very unlikely for a Crown Court judge to grant this, there should be a statutory safeguard to prevent this ever happening;
- d) **Myths and Stereotypes Direction:** Where a woman is a complainant in a rape trial, the trial judge will give a "myths and stereotypes" direction to the jury. This directs the jury not to assume automatically that the following features mean that a rape complainant is not telling the truth: delay in making a complaint,

inconsistency in that complaint, lack of emotion/distress when giving evidence, a complainant's clothing, intoxication, previous sexual relationship with the defendant, some consensual sexual activity and the lack of any use or threat of force [Crown Court Compendium: 20:1-11]. However, where a rape complainant is prosecuted for PCJ, there is no mandatory requirement for such directions to be given to the jury.³

19. Any safeguards are thus a matter of *discretion* (if they exist at all) rather than of *right*. Crucially, the anonymity safeguard is lost as a result of the PCJ prosecution being brought. There is no discretion of the trial judge to grant anonymity on the basis that the Defendant is a rape complainant (per *Jemma Beale* above). If a private prosecution is brought by or on behalf of the alleged perpetrator and the Defendant is subsequently acquitted at trial (i.e. the jury find that she may have genuinely been raped), she will have already lost her anonymity
20. Similar procedural defects apply to private prosecutions for allegedly false allegations of domestic abuse. CWJ has contributed heavily to the Draft Domestic Abuse Bill currently at Committee Stage in Parliament, which is considering a statutory bar against the cross-examination of domestic abuse victims by their alleged abusers: however, this would apply only to complainants, not PCJ Defendants. Permitting PCJ prosecutions to be privately brought – or even threatened – by an alleged abuser is clearly contrary to the administration of justice and to the safety of the alleged victim.
21. Indeed, it leaves open the opportunity for the abuse of legal mechanisms which can amount to a form of partner abuse in itself, one which has analogies in the threat of costly defamation proceedings to ‘silence’ allegations of rape or domestic abuse. *Stocker v Stocker* [2019] UKSC 17 is one instructive example of libel proceedings brought by Mr Stocker against his ex-partner in circumstances where it was beyond dispute that Mr Stocker had been physically abusive to her [see §61 in particular]. CWJ has supported a number of complainants facing similar threats, and knows all too well their effectiveness in hindering the prosecution of serious, violent offences.

³ In the case of *R v Jemma Beale* [2019] 2 Cr App R 19, the Court of Appeal accepted that there may be cases where guidance on myths and stereotypes *may* be appropriate to benefit the Defendant, but it is not mandatory to give such a direction as it is in cases where the alleged offence being tried is rape or sexual assault.

22. Given the specific threats associated with private PCJ prosecutions of alleged VAWG victims, therefore, it is inappropriate for them to be left in private hands. It is of particular concern in the context of a precipitous decline in rape prosecutions, which are at a ten-year low⁴ despite increased reporting rates. Complainants are overwhelmingly unlikely to see their allegations make it to trial. With decreased confidence in the justice system, complainants are likely to be deterred from reporting or supporting a prosecution by the threat – easily weaponised by an abuser or attacker - that they themselves may be privately prosecuted.

III. RECOMMENDATIONS

23. Based on this research and experience, we make the following recommendations for legislation in relation to private prosecutions of rape complainants (and/or complainants of domestic abuse):
- a) Private prosecutions for making an allegedly false allegation of rape and/or domestic abuse should not be permitted to be brought at all (and/or by or on behalf of the person who is the subject of that allegation);
 - b) If private prosecutions in relation to making an allegedly false allegation of rape and/or domestic abuse are permitted to be brought, they should require approval by the DPP and/or AG before criminal proceedings are commenced, applying the Full Code test;
 - c) There should be a mandatory statutory duty for a private prosecution to be referred to the CPS for review at its commencement;
 - d) If the Defendant wishes to do so, police should be required to facilitate an interview under caution in a private prosecution so that the Defendant can be given a full opportunity to answer and/or explain the allegation being put, before criminal proceedings are commenced;
 - e) Mandatory codes of practice should apply to private prosecutors for the conduct of their investigation and the prosecution and there should be remedies to

⁴ Guardian, 12th September 2019 accessed at <https://www.theguardian.com/law/2019/sep/12/prosecutions-in-england-and-wales-at-lowest-level-in-a-decade>

terminate the proceedings if not complied with. The CPS should have the power to review the full case file in order to determine whether or not mandatory duties of investigation and disclosure have been complied with and report to the trial judge;

- f) There should be a public interest filter conducted by the trial judge in order to consider whether the Full Code test is satisfied in private prosecutions. This must include consideration of the impact of the private prosecution on the Defendant's mental health;
- g) Rape complainants should not lose their lifelong anonymity as a result of a private (or public) prosecution being brought. The only time when anonymity should be potentially lost is after a conviction;
- h) Statutory safeguards should be put in place to protect Defendants charged with perverting the course of justice by making an allegation of rape which mirror the protections afforded to witnesses in rape / domestic abuse trials set out at §18 above (eg statutory prohibition on reference to past sexual history unless strict criteria are met; and mandatory myths and stereotypes direction etc). This should apply to both public and private prosecutions;
- i) Limit the amount of costs which can be recovered to successful private prosecutions only to be capped at legal aid rates.

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