

Written evidence from the Crown Prosecution Service

INTRODUCTION

The Crown Prosecution Service (CPS) welcomes the opportunity to contribute to the Committee's consideration of private prosecution safeguards.

Within the CPS, the Special Crime and Counter Terrorism Division (SCCTD) advises on and, where appropriate, prosecutes some of the most sensitive and demanding cases across England and Wales. Private prosecutions that the CPS becomes aware of are reviewed within CPS local Areas, with an assurance function carried out by the Special Crime Division to ensure compliance with policy.

This submission considers the effectiveness of existing safeguards in private prosecutions and examines the reasons why the CPS may be best placed to conduct prosecutions that are independent, fair, and the most cost-effective use of the public purse. This submission will also consider challenges in developing alternative safeguards in private prosecutions and demonstrate the ways in which private prosecutions can raise access to justice issues by creating a 'two-tier' justice system.

KEY COMMENTS

The qualified right to bring a private prosecution and the role of the courts.

1. It is well-established that any individual has the right to institute a private prosecution. Section 6(1) of the POA 1985 preserved the right to bring private prosecutions, and in principle, there is nothing wrong in allowing a private prosecution to run its course through to verdict and, in appropriate cases, sentence. The fact that a private prosecution succeeds is not an indication that the case should have been prosecuted by the CPS. Parliament has specifically allowed for this possibility by the way section 6 is constructed: there is no requirement for the CPS to take over a private prosecution.
2. The right to bring a private prosecution, however, is subject to certain limitations. As held in the case of *R (on the Application of the Director of Public Prosecutions) v Sunderland Magistrates' Court*:

The citizen enjoys the right to bring a private prosecution in England and Wales. It is an important safeguard against improper inaction by a prosecuting authority. It is, however, not unfettered. No summons may be issued "on the nod" nor in reliance on any irrelevant fact. Rather, the issuing magistrate must be scrupulous to ensure all elements of the alleged offence are established.¹

This case highlights that an important existing safeguard for private prosecutions is where magistrates exercise their discretion over whether to issue a summons. All private prosecutions begin with an application to a Magistrates' court to issue a summons under Part 7 of the Criminal Procedure Rules. In determining whether to issue a summons, a magistrate must

¹ [2014] EWHC 613 (Admin) [23].

consider if there is a case to answer and whether the application is vexatious, an abuse of process or otherwise improper.² Individuals can make an application to the High Court to quash the summons if they consider that these matters have not been appropriately considered. The criminal trial process also has built in safeguards and an individual can make a submission of no case to answer, or an abuse of process application in order to stay proceedings.

3. The CPS has published comprehensive legal guidance that sets out other limitations on the right to bring private prosecutions. These limitations include the Attorney General's power to enter a *nolle prosequi* (an entry on the record stating the prosecution will no longer be pursued) to stay proceedings in the Crown Court at any stage; the statutory requirement in some cases that the private prosecutor seeks the consent of the Attorney General or the Director of Public Prosecutions (DPP) before the commencement of proceedings; and of course, the DPP's power under section 6(2) POA 1985 to take over and discontinue a private prosecution. The CPS legal guidance on private prosecutions is publicly available on the CPS's website: <https://www.cps.gov.uk/legal-guidance/private-prosecutions>
4. The statutory requirement for private prosecutors to seek consent in certain cases is designed to prevent particularly sensitive or controversial offences from being prosecuted in inappropriate circumstances. This requirement also ensures consistency of practice and that decisions on prosecutions take account of important considerations of public policy or of a political or international nature.³ For these reasons, if the Full Code Test is met, the CPS will also take over a prosecution where consent to prosecute is required to ensure independence and fairness is maintained in these cases.
5. While an individual is entitled to bring a private prosecution, there can be a risk that the prosecution will not meet the appropriate prosecutorial standards. In these instances, it may be appropriate for the CPS to exercise the DPP's powers under section 6(2) POA 1985, either to continue the prosecution or to discontinue or stop it. The CPS legal guidance sets out the circumstances in which the CPS will exercise its power under section 6(2). These criteria not only secure a measure of consistency of approach, but also ensure that members of the public, particularly private prosecutors and privately prosecuted defendants, are aware of what may happen or what they need to do in order to bring such cases to the CPS's attention. Further information on how the CPS becomes aware of private prosecutions and how decisions about whether or not to discontinue a prosecution and/or to take over a prosecution is outlined in Annex A.
6. Safeguards are already in place to ensure certain decisions taken by the police and the CPS do not automatically mean a complainant feels their only recourse to justice is via a private prosecution. The CPS and police each have a separate Victims' Right to Review Scheme through which victims, as defined in the Victims' Code, can seek a review of decisions where the police decide not to investigate or not to investigate a case further, or where the CPS decides not to

² [2014] EWHC 613 (Admin) [23].

