



PRIVATE PROSECUTORS' ASSOCIATION

## Code for Private Prosecutors

## Foreword

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This Code for Private Prosecutors has been produced by the Private Prosecutors' Association ("the PPA") with input from many of its members.

The aim of the Code for Private Prosecutors is to provide a benchmark for best practice in the conduct of private prosecutions.

Whilst the Code for Crown Prosecutors provides guidance for anyone bringing criminal proceedings, private prosecutions give rise to unique issues and challenges that are not present in public prosecutions. The Code for Private Prosecutors is intended to address some of these topics and to provide guidance for those bringing private prosecutions. It seeks to deal with matters which are not covered by the Code for Crown Prosecutors and should be read in conjunction with it.

Adherence to the Code for Private Prosecutors is voluntary but members of the PPA confirm that they will abide by it. In due course, we hope that it will become an authoritative point of reference for private prosecutors as well as others involved in the criminal justice system.

We wish to extend our thanks to all those members who lent their insight and expertise to this project. There are too many contributors to name them all here, but special thanks go to the Steering Committee Members whose input was invaluable: Jenny Barker of Counsel, Kate Bex QC of Red Lion Chambers, Sarah Clarke QC of Serjeants Inn, Simon Davison of Another Day, James Hines QC of Three Raymond Buildings, Denis Rice of Royal Mail, Kieron Sharp of FACT and Alexandra Webster of Simmons & Simmons.

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# 1. Code for Private Prosecutors

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## 1.1 Introduction

- 1.1.1 This Code for Private Prosecutors (“the Code”) is issued by the Private Prosecutors’ Association (“the PPA”). This is the first edition of the Code.
- 1.1.2 The Code gives *guidance* to private prosecutors, and to those who advise, assist or act on their behalf, on the general principles to be applied when making decisions about private prosecutions. The Code is issued primarily for private prosecutors and their advisors but may also be of assistance to other participants in the process.
- 1.1.3 Private prosecutors must ensure that the law is properly applied; that relevant evidence is put before the Court; and that obligations of disclosure are complied with. Although each case must be considered on its own facts and on its own merits, this Code identifies the general principles that apply in every case.
- 1.1.4 In this Code, the term ‘**private prosecutor**’ is used to describe the person, organisation or body which brings the private prosecution.
- 1.1.5 The term ‘**private prosecution**’ is used to describe prosecutions instituted and conducted other than by the state.
- 1.1.6 The term ‘**the prosecution**’ is used to describe the private prosecutor and those who either assist the prosecutor or who act on their behalf.
- 1.1.7 This Code uses the terms ‘**must**’ and ‘**should**’ in the following ways:
- a. ‘**must**’ is used for an overriding duty or principle;
  - b. ‘**should**’ is used to explain how an overriding duty or principle is met and/or to identify good or best practice.

## 2. Client engagement

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### 2.1 Introduction

2.1.1 In many cases, a private prosecution will be prepared and/or conducted, at least in part, by a firm or company that is external to the private prosecutor, such as a law, accountancy or private investigative firm. In those circumstances, this Chapter will apply.

### 2.2 Engagement

2.2.1 At or before the point of engagement, the private prosecutor must be informed of those issues that are specific to a private prosecution.

2.2.2 Those issues might include some or all of the following:

- a. A private prosecutor is subject to the same Minister of Justice obligations as a public prosecuting authority;
- b. Advocates and solicitors who have conduct of private prosecutions must observe the highest standards of integrity and of regard for the public interest. They have a duty to act as Ministers of Justice in preference to the interests of the client who has instructed them to bring the prosecution. They owe a duty to the Court to ensure that the proceedings are fair and that the case is dealt with justly;
- c. The criminal justice system cannot be used solely or primarily to achieve a purpose for which it is not designed – this will include an overview of the abuse of process jurisdiction (see Chapter 7);
- d. Those acting on behalf of a private prosecutor must withdraw or refuse to act if they consider the conduct of the private prosecutor to be improper or vexatious;
- e. Whilst a private prosecution does not have to satisfy the test in the Code for Crown Prosecutors, in practice, a solicitor or barrister is likely to advise against bringing a private prosecution if the Full Code Test is not met;
- f. The difficulties that are likely to arise where defendants or material are located outside England and Wales, which will include requirements to comply with applicable local law;
- g. Information about the investigative process may need to be withheld from witnesses to avoid tainting their evidence;
- h. The role and obligations of any potential expert witnesses;
- i. The possibility that a private prosecution will be referred to the Director of Public Prosecutions (“the DPP”) (or otherwise come to their attention) and the process that will be followed by the Crown Prosecution Service (CPS) thereafter;
- j. The CPS Legal Guidance on Private Prosecutions provides that a private prosecution should be taken over and stopped if, upon review of the case papers, either the evidential sufficiency stage or the public interest stage of the Full Code Test is not met;

- k. The possibility that, following referral to the DPP, the proceedings will be taken over and continued by the CPS;
- l. The requirement to retain material which may be relevant to an investigation and to schedule such material where it will not form part of the prosecution case;
- m. A full explanation of the prosecutor's disclosure obligations and the consequences of failing to comply with them;
- n. There are circumstances in which information/material will not be shared with the client/private prosecutor and where decisions (including disclosure decisions) will be made without reference to them;
- o. The application of legal professional privilege in a private prosecution and the circumstances in which it may be necessary to waive or partially waive privilege in order for the proceedings to continue (or to stop proceedings if privilege is not waived);
- p. The circumstances in which a private prosecution can and cannot properly be terminated and the potential cost consequences;
- q. The confiscation and compensation regimes; and
- r. The risks associated with pre-trial publicity.

