

PRACTICE NOTE A PRACTICAL GUIDE TO PRIVATE PROSECUTIONS

Anthony Metzger QC and Adam Gersch of Goldsmith Chambers present a briefing note on the principles and process for pursuing a private prosecution.



This note provides a brief overview of:

- *historical background*
- *effect of Covid-19 pandemic*
- *statutory force*
- *core principles*
- *advantages and disadvantages*
- *investigation process and disclosure*
- *test for commencing a prosecution*
- *financial orders (restraint, confiscation, compensation)*
- *costs.*



BACKGROUND

1. The rise in the use of private prosecution is of increasing importance to criminal practitioners as well as civil litigators and commercial practitioners.
2. A private prosecution is “a *criminal prosecution started by a private individual or body, who is not acting on behalf of the police or any other prosecuting authority or body that conducts prosecutions*”: Fraud Advisory Panel, April 2013.
3. Private prosecutions are not a new phenomenon. As Lord Wilberforce observed in “*This historical right which goes right back to the earliest days of our legal system remains a valuable constitutional safeguard against inertia or partiality on the part of authority.*”: *Gouriet v AG [1978] AC 435*. This availability of this important remedy is unlikely to change.
4. Historically, all prosecutions were ‘private’ but brought in the name of the Crown. In 19th Century, they were brought by victims or relatives of the deceased and the Attorney General was only involved in the most serious or notorious cases.
5. With the introduction of the Metropolitan Police Act 1829, police forces established and brought prosecutions. The Prosecution of Offences Act 1879 created a formal role for the DPP (Director of Public Prosecutions) for important or difficult cases.
6. Following the recommendations in the 1981 Royal Commission Report on criminal procedure, the CPS (Crown Prosecution Service) was established as a statutory

prosecution service with national co-ordination by Prosecution of Offences Act 1985 under the leadership of the DPP. Prior to that, individual police officers acted as the prosecution, so all cases were effectively private prosecutions. Now if a case requires a prosecution, the CPS has a duty to prosecute almost all police proceedings.

7. Many cases, especially criminal cases with a civil element, are of little interest to the police, or stretch beyond police resources. Local and national police priorities can mean many cases are not pursued and there are increasing examples of private prosecutions as police and authorities become overstretched.
8. Even before Covid-10, it has been reported that prosecution of white-collar crime has fallen by 30% since 2014: The Times, 9/12/19 “*Police cuts blamed as fraud cases fall*” and that fraud accounts for a third of criminal reports but just 2% of such cases are prosecuted by fewer than 1% of police: BBC News, 25/1/20 “*Fraud victims failed as criminals operate with impunity – report*”.

EFFECT OF COVID-19

9. The pandemic has created a huge backlog of cases, including delays to Crown Court trials which are stacking up at a rate estimated by the Department of Justice at around 1,000 per month. We entered the pandemic with list of around 35,000 cases awaiting trial. There are very limited proposals to re-start jury trials, and these will usually require three court-rooms or equivalent space to enable compliance with social distancing rules, along with physical changes to courtrooms deployed to adhere to the latest health and safety guidance. Guidance on the approach of the courts and judiciary is at <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/#crimeguidance> and includes practical measures as well as a protocol for the handing of time-sensitive Custody Time Limit cases.
10. To avoid being overwhelmed with cases, on 14 April 2020, the CPS issued revised temporary charging guidelines and will prioritise cases to be pursued. See *Coronavirus: Interim CPS Case Review Guidance – Application of the Public Interest Covid-19 crisis response* at <https://www.cps.gov.uk/legal-guidance/coronavirus-interim-cps-case-review-guidance-application-public-interest-covid-19> and the attached *Interim CPS Charging Protocol – Covid-19 crisis response* which contains a useful table of which cases will receive priority.
11. It is clear that many cases will be overlooked and will be ripe for private prosecution.

STATUTORY FORCE

12. Preserving the constitutional right, section 6 of the 1985 Act provides:

(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply

(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

13. It is important to note that anyone can start a prosecution, but that the DPP may take over and pursue or discontinue proceedings. If done properly, this is not so common but the defence will often make an application for the case to be reviewed by the CPS so it is important to ensure that any case brought is properly founded and based on the correct considerations. Independent counsel's advice can be useful to show that the merits were fully and properly reviewed.