³ See, The Law Commission, *Consents to Prosecution Report*, 20 October 1998. For a list of offences where consent is required, see the CPS legal guidance on Consents to Prosecute available at <https://www.cps.gov.uk/legal-guidance/consents-prosecute>

authorise a charge or proceed with a prosecution. Not all private prosecutors will be able to seek a review of a decision as victims are defined as ‘a person who has made an allegation that they have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct.’⁴ As organisations that perform public acts and duties, decisions made by the CPS and police can also be challenged by judicial review. These processes provide additional safeguards for victims by enabling a review of decisions made by the police and the CPS before an individual may decide to bring a private prosecution. A request for review can also be made in a CPS decision regarding a private prosecution so if the CPS decides to stop a private prosecution, a victim, as defined by the Victims’ Code, can request a review of that decision.

The number of private prosecutions referred to the CPS

7. The CPS is only made aware of a proportion of all private prosecution cases before the courts. As such, any figures the CPS could provide would not assist in identifying trends in the overall number of private prosecutions.
8. The CPS does not maintain an authoritative central record of the number of private prosecutions taken over. While CPS prosecutors will record a decision in every case, once a private prosecution has been taken over by the CPS, there is nothing to distinguish it from other prosecution cases on the Case Management System. To identify the exact number of private prosecutions that the CPS has taken over would therefore require a manual exercise to review individual files of all prosecutions.
9. As mentioned above, when a private prosecution is referred to a CPS local Area they must notify the Special Crime Division, informing them of the proposed course of action. In 2019, the Special Crime Division started keeping a manual record of private prosecution cases referred pursuant to its quality assurance function. This information is recorded for internal use only and are not official statistics. It may not capture every case referred to the CPS and does not indicate the final outcome in the case.
10. A detailed manual check of these records⁵ shows that for the period April 2019 to March 2020, the Special Crime Division quality assured 50 private prosecution referrals. Of the 50 referrals:
 - the CPS decided to take over 33 private prosecutions. Of these 33 cases, 30 were taken over and discontinued and three were taken over and continued;
 - the CPS decided not to take over the private prosecution in 17 cases.

Safeguards in regulating private prosecutions

11. In the absence of an effective regulatory scheme for private prosecutors, the CPS is best placed to guarantee independence, fairness and integrity in decision making, the expertise to ensure disclosure obligations are met in difficult and complex prosecutions, and to ensure the cost-

⁴ For further details on eligibility, see the CPS legal guidance on Victims’ Right to Review Scheme available at <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>

⁵ The data provided may be subject to possible errors with data entry and processing, and these figures are provisional and subject to change as more information is recorded.

effective use of public funds. As will be discussed below, while the CPS is uniquely positioned to conduct prosecutions, it would not be appropriate for the CPS to undertake a regulatory role.

Independence, fairness and integrity

12. As outlined above, CPS prosecutors are governed by the Code that is issued by the DPP under section 10 of the Prosecution of Offences Act 1985. Public prosecutors are guided by the Code, which sets out the general principles to be applied when making decisions about prosecutions, including the following provisions:
 - the independence of the prosecutor is central to the criminal justice system of a democratic society;
 - prosecutors must be fair and objective in making decisions; and
 - prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.
13. In applying the Code, CPS prosecutors not only consider whether there is sufficient evidence, but also whether it is in the public interest to bring a prosecution. In determining whether a prosecution is in the public interest, CPS prosecutors consider a range of factors including the seriousness of the offence, the culpability, age and maturity of the suspect, the circumstances of the harm, the impact on the community, whether prosecution is a proportionate response and whether any sources of information require protecting. These factors are unlikely to be considered by private prosecutors.
14. Public prosecutors are subject to scrutiny in the form of judicial review, independent inspection by Her Majesty's Crown Prosecution Service Inspectorate and accountability to Parliament through the Attorney General, thereby ensuring transparency. Save for the remedy of judicial review, these important safeguards are largely absent in private prosecutions.