2.2.3 The private prosecutor should be provided with accurate and comprehensive information about their responsibilities and the potential cost consequences of commencing a private prosecution. This should include:

- a. the importance of having sufficient means to fund the case to its conclusion<sup>1</sup>;
- b. the circumstances in which costs may be ordered against the private prosecutor;
- c. the circumstances in which costs may or may not be recovered from Central Funds or the defendant; and
- d. advice that, in a substantial case, the Court may consider what efforts have been made by the private prosecutor to examine competition in the market, test it and seek tenders or quotations before selecting the solicitor and advocate instructed when determining the amount of costs that might be payable<sup>2</sup>.

2.2.4 The private prosecutor should be asked whether a report has been made to a relevant law enforcement agency and, if a report has not been made, the prosecutor should be advised that it has the option to do so. It should not be suggested that a private prosecutor must report a suspected crime to a state agency, but a decision not to do so should be properly recorded, with reasons, and the potential consequences of that decision explained. If a report has been made but the agency has declined to prosecute, the private prosecutor should be advised of

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<sup>1</sup> As a matter of common sense as well as professional ethics, a private prosecutor who is the client of a law firm should be regularly updated on the issue of costs. If there comes a time when it is clear that there is a risk that the original costs estimates are going to be exceeded, the private prosecutor should be informed.

<sup>2</sup> *R (Virgin Media Ltd) v Zinga* [2014] 5 Costs L.R. 879, at 890.

the victim's right of review process, the need to disclose to the Court (when applying for a summons) and the defence (thereafter) the fact that an agency has declined to prosecute, any reasons given for that refusal and the potential impact of that decision on a private prosecution.

2.2.5 The terms of engagement should provide for a preliminary assessment of the evidence in the case and the subsequent provision of advice on issues which may arise as a result of the private prosecutors' more limited powers to obtain evidence pre-charge, for example, where material is held by a third party or overseas.

## 2.3 Instructions

2.3.1 In all cases, the issue as to which individual has authority to give instructions and receive advice on behalf of the private prosecutor at any point should be clearly defined in writing. This will include the giving of instructions on the acceptability of pleas.



## 3. Investigation

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### 3.1 Overview

- 3.1.1 Investigators who are tasked with obtaining evidence that might be used in a private prosecution should seek, where possible, to comply with the same codes of practice and guidance as apply to law enforcement investigators to ensure that (1) any evidence obtained is admissible; (2) the investigation is fair and balanced; and (3) the proceedings are not an abuse of the Court's process.
- 3.1.2 The person in charge of an investigation must ensure that proper procedures are in place for recording, retaining and revealing (to those acting on behalf of the private prosecutor) material obtained in the criminal investigation which may be relevant. Private prosecutors should be aware of the need to record relevant information as soon as practicable after the time it is obtained.
- 3.1.3 Private prosecutors should also consider their obligations under the Data Protection Act 2018 (DPA 2018) and the lawful basis for processing personal data. Private prosecutors will need to consider the specific provisions that apply to special category data. Private prosecutors should bear in mind that they are unlikely to be a "competent authority" for the purposes of Part 3 of the DPA 2018.
- 3.1.4 The records of the investigation should also address compliance with the GDPR in terms of the use of personal data. The undertaking of a privacy impact assessment in relation to the investigation as a whole would be best practice.

### 3.2 Independence & impartiality

- 3.2.1 Investigations by and for private prosecutors should be conducted impartially, objectively and independently.
- 3.2.2 In conducting an investigation, the investigator should comply with paragraph 3.5 of the CPIA Code of Practice:

"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner."

### 3.3 Terms of reference

- 3.3.1 The investigator(s) should at the outset agree with the prosecution written terms of reference regarding the scope of the investigation.

### 3.4 Digital evidence

- 3.4.1 The investigator(s) should keep accurate records of how and by whom digital evidence was gathered, retained and prepared, as well as any search terms and the review methodology applied. The ACPO Good Practice Guide for Digital Evidence and the Attorney General's Guidelines on Disclosure should be followed where applicable.

## 3.5 Interviews with suspects

3.5.1 Whilst many private prosecutors will not conduct interviews with suspects, those that do should comply with the PACE Codes of Practice to the extent that they are applicable. Private prosecutors should have particular regard to:

- a. Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Parts 10, 11 and 13 contain provisions for the conduct of interviews with suspects.
- b. PACE Codes E and F deal with the audio and video recording of interviews with suspects.

