



## **CBA Response to Private Prosecuting Association Consultation entitled**

### **“Private Prosecutions Consultation”**

**6<sup>th</sup> March 2019**

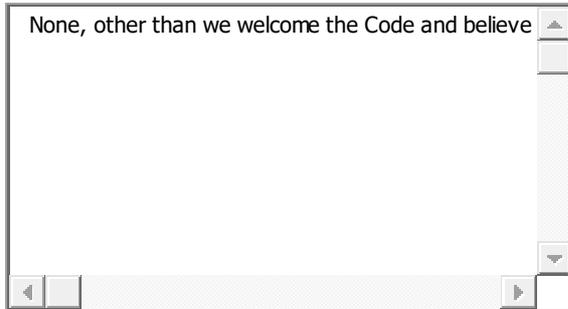
#### **Introduction**

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA’s role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

## RE CHAPTER 1: CODE FOR PRIVATE PROSECUTORS

- Q1. Please make any comments you have on this chapter below.

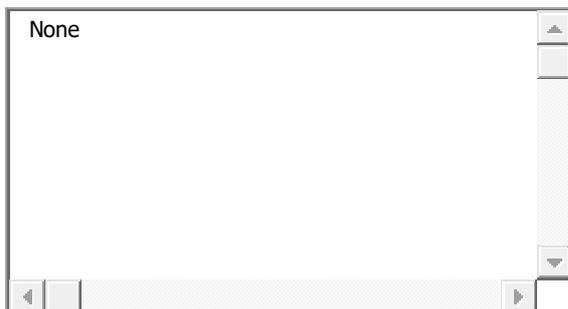
None, other than we welcome the Code and believe that Private prosecutions should, where at all possible, follow the same standards and codes as that of a public prosecution.

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- RE CHAPTER 2: CLIENT ENGAGEMENT

- Q2. Please make any comments you have on this chapter below.

None

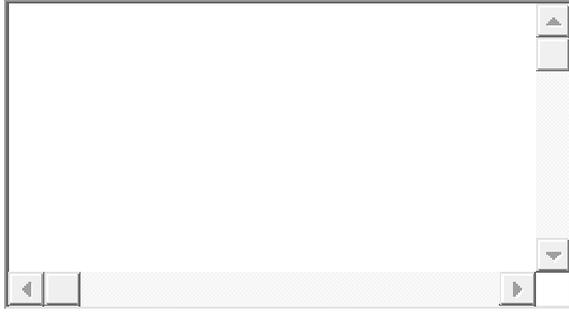
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- RE CHAPTER 3: INVESTIGATION

- Q3. Re 3.2.1: the CPIA mandates that those “charged with the duty of investigating” pursue all reasonable lines of inquiry, whether they point towards or away from the suspect. Not all private prosecutors will fall within this definition. The Draft Code envisages a revised test, not embodied in legislation, but which we consider to represent best practice. Do you agree with the test as stated?

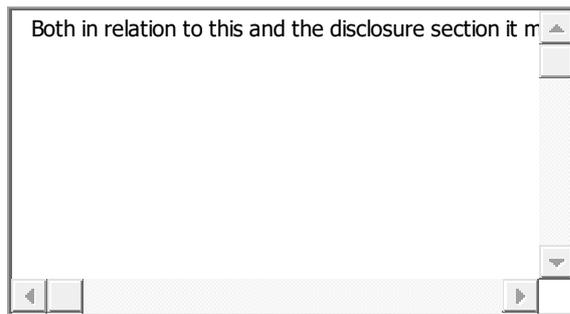
- Yes
- No

- If not, what alternative would you propose?



- Q4. Re 3.5.2: Section 34(4) of the CJPOA provides that an adverse inference can be drawn where a suspect, when questioned by a person other than a constable charged with the duty of investigating an offence, fails to provide answers which s/he later relies upon in her/his defence. The extent to which a private prosecutor comes within section 34(4) may vary in different circumstances. Do you feel that paragraph 3.5.2 of the Draft Code, as drafted, adequately addresses this point?
  - Yes
  - No
- Q5. Re 3.9.2: It is unclear to what extent, particularly having regard to the Police Act 1996, law enforcement agencies are able to enter into agreements with private citizens or entities to provide services relating to the investigation or private prosecution of criminal conduct. The Draft Code is not intended to opine on this question. However, it recognises the importance of transparency where any such arrangement is entered into. Do you consider the inclusion of this paragraph is appropriate in the circumstances?
  - Yes
  - No
- Q6. Please make any additional comments you have on this chapter below.

Both in relation to this and the disclosure section it may be worth adding a section about company structures and what "material held by the prosecutor" means. The Crown/State is indivisible. In our view, the same should be true of companies and their subsidiaries and/or parent companies. Given a global economy this could include companies registered overseas and these too should be caught.