CORE PRINCIPLES

14. Private prosecutions follow the usual criminal process – the purpose is punishment, the burden is on the prosecution to prove the case and the standard of proof is to the criminal standard – the magistrates or jury must be satisfied so that they are sure of the defendant's guilt. Evidence is typically given live and the personal appearance of the defendant is required to answer the summons and for most hearings.

15. The outcomes of a criminal prosecution are restraint (usually pre-trial), sentences which may be custodial, community penalty, fine, confiscation and/or compensation orders. Enforcement of orders is by the court / State.

16. There is a good prospect of recovery of prosecution costs from central funds (see below), regardless of the outcome of the case, and no substantial risk of adverse costs if the rules and procedures are followed properly. Cf the position with defendant's costs which are generally not recoverable.

ADVANTAGES AND DISADVANTAGES

17. Advantages of private prosecution include:

- Prosecutor may have specialist knowledge
- Greater control over speed and shape of proceedings
- Speedier and cheaper process than civil proceedings
- Court enforces orders
- More effective as a deterrent:
 - defendant personally accountable

- threat of punishment by criminal courts
 - Recovery of costs under Prosecution of Offences Act 1985, section 17
 - No costs if prosecution does not result in conviction (provided rules followed)
 - Possibility of a restraint and compensation order in addition to confiscation.
18. Achieving control of a case can be a significant advantage to a private as compared to a public prosecution. In the widely reported trial of *R v Grillo & Grillo*, the complainant celebrity chef Nigella Lawson made an allegation of fraud to police but was then unable to stop proceedings and got caught up in an undesired prosecution, and exposure to cross examination in which her private life was exposed and ultimately led to the acquittal of the defendants. Anthony Mezter QC appeared as defence counsel and successfully represented one of the defendant Grillo sisters. In a private prosecution, the complainant has control of the proceedings, could stop the case if appropriate and would not be compellable as a witness.
19. Disadvantages include:
- CPS may take over private prosecution and discontinue: section 6(2) and 23 of Prosecution of Offences Act 1985
 - Investigators unable to apply for search warrants (section 8 PACE refers to a police officer)
 - Prosecutor must be prepared to fund investigation and prosecution
 - Potential risk of exposure if no costs order made under s17 of POA 1985
 - Cases are usually resisted vigorously, as they can impact on a defendant's liberty, so bringing a private prosecution is not a decision to be taken lightly.

INVESTIGATION AND DISCLOSURE

20. Consider a PACE-compliant interview letter or invite to a voluntary interview. A defendant's refusal to engage will not be subject to any 'adverse inference' at trial as such invitations can only be voluntary, however the information provided may be adduced in evidence at trial and a lack of response may be used when considering the merits of a prosecution.
21. As part of the investigation, a prosecutor may obtain a *Norwich Pharmacal* order for 3rd party disclosure of information: *Norwich Pharmacal v Customs & Excise Commissioners [1974] AC 133*. This is a civil pre-action order against a 3rd party forcing disclosure to enable a decision to be made about whether to initiate a prosecution, and against whom. The courts have confirmed that information obtained from such an order may be deployed in evidence as part of a criminal trial: *FCFM v Hargreaves & Ors [2018] WWHC 3075*.
22. Once a prosecution is underway, a witness summons can be sought to secure production of documents: Criminal Procedure Rules 28.3 and 28.4 or Rule 28.5 for confidential information relating to a 3rd party.
23. The assistance of the police is possible for international enquiries and police may agree to share in any financial reward/recovery pursuant to section 93 of the Police

Act 1996. See *Regina (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52 where Metropolitan Police agreed to assist in return for a 25% share of compensation recovered from the fraudsters (the Court of Appeal also confirmed that private prosecutors were entitled to bring confiscation proceedings under Proceeds of Crime Act 2002).

24. With regard to disclosure the criminal standard applies which is more extensive than for civil cases. The prosecution must disclose to the defence anything which might reasonably be considered capable of undermining the case for the prosecution or which might assist the defence.
25. The private prosecutor must act with a duty of candour and is an officer of the court. Adherence to the rules on disclosure requires great care to safeguard the integrity of the process and to ensure that the prosecutor remains entitled to reclaim costs by showing that case has been conducted properly and responsibly.
26. Be alert to the fact that disclosure requirements may trespass on matters of privilege. In *Leominster JJ ex parte Aston Manor Brewery*, *The Times* 8 January 1997, it was held to be an abuse of process where counsel who acted in civil proceedings brought substantially the same case in a private prosecution and deprived the defence of disclosure of documents helpful to their criminal defence on the same issues.