3.5.2 In principle, there is no restriction on a suspect being invited to attend an interview. However, a private prosecutor should not suggest that an adverse inference might be drawn from any failure to attend or answer questions.<sup>3</sup> A suspect must be told that they do not have to answer any questions, that they are free to leave at any time, that they are entitled to take legal advice and that anything they do say may be given/used in evidence against them.

## 3.6 Interviews with witnesses

3.6.1 It is best practice for witness statements to be taken by experienced investigators or litigators. A full record should be kept of all contact with potential witnesses.

3.6.2 All normal rules of criminal procedure apply to a private prosecutor and should be observed, including the obligation to produce witness statements on the standard template, and to retain any drafts of witness statements, notes of interview and transcripts.

## 3.7 Assistance from the Court – the duty of full and frank disclosure

3.7.1 Should a private prosecutor seek the assistance of the Court to obtain material, the fundamental duty of candour must be observed in any application.

3.7.2 The prosecutor has a duty of full and frank disclosure which necessarily includes a duty not to mislead the judge and which requires disclosure to the Court of any material that is potentially adverse to the application, which might militate against it or which may be relevant to the judge's decision.

## 3.8 Privacy, surveillance and covert activities

3.8.1 Investigators gathering evidence in support of a private prosecution do not fall under the categories of agencies with investigative powers under the Regulation of Investigatory Powers Act 2000 (“RIPA”) or the Investigatory Powers Act 2016. However, private prosecutors should have regard to all relevant legislation in commissioning or undertaking any covert activity, and document any decisions taken to commence surveillance. Private prosecutors should be

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<sup>3</sup> An exception would be where the private prosecutor is “*charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables*” in accordance with s34(4) of the Criminal Justice and Public Order Act 1994. Blackstones Criminal Practice (at D1.3) provides examples of cases in which persons other than constables have been held to be “*charged with the duty of investigating offences*” in this context.

aware that certain forms of surveillance that are available to public authorities are not available to private investigators. Their use may constitute a criminal offence.

3.8.2 A written record should be kept of the decision to commence covert investigations, the rationale behind that decision, the tactics employed and the scope and boundaries of the investigation, in advance of surveillance or other covert activity being conducted. A decision log should be kept as the case progresses, so that the legality, necessity and proportionality of the investigation can be considered at all times.

3.8.3 The document should address collateral intrusion, and the management of material involving third parties that is obtained during the course of surveillance, including the secure disposal of such material.

### 3.9 Co-operation with law enforcement

3.9.1 Some private prosecutors seek assistance from police forces to obtain evidence and conduct investigations.

3.9.2 If any agreement has been reached with the police force for the private prosecutor to make a contribution to the police costs of investigation, the details of this agreement should be disclosed to the defence.

## 4. Disclosure

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### 4.1 Core principles

- 4.1.1 The prosecution must ensure that in discharging its disclosure obligations it complies with the following (unless any provision cannot properly be said to apply to a private prosecution):
- a. CPIA 1996;
  - b. CPIA Code of Practice;
  - c. The CrimPR.
  - d. The Attorney General's Guidelines on Disclosure;
  - e. Judicial Protocol on the Disclosure of Unused Material in Criminal Cases;
  - f. The CPS Disclosure manual; and
  - g. The obligation to disclose material before the requirements of the CPIA are triggered (*R v DPP ex parte Lee* [1999] 2 All ER 737)
- 4.1.2 The prosecution's approach to disclosure must be straightforward, transparent and open.
- 4.1.3 A Disclosure Management Document ("DMD") should be produced (unless to do so would be disproportionate in any given case) to achieve a pro-active and transparent approach, to give the Court confidence that the prosecution is complying with its disclosure obligations and to engage the defence in the disclosure process at an early stage.
- 4.1.4 If a DMD is produced, it should be used to summarise the approach taken by the prosecution in dealing with unused material. In appropriate cases, the document should further be used to explain clearly the limits of the prosecution work on disclosure and why those limits have been set.
- 4.1.5 A DMD will require careful preparation and presentation, by reference to the individual case. It is essential that the criteria which the prosecution have applied to the decision-making process in the particular case are clear.
- 4.1.6 Paragraphs 51 and 52 of the Attorney General's Guidelines on Disclosure 2013 provide useful guidance on the content of any DMD.

### 4.2 Legal professional privilege

- 4.2.1 The prosecution's approach to legal professional privilege ("LPP") material must be open and rigorous.
- 4.2.2 The prosecution must deal with material that might be subject to a claim for legal professional privilege in a manner that is consistent with the requirements of the CPIA and the CPIA Code.
- 4.2.3 All relevant non-sensitive material, including any material to which LPP may apply, must be scheduled on the non-sensitive schedule and disclosed in accordance with the statutory test.