- RE CHAPTER 4: DISCLOSURE
- Q7. Re 4.1.3: Do you agree that a disclosure management document should be produced in most private prosecutions?
  - Yes
  - No
- Q8. Re 4.2.3: Do you agree that material which is subject to LPP must be listed on a disclosure schedule by a private prosecutor?
  - Yes
  - No
- If so, which schedule: the sensitive or non-sensitive schedule?
  - Sensitive schedule
  - Non-sensitive schedule
- Q9. Please make any additional comments you have on this chapter below.

1) LPP material should be listed on the Unused schedule with sufficient detail for the defendant to ascertain the general nature of the material with non privileged detail. A fuller description of the item, including reference to privileged material should also appear on the sensitive schedule.

2) Reference is made elsewhere in the code to obtaining previous convictions of the defendants and how this should be done (sometimes without the prosecutor being given access). The same procedure should take place for all witnesses.

3) Specific reference ought to be made of the obligation to disclose material that might assist an abuse argument (*R v DPP ex parte Lee* [1999] 2 All ER 737) and that this exists before the CPIA regime kicks in.

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- RE CHAPTER 5: CHARGING AND COMMENCING PROCEEDINGS

- Q10. Re 5.1.1: Do you agree that, at the end of the investigation, a private prosecutor should consider whether there is any merit in referring the case to be brought by way of private prosecution to a public prosecuting authority at that stage?

- Yes
- No

- Q11. Re 5.1.2: Do you agree with the way in which the Draft Code envisages the Full Code Test should be applied in the context of a private prosecution?

- Yes
- No

- If not, please set out how you consider it should be applied, giving reasons.

- Q12. Re 5.3.1 and 5.5.6: Do you consider there to be any obligation on a private prosecutor to inform the Court at the time of laying the information if either: a. The private prosecutor has not referred the case to a state agency; or b. A state agency has declined to accept the case?

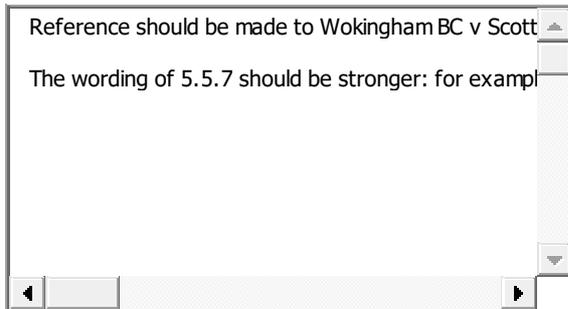
- If so, should this be mandated by the Draft Code?

- Yes
- No

- Q13. Please make any additional comments you have on this chapter below.

Reference should be made to *Wokingham BC v Scott [2019]* which states that a local authority when prosecuting should not consider the making of a confiscation order as part of the code for prosecutors test (the LA get 37.5% of the confiscation amount). It was held that to do so would be an abuse of process.

Also the wording of 5.5.7 should be stronger: for example “Private prosecutors are reminded of their role as officers of the court and must be made aware.....”



- RE CHAPTER 6: REFERRAL TO THE DIRECTOR OF PUBLIC PROSECUTIONS

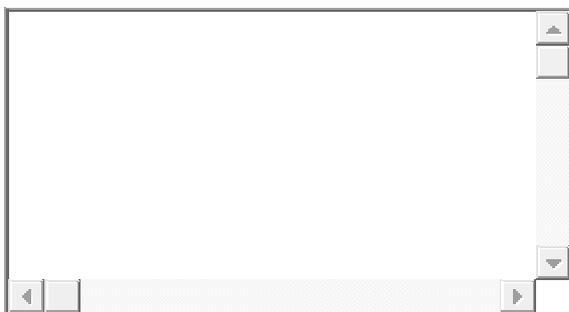
- Q14. This chapter includes information about referrals to the DPP by way of background which does not prescribe specific behaviour or conduct. Do you consider this is helpful to understanding the Draft Code, or is it unnecessary?

- Helpful to understanding the Draft Code
- Unnecessary

- Do you think the level of detail is appropriate

- Yes
- No

- If not, what level of detail do you think is appropriate?

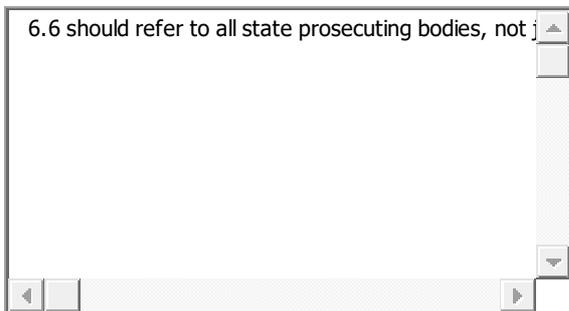


- Are there any behaviours or conduct which should be prescribed here?



- Q15. Please make any additional comments you have on this chapter below.

6.6 should refer to all state prosecuting bodies, not just the police.