Effectiveness of existing investigatory standards and duties of disclosure applying to private prosecutors

15. One of the reasons for establishing the CPS in 1986 was to separate the roles of investigator and prosecutor, both of which were previously carried out by the police. CPS prosecutors are independent from the police and other investigators; they carry out their professional duties without political interference and are unaffected by improper or undue pressure or influence from any source. Private prosecutors are not so required. The Association of Private Prosecutors has issued a Code for Private Prosecutors, but there is no obligation to abide by these requirements, nor any process of enforcement when it is breached.
16. The Code also sets out the duties of a prosecutor in assisting the investigator in advising on all reasonable lines of enquiry and ensuring compliance with disclosure obligations. These are important safeguards that public prosecutors provide to protect the integrity of a prosecution.
17. Unlike private prosecutors, police investigators and CPS prosecutors must meet the obligations outlined in the Disclosure Manual.⁶ The Disclosure Manual contains important and relevant

guidance in relation to the conduct of investigations. For example, Chapter 3 outlines that the Chief Officer of each police force is responsible for ensuring that in every investigation, the identity of the officer in charge of an investigation and the disclosure officer is recorded, and that 'disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively.' In addition, the manual sets out that the Officer in Charge of an investigation must ensure that:

... an individual is not appointed as disclosure officer, or allowed to continue in that role, if that is likely to result in a conflict of interest; for instance, if the disclosure officer is the victim of the alleged crime which is the subject of the investigation. The advice of a more senior officer must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as disclosure officer. If thereafter the doubt remains, the advice of the prosecutor should be sought.

Private prosecutors are not required to adhere to this guidance and in circumstances where they are also the complainant of the alleged offence and/or motivated by financial considerations, there is a risk that they will not focus on investigating reasonable lines of enquiry which may point away from the theory of the case.

18. The 2018 amendments to the Criminal Procedure Rules also draw a distinction between public and private prosecutors by setting out additional criteria imposed on a private prosecutor in making an application for a summons under Rule 7.2(6). As outlined above, all private prosecutions begin with an application to a Magistrates' court to issue a summons under Part 7 of the Criminal Procedure Rules. These procedural requirements, previously contained in case law, are significant safeguards and include the duty of candour, a statement of truth, and the court having an inter parties hearing to determine the issue.
19. The importance of the duty of candour was highlighted by the High Court in the case of *Kay & Anor, R (on the application of) v Leeds Magistrates' Court & Anor*,⁷ where a private prosecutor failed to disclose information in an application for a summons, breaching the duty of candour. The Court held that that 'compliance with the duty of candour is the foundation stone' upon which decisions to issue a summons are taken and its 'importance cannot be overstated.'⁸ This once again highlights the role played by the courts in providing a safeguard in private prosecutions by ensuring that in initiating proceedings, private prosecutors fulfil the same obligations as public prosecutors.
20. The CPS has the expertise to ensure statutory and disclosure obligations are met in conducting prosecutions of complex and difficult cases. Prosecutions increasingly involve large amounts of digital material that must be handled and examined properly to ensure disclosure obligations are discharged. Investigators and public prosecutors working as part of the prosecution team have resources and expertise to navigate through vast amounts of digital material in a way that not all private prosecutors do.

⁶ The Prosecution Team Disclosure Manual is available at <https://www.cps.gov.uk/legal-guidance/disclosure-manual>

⁷ [2018] EWHC 1233 (Admin) (23 May 2018).

⁸ At 43, 45.