In order to continue with the private prosecution, the private prosecutor must not withhold material that meets the test for disclosure on the basis that it attracts legal professional privilege.

### 4.3 Sensitive schedule

- 4.3.1 Sensitive unused material must be scheduled on a sensitive material schedule (MG6D or similar) together with the reason why the Disclosure Officer (if there is one) or the prosecutor believes the material to be sensitive. However, material will be sensitive only if its disclosure would give rise to a real risk of serious prejudice to an important public interest. Examples of such material can be found within the CPIA Code of Practice at paragraph 6.15.

### 4.4 The role of the private prosecutor

- 4.4.1 The extent to which the private prosecutor is involved in the process of identifying relevant material must be given careful consideration by the prosecution at an early stage. Particular consideration must be given to whether in any given case it is appropriate for the private prosecutor to identify relevant material (or whether that role should be assumed by someone else) and how that process is to be managed and supervised. Material cannot be withheld, either from inclusion on the schedule or from disclosure, on the basis that its revelation is inconvenient or embarrassing to the private prosecutor or any other person

### 4.5 Parallel civil proceedings

- 4.5.1 The Prosecutor must ensure that, where there are parallel civil and criminal proceedings, proper consideration is given to the potential relevance of material arising in the civil context to the criminal proceedings<sup>4</sup>. The Prosecutor should ensure that the approach taken to such material is clearly set out in any DMD.

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<sup>4</sup> In so doing, the Prosecutor must be mindful of the limitations on the collateral use of documents and evidence disclosed or served by parties to civil proceedings. What constitutes collateral use in this context is very broadly defined and, if none of the relevant exceptions apply, would include even reviewing a disclosed document or witness statement where the purpose of that review is to determine its relevance to a private prosecution. See also paragraph 8.5.1 of the Code. The relevant exceptions include obtaining permission in the civil proceedings for use of the material in the criminal proceedings.

## 5. Charging and commencing proceedings

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### 5.1 Charging decisions and the application of the Full Code Test

- 5.1.1 The prosecuting solicitor and any counsel instructed must be satisfied that the facts alleged amount to a *prima facie* case and that they are or will be supported by evidence
- 5.1.2 Whilst there is no legal requirement for private prosecutors to satisfy the Code for Crown Prosecutors, or to apply the Full Code Test, when deciding whether or not to institute a prosecution, the CPS Legal Guidance on Private Prosecutions provides that a private prosecution should be taken over and stopped if, upon review of the case papers, either the evidential sufficiency stage or the public interest stage of the Full Code Test is not met. Therefore, in practice, a solicitor or barrister is likely to advise against bringing a private prosecution if the Full Code test is not met. It is considered to be best practice for a private prosecutor and those who advise them to apply the Full Code Test.
- 5.1.3 The prosecution should document the decision to initiate criminal proceedings, in line with the general good practice of maintaining a detailed, accessible and accurate record of the case as it progresses

### 5.2 Charge

- 5.2.1 Some larger institutional private prosecutors have established relationships with law enforcement agencies, which may make it possible to institute private prosecutions by charge.
- 5.2.2 Any private prosecutor working closely with a state law enforcement agency should consider whether it is appropriate to agree a Memorandum of Understanding, covering the extent and nature of the co-operation between the private prosecutor and the state agency.

### 5.3 Laying an information/applying for a summons

- 5.3.1 The majority of private prosecutions will commence with an application for a summons, historically known as “laying an information”. The application must comply with the requirements of Part 7 of the Criminal Procedure Rules<sup>5</sup>. It should also be accompanied by a schedule of draft charges.
- 5.3.2 If the accused has been interviewed or given an opportunity to respond to the allegation, details of that response must be included in the application.
- 5.3.3 In appropriate cases, the Court will be assisted by a skeleton argument or similar document.
- 5.3.4 The prosecution does not have the right to an oral hearing of the application for a summons but should be prepared to attend an oral hearing if required to do so by the Court. There may be circumstances in which it is appropriate for the prosecution to suggest that such a hearing takes place, for example in cases involving particularly complicated or unusual charges.
- 5.3.5 If there is an oral hearing, and it is conducted on an *ex parte* basis, the prosecution should ensure that a careful record is kept of the hearing. The Judge or Magistrate hearing the

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<sup>5</sup> <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-07.pdf>.

application for a summons should be encouraged to hand down a brief formal ruling, with reasons.

5.3.6 A magistrate considering a summons application must be informed of any previous decisions of the Court relating to the same subject-matter or proposed proceedings, including any refusal to issue a summons and the reasons for that refusal (Criminal Procedure Rules, Part 7).

## 5.4 Venue

5.4.1 The prosecution should give consideration to the following factors in identifying the appropriate Court at which to apply for a summons.<sup>6</sup>:

- a. where the offence took place;
- b. the location of the victim and witnesses; and
- c. the location of the defendant.

