



**The CBA Response to the Justice Committee
on Private Prosecutions: Safeguards**

30th June 2020

Introduction

1. The Criminal Bar Association (“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.

4. It has been widely acknowledged that private prosecutions play an important role within the criminal justice system. The right to bring a private prosecution is enshrined in the Prosecution of Offences Act 1985. Justice is denied if those who have committed criminal offences are not prosecuted. In an age of increasingly limited resources for the Police and state prosecutors the ability of an individual, or an organisation, to commence a private prosecution can provide access to justice in a case in which the suspect would otherwise never be investigated or tried.

The existing safeguards that regulate private prosecutions

5. There are a number of safeguards to ensure private prosecutions are brought properly and conducted fairly. There are judicial safeguards and professional safeguards.
6. A judicial safeguard is available at the outset of proceedings. Private prosecutions are commenced by an application for a summons to a Magistrates' Court. The consideration of that application is a judicial exercise. On the applicable caselaw the application should be granted if on a *prima facie* review of the evidence the ingredients of an offence known to law were present. The court must also consider whether the prosecution is vexatious or otherwise improper. That is a safeguard to the commencement of improper criminal proceedings. There is scope for judicial review of the decision of a Magistrate as to whether or not a summons should be issued. This was the route adopted by Mr Boris Johnson. The High Court ruled that the summons should not have been issued and gave guidance for future cases.

7. Recent changes to the Criminal Procedure Rules and Practice Directions have resulted in a prescribed form (SP0001) in which a private prosecutor is directed towards questions which require full and frank disclosure. A Magistrate is entitled (but not obliged) to require attendance by the intending prosecutor and to invite representations from a proposed defendant.
8. A defendant is also entitled to apply to dismiss a prosecution for lack of evidence, or to stay a prosecution on grounds it is an abuse of process. These are further safeguards provided by the courts. The abuse jurisdiction is available at every stage of the proceedings.
9. At any stage the Director of Public Prosecutions has the ability to takeover a private prosecution, and either to continue it or discontinue it. The DPP would apply the Full Code Test set out in the Code of Crown Prosecutors. In those circumstances the DPP may take over the case and stop it. The DPP may have the case referred to them, and it is open to the defendant, court or private prosecutor to do so. When a case is referred, the DPP will have in mind the guidance currently available.¹ The decision of the DPP is subject to a Victim's Right of Review and/or to judicial review.
10. The instruction of independent counsel to prosecute is an important safeguard. Prosecutions in the Crown Court can only be conducted by an advocate with appropriate rights of audience. Counsel hold a professional obligation to act as a minister of justice, to act honestly and with integrity and to maintain independence. The Farquharson Guidelines apply as much to counsel instructed by private prosecutors as to those instructed by state prosecutors.

¹ <https://www.cps.gov.uk/legal-guidance/private-prosecutions>

11. Judges have extensive case management powers under the Criminal Procedure Rules designed to ensure fairness.
12. In serious cases it is ultimately a jury who will determine guilt or innocence. It will be a matter for the judge as to whether they are told that it is a private prosecution, but the same fair approach can be expected for either.

Are the existing investigatory standards and duties of disclosure that apply to private prosecutions effective?

13. Private prosecutors are bound by the statutory disclosure regime in exactly the same way as a public prosecutor. We note the Attorney General is currently consulting on revisions to the Guidelines for Disclosure and the CPIA Code of Practice. There are a number of other codes and guidance (including The Judicial Protocol on Disclosure of Unused Material in Criminal Case, the Criminal Procedure Rules, Criminal Practice Directions and the CPS Disclosure Manual) which provide a useful guide to be adapted and applied to a private prosecution.
14. There are two stages in any disclosure process – firstly the revelation of material to the attention of the “prosecutor” and secondly the decision of “the prosecutor” as to whether that material should be disclosed to the defendant. In public prosecutions there is usually a clear distinction between the “investigator” (typically the Police) and the “prosecutor” (typically the CPS). However in some cases (for example the SFO or HSE) the roles will be fulfilled by individuals with a common employer.

15. In any substantial private investigation or prosecution the roles of “investigator” and “prosecutor” will be carefully and transparently defined, but there is scope for improvement, or for regulation in this area.
16. Many of the issues concerning disclosure in private prosecutions are issues experienced in the wider criminal justice system. The unique tension in private prosecutions, whether it is apparent or real, lies with the involvement of the alleged victim (complainant) as the individual bringing the prosecution. This quite understandably may raise concerns around how the complainant’s interests in securing a conviction have been balanced against the right for the defendant to have a fair trial.
17. There is an important role for independent counsel to play within the disclosure exercise of a private prosecution. Increasingly, independent counsel in these cases are instructed as disclosure counsel. This is often a separate role to counsel instructed to prosecute the case. Counsel can be given specific instructions to exercise independent judgment and a sensible “client” will have agreed in advance to abide by the judgment of the disclosure counsel they choose to instruct. The independence of counsel provides the important ability to raise issues, probe them, and ensure the disclosure process is robust and fair.
18. There has been a move across the criminal justice system to increased transparency of the disclosure process in criminal trials by way of the increased use of Disclosure Management Documents (“DMDs”). DMDs in private prosecutions should be encouraged. They allow for scrutiny of the approach adopted by the prosecutor as to what decisions have been made and the rationale for them. In private prosecutions DMDs can address issues concerning what reasonable lines of enquires have been pursued, and if not

why not. Equally they can confirm the approach taken to “relevance”, and as to the disclosure of material which attracts legal professional privilege.

19. In private prosecutions conducted by large organisations the use of independent counsel may well be even more important. The ability to have an independent party challenge and scrutinise the processes of investigation and disclosure which will have occurred almost exclusively within an organisation is vital. As is the ability of independent counsel to provide robust advice as to whether commencing or continuing a private prosecution is proper and fair.

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

20. We note that the Private Prosecutor’s Association (“PPA”) has published a Code for Private Prosecutors. Adherence to that code is voluntary, save for members of the PPA who confirm by their membership they will subscribe to it.

21. We consider that there is scope for improvement, which could be by the Criminal Practice Directions or Judicial Guidelines rather than by primary or secondary legislation (or AG’s Guidelines), with regards to mandatory identification of the “investigator” and the “prosecutor” for the purposes of the disclosure regime in CPIA 1996. Such Practice Directions could also reflect the principles presently established in caselaw.

22. This would in our view be preferable to the imposition, perhaps by means of a Code of Practice issued by the Home Office, as it could reflect the fact that the

state has no involvement in the prosecution itself, but merely provides the judicial and penal facilities to allow private prosecutors to exercise their rights.

On behalf of the CBA,

**Kevin Dent QC
Edmund Burge QC
Andrew Bird
Sarah Wood
John McNamara**

5 St. Andrew's Hill, London