21. Private prosecutions are also becoming more complex, with the Court of Appeal accepting that 'in certain areas of criminal prosecutions, some specialist knowledge of an area of law is necessary.'⁹ Prosecutors working in the CPS have developed significant expertise in conducting prosecutions and apply the Code in deciding which cases should be prosecuted, determining the appropriate charges in more serious or complex cases and in discharging disclosure obligations in preparing cases and presenting them at court. In the Central Casework Divisions, specialist prosecutors work closely with specialist investigators from a range of organisations to prosecute some of the CPS's most complex cases. For example, the CPS has a dedicated Specialist Fraud Division with the skills to prosecute complex and serious fraud and economic crime. Their work ranges from prosecution of bankers and investment scams to prosecuting those who seek to defraud the taxpayer of millions of pounds. The CPS also operates effectively in partnership with law enforcement and prosecutors overseas.
22. A prosecutor's function includes considering and pursuing confiscation, in parallel to a criminal prosecution. This includes the prior restraint of assets and the enforcement of an Order once made. The CPS has settled policy and process to ensure proper pursuit of this important factor in any criminal case, following a conviction. We are not aware of a private prosecutor ever pursuing confiscation, although the legislation arguably allows this, and the CPS has become involved in confiscation proceedings following a private prosecution. The case of *Virgin Media Ltd, R (On the Application Of) v Zinga*,¹⁰ sets out the issues that arise in handling and sequencing of such cases.
23. Decisions to pursue confiscation should not be driven by financial reasons, but guided by the stated Government objectives of asset recovery, namely disrupting criminal networks and the further funding of crime, depriving people of their proceeds of crime, removing criminal role models in society and deterring people from becoming involved in crime. The CPS abides by these factors and therefore pursues confiscation in appropriate cases for the correct criminal justice outcome. There is no certainty that this would be the case with private prosecutors. It is important in the broader context of asset recovery and prosecutions that confiscation orders are pursued and for the purposes set out by the Government.
24. There are other areas where private prosecutors do not have the same powers as public prosecutors or investigators. For example, only public prosecutors are able to conduct extradition proceedings, which is significant given a growing proportion of crimes, particularly economic crime, operate across national borders and jurisdictions. In addition, private prosecutors do not have the power to execute a search warrant. It is difficult to undertake reasonable lines of enquiry without relevant powers, such as obtaining and executing search warrants.

Cost-effectiveness of private prosecutions

25. Prosecutions conducted by the CPS are cost-effective and make the best use of public funds. In contrast, irrespective of the success or failure of the prosecution, a private prosecutor can

⁹ *Virgin Media Ltd, R (On the Application Of) v Zinga* [2014] EWCA Crim 1823 (11 September 2014) at 41.

¹⁰ [2014] EWCA Crim 1823 (11 September 2014).

recover costs from central funds under section 17(1) of the Prosecution of Offences Act (POA) 1985.¹¹ In the case of *Virgin Media Ltd, R (On the Application Of) v Zinga*, the Court of Appeal stated:

The experience of this court is that there is unlikely to be any difference in quality between a prosecution brought by the State and a private prosecution. We have no doubt but that it is in the public interest that the CPS is properly resourced to conduct such difficult and complex proceedings. The consequence of the CPS not being so resourced is detrimental to the public purse. The costs of a private prosecution, whether successful or unsuccessful, are recoverable from the taxpayer; the use of private prosecutors will almost inevitably cost the State much more than the use of a State prosecutor, such as the CPS ... In the present state of public finances and the funds available for the proper administration of justice, it cannot be right that resources are deployed by the State in such a way that an opportunity is provided for prosecutions to be brought by private interests at a cost to the State that is likely to be far greater than if the prosecution were undertaken by the State. No doubt the savings to public expenditure can be used for the benefit of the proper administration of justice.¹²

The ability of a private prosecutor to recover costs regardless of the outcome may also increase the likelihood of this system being abused, given the lack of financial consequences for a private prosecutor should the case be unsuccessful. As will be discussed below at paragraphs 33-39, this also raises access to justice issues.

The effectiveness of different safeguards in regulating private prosecutions

26. While there are many examples of responsible private prosecutors, there are also circumstances where private prosecutions do not adhere to the high standards of integrity and fairness of public prosecutions. While prosecutorial decisions made by the CPS are based solely on whether our legal test is met, private prosecutors may be motivated by a range of factors, including financial considerations. As Richard Buxton has explained:

Prosecution counsel has to exercise independent judgment throughout, with the objective not of obtaining a conviction at any cost, but of ensuring that justice is done. To achieve that goal, two qualities are required. First, prosecutors must have no personal interest in the outcome of the case. Secondly, they must have the training and professional insight to understand what steps are, in terms of a criminal trial, unfair; and to know when the evidence, although not necessarily unfounded, is not sufficient to sustain the indictment. Judges who try criminal cases can happily take those conditions for granted. There is, however, one class of prosecution to which those assumptions do not apply. A private prosecutor will almost by definition have a personal interest in the outcome of the case. Such a prosecutor is either an individual who seeks to use the criminal courts as an extension of a personal dispute with other individuals or with officialdom; or an interest group dedicated to suppression of particular forms of allegedly criminal conduct.¹³

¹¹ Section 17(1) of the Prosecution of Offences Act 1985 in 'such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings', unless, by section 17(2A), 'the court considers that there are circumstances that make it inappropriate for the prosecution to recover the full amount mentioned in subsection (1)'; in which event 'an order under this section must be for the payment out of central funds of such lesser amount as the court considers just and reasonable'.