## 5.5 The private prosecutor's duty of candour

5.5.1 It is essential that prosecutors, public and private alike, comply with their duty of candour when applying *ex parte* for the issue of summonses in the Magistrates' Court. The grant of summonses can have far reaching consequences. Compliance with the duty of candour is the foundation stone upon which such decisions are taken and its importance cannot be overstated<sup>7</sup>.

5.5.2 It is essential that any application discloses all the information that is material to what the Court must decide, including any material which is potentially adverse to the application or which might militate against it.

5.5.3 The Court must be provided with the whole of the relevant circumstances in order to be satisfied that it is a proper case in which to issue a summons and, even if there is evidence of the offence, to consider whether the application is vexatious, an abuse of process, or otherwise improper.

5.5.4 It must be made clear that the application for a summons is made by a private prosecutor.

5.5.5 The prosecution must ensure that the Court is fully informed of any other disputes between the private prosecutor and the proposed defendants, including civil actions, whether in England and Wales or any other jurisdiction.

5.5.6 The prosecution should also inform the Court of any approach which it has made to state investigative or prosecuting authorities about the matter that is the subject of the prosecution, and inform the Court of any reasons provided by the authority for not accepting the case.

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<sup>6</sup> Courts Act 2003, section 30.

<sup>7</sup> R (on the application of Kay and Scan-Thors (UK) Limited) v Leeds Magistrates' Court) [2018] 4 W.L.R. 91.

5.5.7 Private prosecutors must be made aware that the withholding of information may lead to a summons being set aside.

## 5.6 Bail

5.6.1 Where the Court has to consider the question of bail, the private prosecutor must be made aware of the presumption in favour of bail and the application and framework of the Bail Act; they must also be made aware that an application for a remand into custody can be made only within the terms of the Bail Act and cannot be used as a punitive measure or to seek to gain a tactical or other advantage.

5.6.2 Where possible, the prosecution should be in a position to provide sufficient information to allow the Court to make a decision as to whether or not to grant bail (and if so, with what, if any, conditions).

5.6.3 Private prosecutors should seek to obtain the antecedent history (“PNC”) of any defendant and make copies of the same available to the Court. The Police Liaison Office (“PLO”) will frequently not disclose the PNC to the private prosecutor. If that occurs, an order should be sought for the PLO (or the police) to disclose the PNC to the Court. The full name, date of birth and residential address of the defendant will need to be provided in order for the PNC to be located.

5.6.4 If bail is refused, then the prosecution will bear the burden of monitoring custody time limits. It should apply the ‘*CPS National Standard for the Effective Management of Prosecution Cases Involving Custody Time Limits*’ and the ‘*Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates’ and the Crown Court between HMCTS and the CPS*’, where applicable



## 6. Referral to the Director of Public Prosecutions

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### 6.1 Overview

6.1.1 There is no obligation on a private prosecutor to notify the CPS, the DPP or any state agency that it is contemplating, or that it has commenced, a private prosecution. Subject to paragraph 6.1.2 (below), a private prosecutor does not require permission from the public prosecuting authorities to bring a private prosecution.

6.1.2 An exception to that general rule applies to those offences that require the consent to prosecute of the DPP or the Attorney General. In such cases, the private prosecutor must seek consent before commencing proceedings. If an offence requires the DPP's consent to prosecute, and if such consent is given, the CPS, (applying its current guidance) will take over and conduct the prosecution.

### 6.2 Power to take over a prosecution

6.2.1 The DPP has the power under section 6(2) of the Prosecution of Offences Act 1985 to take over private prosecutions, but is not obliged to do so. That power may also be exercised by a crown prosecutor.

6.2.2 Where they conclude that the prosecution does not meet the Full Code Test set out in the Code for Crown Prosecutors, the CPS should take over the private prosecution and stop it.

6.2.3 If the case meets the Test, the CPS has a discretion whether to take the case over and prosecute it or to permit the private prosecution to continue.

6.2.4 The manner in which the power to take over a private prosecution is exercised is explained in the CPS's published Legal Guidance<sup>8</sup>.

### 6.3 Referral process

6.3.1 The CPS may learn about a private prosecution in a range of ways, but most commonly through a referral to it by (1) a defendant, (2) the prosecutor or (3) the Court. A request to intervene may be made at any stage, by any of these parties, including after the trial has started, between a first trial and a subsequent retrial or following conviction (i.e. before sentence or appeal).

6.4 When the CPS receives a request to intervene in a private prosecution, it will contact the prosecutor, the defence and the police to ask for information to be supplied, usually within 14 days.

6.5 There is no obligation on the private prosecutor to provide anything to the CPS. That being said, failure to provide adequate information may result in the CPS concluding that the case should be taken over and stopped.

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<sup>8</sup> [www.cps.gov.uk/legal-guidance/private-prosecutions](http://www.cps.gov.uk/legal-guidance/private-prosecutions).

