We are experts on private prosecutions, having spent a considerable amount of time conducting academic research in relation to criminal law in general and private prosecutions in particular. We have two publications that focus on the issues at hand:


We are offering evidence because, as we have argued in our publications above, we believe that there is a need for reform in relation to private prosecutions.

The way in which large organisations conduct private prosecutions

Contrary to public perceptions and, indeed, the presumptions of some writers and judges, it is clear that the vast majority of private prosecutions in England and Wales are brought by organisations, not by individual victims of crime. There are no official statistics on the use of private prosecutions, so it is impossible to be certain about the precise extent to which large organisations conduct private prosecutions unless they publish information about it. However, certain organisations are clearly prolific private prosecutors, acting in various contexts. These include:

- The Royal Society for the Prevention of Cruelty to Animals (RSPCA), who, for instance, secured convictions against over 600 defendants in each year between 2017-2019 (see https://view.pagetiger.com/bessstj/prosecutionreport2019);
- The Federation Against Copyright Theft (FACT), who regularly bring private prosecutions in relation to intellectual property offences and act on behalf of a range of companies, such as Sky (see e.g. https://www.fact-uk.org.uk/tag/prosecution/).

Each of these large organisations has faced criticism for the manner in which they investigate and prosecute criminal offences, as we have elaborated in our publications. Some of the criticisms are weighty, and hence we have proposed a comprehensive programme of reforms.
The effectiveness of existing safeguards

As we have argued previously in our two publications above and as we shall explain briefly below, the existing safeguards are not adequate to prevent significant problems. The issues here do not simply include miscarriages of justice, but also the inappropriate initiation of legal proceedings which can cause great distress to the defendant even if they are subsequently dropped or otherwise do not lead to conviction, as well as inappropriate threats to prosecute in order to secure some advantage, such as a sum of money.

It must also be remembered that private prosecutions result in public expenditure and that there is no general requirement for them to be in the public interest, although some private prosecutors apply a ‘public interest’ test in determining which cases to prosecute. The costs of bringing private prosecutions are potentially recoverable from ‘central funds’ (as well as from defendants): for instance, the RSPCA recovered £431,451 from central funds in 2013 (see https://www.rspca.org.uk/webContent/staticImages/Downloads/WoolerReviewFinalSept2014.pdf).

As our research elaborates, there is no good reason, in theory, policy or practice, why those alleged victims of crime who can afford to instigate a private prosecution should be privileged above those who cannot.

Alternative legislative, legal and administrative safeguards that could be used to regulate the way in which large organisations use the right to bring private prosecutions

In our Criminal Law Review article above, we proposed, on a strong evidential and theoretical basis, “the introduction of a statutory Code relating to private prosecutions, regulating all aspects of preparation, and involvement in, such prosecutions”. Nothing has happened since that has made us reconsider this. On the contrary, greater safeguards may be even more important than ever if private prosecutions become more frequent because police resources are stretched due to the Covid-19 crisis. We made several proposals in our Criminal Law Review article, but these would form part of a wider Code:

- As Findlay Stark and the Law Commission have concluded, the Crown Prosecution Service should be notified whenever a private prosecution is initiated (see F. Stark, “The Demise of the Private Prosecution?” [2013] Cambridge Law Journal 7, 9, referring to Law Commission, Consents to Prosecution (London: TSO, 1998), LC 255, paras 7.2–7.9). As we stated in our article, “This would help the CPS to use their power to take and over and discontinue prosecutions effectively and further, in the twenty-first century, could be a fully automated part of the court procedures with minimal costs or administrative burden.” We are happy to expand on how such a system would work, and how it would be cost-efficient.
- There should be an initial hearing for private prosecutions to act as a filtering mechanism. We proposed the introduction of a pre-trial review by a magistrates’ court to deal with potential abuse of the right to initiate a private prosecution;
• Legislation should fix the Crown Prosecution Service duty in relation to private prosecutions in a clear, specific manner. Case law suggests that the Crown Prosecution Service power to take over private prosecutions is currently largely unfettered, so the Director of Public Prosecutions can exercise discretion and formulate a policy or a rule as guidance as long as it does not “defeat or frustrate the policy of the Act from which it is derived” (R. (on the application of Gujra) (FC) v CPS [2012] UKSC 52 at [76], per Lord Kerr);

• That it should be possible to obtain “exemplary damages” in certain cases. Exemplary damages are money awarded by a court to punish a defendant rather than simply compensate a claimant. As we put it in our article, such awards should be possible where a person “has been subjected to a malicious private prosecution or to behaviour by a private prosecutor or their agents which breaches the normal requirements of the laws of criminal procedure and evidence, including our proposed statutory Code”.

Whether the existing investigatory standards and duties of disclosure that apply to private prosecutions are effective

It would be surprising if the duties of disclosure are effective. The same rules apply to the Crown Prosecution Service, and there is evidence that there has been a significant failure to disclose relevant evidence to defendants (see e.g. https://www.bbc.co.uk/news/uk-42795058). The Chair of the Criminal Cases Review Commission stated in 2016 that problems regarding disclosure need addressing to the betterment of the criminal justice system (see https://ccrc.gov.uk/text-of-letter-sent-5-july-2016-from-ccrc-chair-richard-foster-to-dpp-attorney-general-and-others/). There is no reason to believe that the situation is better with private prosecutors. As we have put it in our Criminal Law Review article, the Crown Prosecution Service is required to be objective and to act independently; “in comparison to private prosecutors, its independence makes it more likely to be dispassionate and less likely to act out of self-interest.”