¹² [2014] EWCA Crim 1823 (11 September 2014).

As private prosecutors are not bound by the Code there is the risk of vexatious litigation, personal disputes or political considerations motivating private prosecutions.

Alternative safeguards that could be used to regulate the way in which large organisations use the right to bring private prosecutions

27. While the right of any individual to bring a private prosecution should be preserved, the CPS is best placed to conduct prosecutions, and any proposals to introduce alternative safeguards must be balanced against the risk of encouraging an increase in private prosecutions. Improved regulation of private prosecutors could increase the effectiveness of safeguards to prevent miscarriages of justice and guard against private prosecutors failing to adhere to appropriate standards.
28. While not bound by the Code, in principle, private prosecutors are subject to the same obligations as public prosecutors as they act as ‘Ministers of Justice’,¹⁴ and any failure to meet those obligations is currently managed by the courts. While the creation of a Code for Private Prosecutors was a positive step, it does not amount to an effective regulatory safeguard. Private prosecutors are not obliged to follow it and do so on a voluntary basis. There are also practical difficulties in enforcement, such as identifying an appropriate enforcement body to take action in respect of breaches. Apart from the important safeguard of the courts, an absence of regulation of private prosecutors means there is no guarantee of fairness and integrity in private prosecutions.
29. It is the role of the CPS to make sure that the right person is prosecuted for the right offence, and to bring offenders to justice wherever possible. While the CPS has a role in reviewing private prosecutions that have been referred to us, it would not be appropriate for the CPS to carry out a regulatory or inspection function. The CPS is not a regulator, licensing or inspection body and taking on such a role would require it to act inappropriately as a gatekeeper. Private prosecutions can act as a safeguard against ‘inertia or partiality on the part of authority’.¹⁵ If the CPS were to be assigned as a regulator of private prosecutors, it would arguably conflict with this and with the overarching purpose of private prosecutions. Automatic referral to Crown Prosecutors was recommended by the Royal Commission on Criminal Procedure in 1981 and the Law Commission in 1998. As noted in the case of *R (on the application of Gujra) (FC) v Crown Prosecution Service*, Parliament rejected this proposal:
- This recommendation for automatic notification was not adopted, either then or when effectively repeated by the Law Commission in paragraph 13 of its 1998 report, *Consents to Prosecution*. Instead, the basic right to institute a private prosecution was re-enacted and remains in section 6(1).¹⁶
- As illustrated by the case of *Scopelight Ltd v Chief Constable of Northumbria Police Force*, private prosecutions remain possible in appropriate cases, even where the CPS has decided against

¹³ Richard Buxton, ‘The Private Prosecutor as a Minister of Justice’ (2009) 6 *Criminal Law Review* 427-432, 427.

¹⁴ *The Queen (on the application of Ayodeji Holloway) and Harrow Crown Court and Adamneet Singh Bhui, Jimneet Singh Bhui and Gurbinder Singh Bhui* [2019] EWHC 1731 (Admin).

¹⁵ *Gouriet v Union of Post Office Workers* (1978) 3 All ER 70 [1977].

¹⁶ [2012] UKSC 52 at 106.

instituting a prosecution.¹⁷ The right to initiate private prosecutions has been preserved and should not be impinged by mandatory referral to the CPS.