6.6 Following a request from the CPS, it is good practice for the private prosecutor to provide:

- A complete set of case papers;
- A note explaining how the case is to be put and why the prosecution contends that it meets the Full Code Test;
- An explanation of the prosecution's approach to the disclosure of unused material, together with copies of any material which the prosecution considers meets the test for disclosure<sup>9</sup>;
- Details of any complaint made to the police (or other public investigator/prosecutor) and the outcome of any subsequent investigation.

6.7 If the private prosecutor so wishes, they may also make representations to the CPS reviewing lawyer as to whether the DPP should exercise their powers to take the case over.

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<sup>9</sup> See chapter 4.

## 7. Abuse of process

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### 7.1 General principles

7.1.1 Because private interests are, to some degree, almost invariably inherent in the bringing and conduct of private prosecutions, there is more scope for scrutiny of private prosecutors than public prosecutors. Private prosecutors should be made aware that, realistically, there will likely be more room for questioning the initiation and conduct of a private prosecution than a public prosecution<sup>10</sup>.

7.1.2 However, the legal principles relating to the abuse of process jurisdiction apply in the same way to private prosecutions as they do to public prosecutions.<sup>11</sup> This chapter therefore does no more than identify some areas which those acting on behalf of a private prosecutor should consider.

### 7.2 Motive

7.2.1 Many private prosecutions will be brought with mixed motives, most obviously where the prosecutor claims to be the direct victim of the alleged misconduct. Mixed motives may result in heightened scrutiny of the process, to ensure that the case is conducted fairly.

7.2.2 Where the primary motive for the prosecution is unrelated to the proceedings, it is likely to render the prosecution a misuse or an abuse of the Court's process. A useful touchstone for consideration of the issue may be to ask whether the criminal legal process is being used against another primarily to accomplish a purpose for which it is not designed.

### 7.3 Delay

7.3.1 Detailed consideration of the abuse jurisdiction is outside the scope of this Code. Some of the key factors to consider at the outset may be:

- a. When did the prospective private prosecutor first (i) become aware of the facts or issues which give rise to the prosecution and (ii) realise that a criminal offence may have been committed?
- b. What, if any steps has the prospective private prosecutor taken to deal with the matters giving rise to the prosecution before applying for a summons?
- c. Is there a reasonable explanation for any delay?
- d. Is there any evidence which no longer exists?

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<sup>10</sup> *David Haigh v City of Westminster Magistrates' Court* [2017] EWHC 232 (Admin).

<sup>11</sup> *D Ltd v A* [2017] EWCA Crim 1172.

## 7.4 Adverse publicity

7.4.1 Legal advisers should warn private prosecutors for whom they act that adverse and/or excessive media publicity can cause the fairness of the ensuing trial to be called into question and can potentially become the subject of legal argument.

7.4.2 This warning may be particularly important in cases that are crowdfunded and which therefore rely on publicity for their very existence. Given the detrimental effect that adverse publicity can have on a prosecution, crowdfunding must be approached and handled with caution.

7.4.3 Private prosecutors should consider identifying an appropriate media spokesperson, particularly where proceedings are likely to generate significant public or media interest.

## 7.5 Disclosure

7.5.1 The private prosecutor should be aware/advised by his or her legal representative that a failure by the prosecution to comply with its duties of disclosure may lead to the proceedings being stayed as an abuse of process.

## 7.6 Concurrent civil proceedings

7.6.1 Parallel criminal and civil proceedings may be pursued so long as to do so is fair, proportionate and properly motivated. It would not be appropriate to launch criminal proceedings purely to influence extant or prospective civil proceedings.<sup>12</sup>

## 7.7 Professional standards

7.7.1 Where the private prosecutor is the client of a law firm, they may be entitled to receive their solicitor's file.<sup>13</sup> Where the private prosecutor is also a witness in the case, a request of this nature may leave the prosecution open to criticism. The private prosecutor must be advised that there are circumstances in which information/material will not be shared with them and where disclosure and decisions about the case will be made without reference to them.

7.7.2 If any witness familiarisation process is undertaken it should be regulated in accordance with the guidance of the Court of Appeal in *Momodou (Practice Note)* [2005] 2 All ER 571 and disclosed to the defence. The CPS also provides guidance on witness familiarisation.

## 7.8 Previous disposals

7.8.1 So far as possible, a prosecutor should establish the factual background of any previous disposal before initiating proceedings. If a potential defendant has been told that an out of court disposal would act as a bar to further proceedings, a prosecution may be an abuse.

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<sup>12</sup> *R (G) v S and S* [2017] EWCA Crim 2119.

<sup>13</sup> Subject to certain exemptions – see the Law Society practice note, Who Owns the File?

## 7.9 Costs

- 7.9.1 A successful abuse of process application may result in a defendant receiving an award of costs payable by the private prosecutor. Private prosecutors should be advised of this risk prior to the commencement of the case.