- RE CHAPTER 7: ABUSE OF PROCESS

- Q16. This chapter includes information about abuse of process by way of background which does not prescribe specific behaviour or conduct. Do you consider this is helpful to understanding the Draft Code, or is it unnecessary?

- Helpful to understanding the Draft Code
- Unnecessary

- Do you think the level of detail is appropriate

- Yes
- No

- If not, what level of detail do you think is appropriate?

The section deals specifically with delay and adverse media publicity, but not many of the other keys areas which private prosecution may be particularly susceptible to such as failures to obtain/destroying material. It does not also deal with both limbs of abuse; cannot receive a fair trial and unfair to try the defendant and considerations that apply. Therefore greater detail should be included.

The section deals specifically with delay and adverse

- Are there any behaviours or conduct which should be prescribed here?

- Q17. Please make any additional comments you have on this chapter below.

Specific reference should also be made (see above) to the duty to disclose material that would assist in arguing abuse of process.

Specific reference should also be made (see above) to

- RE CHAPTER 8: INTERACTION BETWEEN CIVIL AND CRIMINAL PROCEEDINGS

- Q18. Re 8.3.1 and 8.8.1: The Draft Code refers to the impropriety of bringing, or threatening to bring, private prosecutions solely as a strategic tool to add leverage to a party's position in civil proceedings. This is based on the judgments in R (Dacre) v City of Westminster Magistrates' Court [2009] 1 Cr App Rep and R (G) v S and S [2017] EWCA Crim 2119. However, many practitioners, as well as those acting for defendants have continuing concerns about the extent to which private prosecutions are/can be used for this purpose. Do you think the Draft Code as drafted appropriately/sufficiently addresses this issue?

- Yes
- No

- Q19. Re 8.8.1: The Draft Code is silent as to the appropriateness of discontinuing proceedings if the accused settles related civil proceedings and/or pays compensation/makes reparation to the victim. Do you think that the Draft Code should address this point?
  - Yes
  - No
- If so, do you think it is or is not appropriate to discontinue proceedings in such circumstances and what is relevant/not relevant to this consideration?

It should lead to a full code review. In our view, where the evidential test continues to be met, the presumption should be that the prosecution will continue as otherwise it undermines 8.3.1 and 8.8.1

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- Q20. Please make any additional comments you have on this chapter below.

In our view a section should be added to deal specifically where the prosecuting authority themselves may be facing a criminal investigation and/or regulatory proceedings. There may be circumstances where it is appropriate for a company to prosecute individuals for their criminal behaviour, but care should be taken that this is not used as a way to scapegoat or shift focus away from themselves (this ties in with the section on motive).

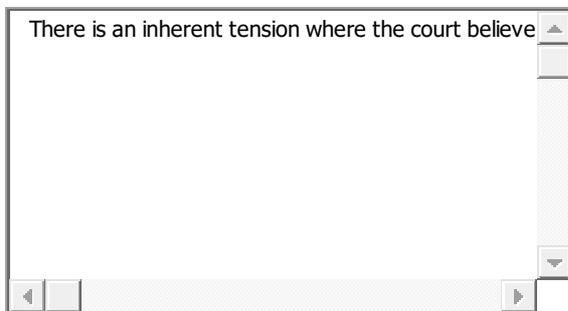
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- RE CHAPTER 9: TRIAL

- Q21. Re 9.3.1 and 9.3.2: Do you feel this is the appropriate procedure to be adopted in these circumstances?
  - Yes

- No
- RE CHAPTER 10: SENTENCING, CONFISCATION AND ANCILLARY ORDERS
- Q23. This chapter includes general information about sentencing, confiscation and ancillary orders which is not specific to private prosecutions and/or does not prescribe specific behaviour or conduct. Do you consider this is helpful to understanding the Draft Code, or is it unnecessary?
- Helpful to understanding the Draft Code,
- Unnecessary
- Do you think the level of detail is appropriate
- Yes
- No
- If not, what level of detail do you think is appropriate?

There is an inherent tension where the court believes it is appropriate to proceed to confiscation but where the prosecutor does not benefit from the process (unless compensation is awarded and then only to the level of compensation when overall benefit could be larger). Tensions may also arise in circumstances where civil proceedings are ongoing or anticipated. There may therefore be an incentive to drop confiscation proceedings or settle for a lesser amount. The code should address this and the expectations on the private prosecutor in these circumstances. This can also have cost implications for the private prosecutor.



- Are there any behaviours or conduct which should be prescribed here?

- Q24. Please make any additional comments you have on this chapter below.

- RE CHAPTER 11: COSTS
- Q25. Please make any comments you have on this chapter below.

None other than reference should be made to the cost of confiscation proceedings (from which they might not benefit).

- RE CHAPTER 12: COMMUNICATIONS WITH PRESS AND MEDIA
- Q26. Please make any comments you have on this chapter below.
- None