30. A requirement for the CPS to review all private prosecutions would also create a significant administrative and legal burden, directing resources away from our central function of prosecuting offences referred by the police and other law enforcement agencies and result in delays. It would be necessary to conduct a full assessment of each case and request additional evidence and information from the private prosecutor and defendant. Significant resource would be required to do this, and in effect it would mirror a process that is already available to a complainant via a police investigation and CPS prosecution decision. There may be a consequential increase in the number of requests for judicial review of these decisions that would further strain resources.
31. As noted above, our legal guidance is published on the CPS website to ensure that members of the public, particularly private prosecutors and privately prosecuted defendants, are aware of how to bring a private prosecution to the attention of the CPS and the CPS role is referred to in the Private Prosecutors' Code. The CPS would have concerns that requiring all defendants be individually informed of this role in each case would be almost analogous to inviting a mandatory referral process. The CPS does not consider this to be proportionate or cost-effective.
32. We would suggest that the courts are an effective existing safeguard and appropriate gatekeepers to prevent miscarriages of justice in private prosecution, subject to equality of access issues being addressed.

Two-tier justice system – ways in which large organisations conduct private prosecutions

33. The growing trend for private criminal prosecutions has raised concerns about the prospect of a “two-tier” justice system, as not all individuals can afford to bring a private prosecution. Legal aid is not available, so they are more likely to be brought by organisations, private industry or wealthy individuals. As noted in paragraph 25, private prosecutors can recover their costs from the central fund under section 17(1) of the POA 1985. While a private prosecutor is able to recover these costs, they would still need to be able to fund a private prosecution upfront. There is therefore a risk that this space becomes occupied by the wealthy or well-resourced, with some cases reaching court only because an individual or organisation can afford to pay the substantial costs.
34. Private prosecutions can raise issues of equality of access where there is a financial disparity between the position of defendants and private prosecutors. Private prosecutors can recover their costs from central funds, regardless of the outcome. A privately paying defendant will recover nothing if convicted and is likely to be required to contribute to the prosecutor's costs. Even if acquitted, the defendant will recover only a limited amount from public funds and in all likelihood, recover nothing from the prosecutor. By contrast, irrespective of the outcome of the case, the private prosecutor will be reimbursed, by a convicted defendant or from public funds,

¹⁷ [2009] EWCA Civ 1156.

and at rates that are not confined by prescribed amounts unless that prosecutor has behaved unreasonably, or worse.¹⁸ This means that private prosecutions are publicly funded at a higher cost than if the prosecution had been conducted by the CPS. An additional cost is then incurred when the CPS is asked to review a private prosecution to consider whether it should be taken over. The Committee may consider that a review of funding arrangements for private prosecutions is necessary in order to address issues with equality of access and ensure the most cost-effective use of public funds.

35. If convicted, a private prosecutor can recover costs from the defendant under section 18 of the POA 1985, provided they have the means to pay. The Criminal Cases Unit of the Legal Aid Authority has issued guidance which excludes investigation costs from a prosecutor's recovery of costs from Central Funds, however, an application for costs against a defendant can include investigators' costs or costs of the investigation. Other safeguards in seeking judicial review or making an application to the High Court to quash a summons would also be unavailable to most individuals due to cost and without these recourses they may be unfairly brought into the justice system. While the CPS is not advocating for all private prosecutions to be referred to or conducted by the CPS, the system should ensure that private prosecutions are equally accessible to all.
36. Equality of access issues particularly arise in private prosecutions relating to economic crime, with a number of recent reports identifying a gap in the criminal justice system in relation to police investigation of fraud.¹⁹ Fraud accounted for approximately one third (35%) of crime in the year ending September 2019 and was the most common crime type. Investigations into alleged criminal conduct are a matter for the relevant police force or law enforcement agency, and the CPS therefore relies on matters to be referred by the police before it can consider prosecutions. However, according to a 2019 Report by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services entitled "Fraud: Time to Choose", while individuals are more likely to be victims of fraud than any other crime, particularly those who are elderly or vulnerable, fraud is unlikely to be investigated by police.²⁰
37. Organisations and wealthy individuals have turned to private prosecutions as a means of seeking justice where the police do not investigate, yet those most affected by fraud are unlikely to be able to fund a private prosecution. There is a need to ensure that there is adequate investigative capability and capacity to deal with the levels of fraud mentioned above and

¹⁸ The Criminal Procedure Rules 45.4(5)(b) adds, codifying case law on the extent of the court's jurisdiction, that 'the court may decline to make a prosecutor's costs order if, for example, the prosecution was started or continued unreasonably'. See paragraphs 2.6.2 to 2.6.4 of the Criminal Costs Practice Direction.