## 8. Interaction between civil and criminal proceedings

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- 8.1 Cases involving parallel or consecutive civil and criminal proceedings require careful management. There is often scope for conflict or tension between the strategies adopted in each of the proceedings, the timeframes within which they are operating and the applicable procedural rules. Parallel proceedings may also increase cost, put pressure on available resources, and add complexity to the disclosure process.
- 8.2 There are a number of issues that prospective private prosecutors and their representatives should consider when seeking to commence a private prosecution where related civil litigation (including regulatory proceedings) is either ongoing or has preceded it.
- 8.3 **Motivation**
- 8.3.1 The private prosecutor must not use the threat or commencement of a private prosecution as a strategic tool to add leverage to a party's position in civil or other proceedings.
- 8.3.2 Private prosecutors should ensure that they comply with the common law and statutory criminal disclosure obligations in this regard. Good practice is to ensure that the private prosecutor's motives are reduced to a written form.
- 8.4 **Claims to privilege**
- 8.4.1 It may be necessary to disclose material in the criminal case that would not fall to be disclosed in the civil case. The private prosecutor should be advised of this issue at the earliest possible opportunity.
- 8.5 **Disclosure**
- 8.5.1 Material that has been disclosed, served by or otherwise received from counterparties in civil or regulatory proceedings may be subject to restrictions against collateral use.<sup>14</sup> This is an issue that should be resolved as early as possible, particularly if the prosecutor is being asked to review such material in connection with advising on the merits of a private prosecution. The prosecution may be required to apply for permission to use that material, if it does not fall within one of the exceptions provided for by the Civil Procedure Rules.
- 8.6 **Witnesses**
- 8.6.1 Care must be taken to ensure that interaction with a witness which may be permissible in a civil case does not prejudice any ongoing prosecution.
- 8.6.2 Witnesses who have given civil statements may have done so with the benefit of disclosure that has been made in the course of those proceedings. The prosecution will need to review and potentially disclose unused material that was generated in the course of drafting civil statements, which may include privileged material.

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<sup>14</sup> See *inter alia* CPR 31.22(1) and CPR 32.12 and *Tchenguz & another v Grant Thornton LLP & others* [2017] 1 W.L.R. 2809. Material may also be provided subject to contractual undertakings to the same effect.

## 8.7 Staying proceedings

- 8.7.1 Private prosecutors should consider whether it is appropriate to request a stay of the concurrent civil proceedings until after the criminal proceedings have concluded.

## 9. Trial

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### 9.1 General principles – role of the prosecutor or the prosecuting advocate

9.1.1 The private prosecutor must be reminded that all lawyers instructed by the prosecution in a criminal trial must comply with their professional duties, as defined by the relevant professional bodies.

9.1.2 Where no such professional obligations apply, the private prosecutor should endeavour to adhere to this Code and conduct the prosecution by the same high standards.<sup>15</sup>

### 9.2 Farquharson guidelines

9.2.1 The private prosecutor should also be made aware that any advocate it instructs will comply with the guidelines on the role of prosecuting advocates first formulated by Lord Justice Farquharson in 1985:

*'It is well known to every practitioner that counsel for the prosecution must conduct his case moderately, albeit firmly. He must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits; he must not invite the jury to convict on evidence which in his own judgment no longer sustains the charge laid in the indictment.'*

9.2.2 As Lord Thomas observed in *R v Zinga* (op cit):

*'Advocates...who have conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a minister of justice (as described by Farquharson LJ) in preference to the interests of the client who has instructed them to bring the prosecution.'*

### 9.3 Disclosure mid-trial and the taking of instructions

9.3.1 There is a continuing duty on the prosecution to keep disclosure under review. The private prosecutor should be advised in advance of the trial that disclosure could be made without reference to them, either generally in the proceedings or in certain exceptional circumstances, for example, if they are giving evidence.

9.3.2 It may be that the private prosecutor's evidence discloses the existence of material which has not been provided to their lawyers for review. In those circumstances, disclosure should be made to the Court and defence of the fact that no such material has been made available for review. Exceptionally, it may be appropriate to seek permission from the trial judge and defence to speak to the private prosecutor for the sole purpose of locating any such material.

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<sup>15</sup> *R v Zinga* [2014] 1 Cr. App. R. 27, *R v George Maxwell (Developments) Ltd* (1980) 71 Cr App R 83.