The effectiveness of different safeguards in preventing miscarriages of justice resulting from the right to bring private prosecutions

There are various existing mechanisms for controlling private prosecutions. Even considered collectively, these provide only partial protection against potential miscarriages of justice and the other matters that we highlighted above. There are three main protections, which we will explore below:

• Magistrates’ discretion to refuse to issue a warrant or a warrant;
• The requirement to obtain consent from either the Attorney General or the Director of Public Prosecutions in relation to some offences;
• The power of the Crown Prosecution Service to take over private prosecutions.

There are also other measures that may help to control private prosecutions, but each of them has limitations, as we have explained in detail in our Criminal Law Article. For example, case
law makes it clear any prosecution can be stopped where a trial will “offend the court’s sense of justice and propriety” or “undermine public confidence in the criminal justice system and bring it into disrepute” (*Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 A.C. 42 and *Latif* [1996] 1 W.L.R. 104). However, a judge cannot stop a prosecution on the grounds that it is disproportionate or not in the public interest. Abuse of process seems to apply only to the most serious examples of malpractice, such as abduction and entrapment.

The voluntary Code for Private Prosecutors introduced by the Private Prosecutors’ Association may lead to greater consistency between private prosecutors. However, its potential for addressing abuses of the right to initiate a private prosecution is also limited: for instance, there is no requirement for private prosecutors to join the Association and it has no sanctions.

**The role of the Crown Prosecution Service in taking over private prosecutions**

The Crown Prosecution Service has the power to take over a private prosecution and either continue or discontinue it. In principle, this is useful because it means that it can take over and discontinue inappropriate private prosecutions; i.e. those that do not have a “realistic prospect” of resulting in a conviction and/or are not in the public interest. However, there is no requirement for a private prosecutor or a magistrates’ court to notify the Crown Prosecution Service of the initiation of a private prosecution, and, as we have explained our Criminal Law Review article, evidence suggests that the vast majority of private prosecutions never come to the attention of the Crown Prosecution Service. No fair and consistent standards can be applied without a compulsory notification procedure on instigation of every private prosecution.

Further, the Crown Prosecution Service power to discontinue prosecutions does not prevent the initiation of private prosecutions and the events which may precede them. Thus, it provides limited protection for defendants from mental anguish, career disruption, financial costs, and other harm.

**The role of the Attorney General in supervising private prosecutions**

This is not a significant factor in the vast majority of private prosecutions. Some offences can only be prosecuted with the consent of the Attorney General, the Director of Public Prosecutions, or other authorities. Dozens of offences require such consent, but there are thousands of offences in English criminal law, meaning that the requirement to obtain consent is rarely relevant. As Lord Neuberger put it in *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52, the right to “initiate private prosecutions … [is] virtually unlimited”.

**The role of the courts in private prosecutions**
We have already briefly explained the role of the courts in relation to abuse of process. Another safeguard is that magistrates have a discretion to refuse to issue a summons or a warrant. A private prosecution is started by a prosecutor making an allegation of a criminal offence at a magistrates’ court. When presented with an allegation, the magistrate will decide whether to proceed with the case. In making this decision, the magistrate must consider: “whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time-barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute” (R. (on the application of Kay) v Leeds Magistrate Court [2018] EWHC 1233). The magistrate should issue the summons if these requirements are met, “unless there are compelling reasons not to do so”, such as the allegation being an abuse of process (R. (on the application of Kay) v Leeds Magistrate Court [2018] EWHC 1233). The magistrate has a power but not a duty to make inquiries when determining whether to issue a summons; this can include seeking information from the proposed defendant, but this party has no right to be heard (R. (on the application of Kay) v Leeds Magistrate Court [2018] EWHC 1233). As we have explained in our Criminal Law Review Article, the reality is that “obtaining a summons or a warrant from a magistrate is in effect largely just a matter of completing the paperwork correctly”. Indeed, we have evidence of private prosecutions which have proceeded even though the paperwork was completed incorrectly and, in some cases, did not disclose any criminal offence.

The way in which private prosecutions are regulated in other jurisdictions

Many jurisdictions do not allow private prosecutions at all. Some of those that do have incorporated safeguards that are familiar from an English perspective: for example, private prosecutions in Australia are limited by the need for the Attorney General’s consent in relation to certain offences (see Taylor v Attorney-General (Cth) [2019] HCA 30). However, this does not mean that they do not also have additional safeguards. Unlike England, some jurisdictions have limited private prosecutions by reference to a need for the private prosecutor to have appropriate standing: for instance, private prosecutions in Scotland require the prosecutor to show that the crime alleged is a wrong against them (see https://www.lawscot.org.uk/media/359757/scottish-government-justice-committee-petition-pe-1633-private-criminal-prosecution-in-scotlanddocx-23-february-2018.pdf). Case law defines this as requiring an individual to “show a wrong personal to themselves, from which they have suffered injury of a substantial nature beyond all others, giving them a special and peculiar interest in bringing proceedings” (Stewart v Payne [2016] HCJAC 122). In some jurisdictions it is unclear whether private prosecutions are still possible. Some British jurisdictions have recently taken the step of banning private prosecutions by statute, to remove any lingering doubt; Jersey is one such example. We would also note here that there are numerous safeguards and much research which must be undertaken before comparisons are made with the approach of other jurisdictions.

July 2020