¹⁹ Sir Craig Mackey QPM and Jerry Savill, 'A Review of the National 'Lead Force' Responsibilities of the City of London Police and the Effectiveness of Investigations in the UK', 24 January 2020, available at <https://www.cityoflondon.gov.uk/assets/About-us/action-fraud-report.pdf>; Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, Fraud: Time to Choose – An Inspection of the Police Response to Fraud, April 2019, available at <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/fraud-time-to-choose-an-inspection-of-the-police-response-to-fraud.pdf>; The Police Foundation, 'More Than Just a Number: Improving the Police Response to Fraud', December 2018, available at http://www.police-foundation.org.uk/2017/wp-content/uploads/2010/10/more_than_just_a_number_exec_summary.pdf

²⁰ Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, Fraud: Time to Choose – An Inspection of the Police Response to Fraud, April 2019, available at <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/fraud-time-to-choose-an-inspection-of-the-police-response-to-fraud.pdf>

address the gap in enforcement. A formal review has been launched by Sir Craig Mackey QPM, to identify the powers, capabilities, governance and funding needed to improve the response to serious and organised crime in all its forms, including fraud. Sir Craig has also set out concerns around police resourcing and capabilities for investigating fraud in his Action Fraud Report, published in January.²¹

38. An example to illustrate this pressure on policing is a recent case in which a director of a letting agency became aware that his co-director had accrued liabilities in excess of £100 000 and informed police, who ‘declined to investigate, citing the effects of “austerity”, which required them to prioritise the investigation of other forms of criminal activity.’²² The director then brought a private prosecution against his co-director on charges of making articles for use in fraud, theft and fraudulent trading. A similar case was recently reported in The Times, where a retailer brought a private prosecution against an individual for theft after the police failed to investigate.²³
39. The CPS has a dedicated, specialist fraud division to ensure that we devote the right skills to prosecuting complex and serious fraud and economic crime, but it is not the function of the CPS to investigate allegations of crime. Ensuring that the police are properly resourced, so that the CPS can prosecute cases referred to us, will help to address equality of access issues.

CONCLUSIONS

We hope this written submission is of assistance to the Committee. In summary, our assessment of private prosecution safeguards has identified the following key points:

- There are a number of effective safeguards in private prosecutions provided by the criminal trial process and the courts.
- The principle that any individual has a right to bring a private prosecution should be preserved, while noting there are also circumstances where private prosecutions do not always adhere to the high standards of integrity and fairness.
- Currently, only the CPS can guarantee fairness, integrity and independence in conducting prosecutions, providing the most cost-effective use of the public purse, and therefore the growth in private prosecutions should be discouraged.
- While prosecutorial decisions made by the CPS are based solely on whether our legal test is met, private prosecutors may be motivated by a range of factors, particularly where they are also the complainant in the case. CPS prosecutors apply the Code for Crown Prosecutors to consider both the evidence and the public interest in bringing a prosecution, and are guided by the Disclosure Manual to meet their obligations of assisting the investigator in advising on all reasonable lines of enquiry, ensuring compliance with disclosure obligations and meeting the complexities of reviewing digital material. The CPS is also subject to scrutiny and inspection, ensuring transparency and accountability.

²¹ Sir Craig Mackey QPM and Jerry Savill, ‘A Review of the National ‘Lead Force’ Responsibilities of the City of London Police and the Effectiveness of Investigations in the UK’, 24 January 2020, available at <https://www.cityoflondon.gov.uk/assets/About-us/action-fraud-report.pdf>.

²² *Fuseon Ltd v Senior Courts Costs Office and The Lord Chancellor* [2020] EWHC 126 at 1.

²³ <https://www.thetimes.co.uk/article/boots-makes-legal-history-after-police-let-thief-go-3d8jfd0vq>