## 10. Sentencing, confiscation and ancillary orders

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### 10.1 Confiscation

- 10.1.1 Confiscation proceedings in the Crown Court (under the Proceeds of Crime Act 2002 (“POCA”)) against a convicted defendant will follow where the conditions in section 6 of that Act are fulfilled - that is to say either the prosecutor asks the Court to proceed under that section or the Court believes it is appropriate to initiate them of its own motion.
- 10.1.2 Although the proceeds of a confiscation order will in the ordinary course of events go to the state, the Court will have the power to order that a compensation order be made and paid out of the proceeds of the confiscation order.
- 10.1.3 The decision to instigate confiscation proceedings should be made in the public interest and prosecuted with that interest paramount.
- 10.1.4 In considering whether to institute confiscation proceedings, the lawyer acting for the private prosecutor should explain to the private prosecutor that they will have regard to any guidance periodically issued by the CPS or the Attorney General and that the Court will apply the confiscation regime in a way that is compliant with Article 1 of the First Protocol to the ECHR.<sup>16</sup>
- 10.1.5 Early consideration must be given to applying to the Crown Court for s.40 restraint orders and the private prosecutor should be advised of the enhanced duty of candour expected by the Court in *ex parte* applications.
- 10.1.6 There is nothing to prevent a private prosecutor asking the Court to set a confiscation timetable, and to provide a section 16 statement as required. A private prosecutor should consider whether they require the assistance of an appropriate officer as defined by section 378(1) of the Proceeds of Crime Act 2002 in order to investigate properly the defendant’s financial circumstances. Any agreement between the private prosecutor and an appropriate officer or body providing an appropriate officer should be made with reference to the principles set out in *R v Zinga* [2014] 1 W.L.R. 2228 at paragraphs 52-54.

### 10.2 Parallel civil proceedings

- 10.3 If a court comes to the conclusion that the defendant has benefitted from his or her criminal conduct, it must proceed to make an order unless the Court “believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct”,<sup>17</sup> in which case it has a discretion rather than an obligation to make an order.
- 10.4 A private prosecutor must bring any existing or intended proceedings of which they are aware to the Court’s attention.

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<sup>16</sup> *R v Waya* [2012] 3 W.L.R. 1188.

<sup>17</sup> Section 6(6) of the Proceeds of Crime Act 2002.

## 10.5 Sentencing

10.5.1 Prosecutors must assist the Court to reach a decision as to the appropriate sentence, including by drawing any relevant sentencing guidelines to the Court's attention.

10.5.2 Private prosecutors should obtain the antecedent history ("PNC") of any defendant and make copies of the same available to the sentencing court. The Police Liaison Office ("PLO") will frequently not disclose the PNC to the private prosecutor. If that occurs, an order should be sought for the PLO to disclose the PNC to the Court. The full name, date of birth and residential address of the defendant will need to be provided to the PLO in order for the PNC to be located. Sufficient time should be allowed for this to occur, to allow the defence advocate to take full instructions on it.

## 10.6 Victim personal statement

10.6.1 In all cases the prosecution should consider whether it is appropriate to invite a victim, or a family member, to provide a Victim Personal Statement, a Community Impact Statement or an Impact Statement for Business.

## 10.7 Ancillary orders

10.7.1 In all cases the private prosecutor must consider and apply for any appropriate ancillary order, having regard to the needs of the victim, their future protection and the protection of the public.

## 10.8 Unduly lenient sentence

10.8.1 In respect of any sentence imposed for an offence triable only on indictment, or for any other offence specified in Schedule 1 of the Criminal Justice Act 1988 (Review of Sentencing) Order 2006, that appears to the private prosecutor to be unduly lenient, they may refer the matter to the Attorney General.

## 11. Costs

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### 11.1 Principles and general advice

#### 11.1.1 The following general principles are applicable:

- a. The purpose of a costs order is to compensate the prosecutor for their reasonably incurred (legal) costs.
- b. A successful private prosecutor should, in the first instance, consider making an application against the defendant, before it considers an application for costs out of Central Funds.
- c. Such an award is discretionary and the award of costs should be “just and reasonable”.
- d. An application for costs against a defendant can include investigators’ costs / costs of the investigation. 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.

11.1.2 Reference should be made to Part 45 of the Criminal Procedure Rules and the associated Practice Direction.

### 11.2 Prosecution costs

11.2.1 Wherever possible the primary application for a prosecutor’s costs should be made against the convicted defendant(s). The defendant should be provided with sufficient information in relation to the costs sought to enable the defendant and the Court to consider whether those costs are ‘just and reasonable.’

11.2.2 If an application is made against a defendant, he or she must be afforded the opportunity to comment on the costs sought prior to the order being made.

11.2.3 The private prosecutor must be made aware that, in a substantial case, the Court may consider what efforts have been made by the private prosecutor to examine competition in the market, test it and seek tenders or quotations before selecting the solicitor and advocate instructed when determining the amount of costs that might be payable.

11.2.4 Where there has been misconduct on the part of the prosecution, a private prosecutor should not be awarded costs out of Central Funds.<sup>18</sup>

### 11.3 Defence costs

11.3.1 The private prosecutor must be advised that there is a power to award costs against a private prosecutor and/or legal representatives, “*where the Court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings*”.<sup>19</sup> In proceedings where, on proper analysis,

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<sup>18</sup> *R v Esher and Walton Justices ex p Victor Value & Co Ltd* [1967] 111 Sol Jol 473.

<sup>19</sup> Section 19 of the Prosecution of Offences Act 1985.

the prosecution never had any prospect of success and thus should never have been brought, a private prosecutor should expect to have to bear the costs of the defendant.<sup>20</sup>

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<sup>20</sup> *R (on the application of Aisling Hubert) v Manchester Crown Court v Dr Prabha Sivaraman* [2015] EWHC 3734.