FULL CODE TEST

27. Private prosecutors must apply the same fair standards as for CPS prosecutions. It is important to consider whether the case meets the “full code” test for Crown Court Prosecutors. The latest edition is dated 26 October 2018 and can be found at <https://www.cps.gov.uk/publication/code-crown-prosecutors>.
28. In summary, the prosecution must consider there is sufficient evidence to found a **realistic prospect** of conviction. This includes admissibility of the evidence, and the importance of the evidence in relation to the case as a whole. Consideration must be given to reliability and credibility of the evidence and whether any other material might affect the sufficiency of the evidence.
29. Next, the prosecution must consider whether it is in **the public interest** to pursue a prosecution. Consideration will include the seriousness of the offence, the level of culpability of the suspect, the circumstances of any harm caused, the age and maturity of the parties at the time of the offence and any wider community impact. A prosecutor should also consider the issue of proportionality and whether any sources of information (eg informants) need protecting.
30. In limited circumstances, where the Full Code test is not met, there is a 5-stage threshold test for considering the merits of a prosecution.
31. Commencing a private prosecution is a serious step. If the test is not satisfied, there is a risk of the defence inviting the CPS to take over and discontinue the

case. If a prosecution is commenced which is frivolous or vexatious there is risk of an adverse costs order.

32. Accordingly, it is advisable to obtain independent counsel's written advice on the merits and appropriate allegation to pursue if so advised.

RESTRAINT, CONFISCATION AND COMPENSATION

33. An *ex parte* **restraint order** can be obtained pursuant to section 41 of the Proceeds of Crime Act 2002 provided that "*proceedings for an offence have been started*" and there is "*reasonable cause to believe that the defendant has benefited from his criminal conduct*".
34. Proceedings are started when a summons has been issued, i.e. an information laid with the magistrates' court (but prior to this being served by the court which can take days or weeks to process). The authors have been involved in a case where the information was laid before magistrates moments before a worldwide restraining order application was successfully sought in the Crown Court.
35. The grant of a restraint order is discretionary and requires demonstration of a "real risk of dissipation" of assets. Unlike in the High Court, there is no indemnity provided by the applicant as the court is responsible for making and enforcing the order and there is no court fee.
36. A **confiscation order** can be obtained on conviction: see *R (on application of Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823 where the court confirmed that such an order was available in private prosecutions under section 6 of POCA 2002 to deprive D of benefit from criminal conduct. It is even available, the court ruled, if the prosecutor has no financial interest in the assets.
37. The draconian effect of POCA proceedings is a powerful deterrent. In *Ketan Somaia v Regina* [2017] EWCA Crim 741, the largest confiscation order to date, the court ordered the defendant to repay £36.8M to duped investors by the defendant styled King Con by the Daily Mail; on making the Order, the Judge described the defendant as "*a formidable and serial fraudster on a truly Olympian scale*".
38. Compensation may be awarded on conviction pursuant to section 130-134 of the Power of Criminal Courts (Sentencing) Act 2000. There is no limit to the amount, subject to the court's assessment of the defendant's ability to pay. Compensation may be paid to the prosecutor or other victims out of any proceeds recovered from confiscation.

COSTS

39. A private prosecutor who has instituted and continued proceedings with good cause will generally recover costs from central funds pursuant to section 17 of the Prosecution of Offences Act 1985. This applies, irrespective of whether the prosecution leads to a conviction.
40. The court may order: *“the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings”*
41. Para 2.6.1 of the Practice Direction (Costs in Criminal Proceedings) provides a presumption in favour of such an order which *‘should be made save where there is good reasons for not doing so.’*
42. The authors have substantial experience in recovering costs following private prosecutions, which are considered on a private hourly rate basis and are not limited to legal aid rates.
43. A degree of caution remains advisable as section 19 of the 1985 Act provides that the court may order payment of any costs incurred as a result of any unnecessary or improper act or omission. Further, the court will take into account terms of engagement with solicitors and advocates, and steps taken to involve State prosecuting authorities.
44. Before commencing proceedings, private prosecutors should consider motive, stance taken in respect of reporting to public authorities (para 8 above may be used to explain why no police report made – it is not a requirement merely a consideration), why criminal rather than civil remedies are being pursued and fairness to the defendant – has the defendant had full disclosure, been provide with an opportunity to answer the allegation if possible, and have all the relevant standards and procedures been followed.

NEXT STEPS

This note is for general information only and is not and is not intended to constitute legal advice on any general or specific legal matter.

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