- Regulation of private prosecutors could increase the effectiveness of safeguards to prevent miscarriages of justice, but there are challenges in developing a robust system of enforcement that is effective.
- The CPS would not support a scheme that amounts to mandatory referral of all private prosecutions to the CPS, given the significant legal and administrative implications of such a proposal.
- The CPS would also not support being assigned a regulatory or inspection function, because that goes beyond our statutory function.
- There is a risk that private prosecutions will only be available to the wealthy or well-resourced, with some cases reaching court only because a complainant can afford to pay the substantial costs. Equality of access issues arise due to the significant financial burden that private prosecutions impose on a defendant. For a private prosecutor there is no comparable disadvantage, even in the event of an acquittal. Due to the ability of a private prosecutor to recover costs regardless of the outcome, private prosecutions are publicly funded at a higher cost than if the prosecution had been conducted by the CPS.
- The Committee may want to consider whether a review of the current funding arrangements for private prosecutions is necessary, to address equality of access issues and to ensure the most cost-effective use of public funds.
- The CPS has a dedicated specialist fraud division to prosecute economic crime, but equality of access issues may also arise due to an identified gap in police investigation of fraud, with individuals or organisations resorting to private prosecutions where matters are not investigated and referred to the CPS.

Annex A - The role of the Crown Prosecution Service in taking over private prosecutions.

1. CPS prosecutors are governed by the Code for Crown Prosecutors (the Code), which sets out general principles to ensure the independence, fairness and integrity of prosecutions. The Code is publicly available and can be accessed on the CPS website: <https://www.cps.gov.uk/publication/code-crown-prosecutors>
2. The private prosecutor is not under a duty to inform the CPS that a private prosecution has commenced. As outlined in our guidance, the CPS may therefore find out about a private prosecution in one of the following ways:
 - where the private prosecutor, or a representative of the private prosecutor, asks the CPS to take over the prosecution;
 - where the defendant, or a representative of the defendant, asks the CPS to take over the prosecution;
 - where extradition is required²⁴ and the Home Office (directly or indirectly) refers the private prosecutor, or a representative of the private prosecutor, to the CPS;

²⁴ See paragraph 24 for further information on extradition and private prosecutions.

- where a justices' clerk refers a private prosecution to the CPS under section 7(4) of the Prosecution of Offences Act 1985, because the prosecution has been withdrawn or unduly delayed and there does not appear to be any good reason for the withdrawal or the delay;
 - where a judge sends a report to the CPS;
 - where the CPS learns of the private prosecution in another way, for example, from a press report.
3. A private prosecution should be taken over and stopped if either the evidential stage or the public interest stage of the Full Code Test is not met. CPS published legal guidance also sets out some generic factors which would be damaging to the interests of justice if the private prosecution was not discontinued – such as where the prosecution interferes with the investigation or prosecution of another criminal offence or charge, or where it is a vexatious prosecution.
 4. The legal guidance states that the CPS should take over and continue with the prosecution if the papers clearly show that:
 - the evidential sufficiency stage of the Full Code Test is met; and
 - the public interest stage of the Full Code Test is met; and
 - there is a particular need for the CPS to take over the prosecution.All three elements outlined above must be satisfied before the CPS takes over and continues with the prosecution.
 5. In every case where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, CPS prosecutors must go on to consider whether a prosecution is required in the public interest. These public interest considerations are unlikely to be considered in every case brought by a private prosecutor. A prosecution will usually take place unless the CPS prosecutor is satisfied that the public interest factors tending against prosecution outweigh those tending in favour. In some cases, the prosecutor may be satisfied that the public interest can be properly served by offering the offender an out-of-court disposal rather than bringing a prosecution.
 6. In determining whether there is a particular need to take over a prosecution, some of the factors that may be considered are:
 - the seriousness of the offence;
 - there are detailed disclosure issues to resolve;
 - the prosecution requires the disclosure of highly sensitive material;
 - the conduct of the prosecution involves applications for special measures or for witness anonymity;
 - the prosecution is being used as a device to enable the prosecutor to pursue a personal agenda against the defendant arising from a form of relationship between them.
 7. It is also necessary to consider whether or not the case is of a type that the CPS normally conducts following a police investigation.

8. The CPS may be asked to take over a case within section 6(2) POA 1985 that is not a private prosecution, because the case is being conducted by or on behalf of another prosecuting authority. This situation is governed by the Prosecutors Convention, which is an agreement between prosecuting authorities to abide by broad principles which promote improved liaison and a coordinated approach to decision making where two or more signatories have a common interest.²⁵ The Prosecutors Convention is available on the CPS website at: <https://www.cps.gov.uk/legal-guidance/prosecutors-conventions-2009>

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²⁵ Further information on CPS relationships with other agencies can be found at: <https://www.cps.gov.uk/national-protocols-and-agreements-other-agencies>