Justice Committee Inquiry:
Private Prosecutions brought by organisations acting as the Investigator and the Prosecutor

Adequacy of Safeguards to limit injustice

Written evidence of JUSTICE

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. We provide here our initial observations on the issues raised in the inquiry. There are important factors to balance between ensuring victims of crime have access to the courts, while also ensuring procedural safeguards for those accused of crime.

Issuing a summons

3. JUSTICE is concerned that the issuing of a summons is in many cases a simple formality. The test for issuing a summons as set out in *R (Kay) v Leeds Magistrates' Court*[1] should be strictly adhered to. Beyond the base requirements, such as making out a prima-facie case and complying with time bars, the Committee's Inquiry may wish to consider the extent to which magistrates actively enquire into the propriety of the information laid before them. Although there can be no question of conducting a preliminary hearing,[2] the magistrate considering issuing a summons in a private prosecution should actively consider the whole of the relevant circumstances, and satisfy themselves that it is a proper case to issue a summons. JUSTICE is concerned that this safeguard is not being adequately applied and that the consideration of the issuing magistrate or district judge is often cursory. The issuing magistrate should proactively consider whether the application is vexatious, an abuse of process or otherwise improper. Any set of parallel civil proceedings should be actively interrogated in this respect, in order to determine whether they may point to an ulterior motive by the private prosecutor.

Objective analysis

4. In terms of conducting proceedings and upholding their duty as a *minister of justice*, the courts have recently questioned the very premise that an individual private prosecutor can ever carry out an independent evaluation of the evidence. The courts have suggested that because *"a private prosecutor will often have a private interest in the proceedings, he may lack the objectivity required to undertake such an analysis*."[3] JUSTICE is concerned that objective scrutiny of the evidence put forward by a private prosecutor should not be reserved to the point at which the court comes to determine an application to dismiss. An obligation on private prosecutors to bring a proposed prosecution to the attention of the police or prosecution authorities and to take legal advice on their obligations of disclosure prior to it beginning may represent a worthwhile safeguard early in the process. The inquiry may also wish to consider the Code for Private Prosecutors[4], which was developed by the Private Prosecutors' Association. Making compliance with such a code mandatory for those wishing to bring a private prosecution may be a worthwhile step to ensure the quality of the process.

Costs

5. Section 17(1) of the Prosecution of Offences Act 1985 ("the POA 1985") and Part III of the Costs in Criminal Cases (General) Regulations 1986 ("the Regulations") empower the court to "*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*." Although this is tempered by regulation 3 of the Regulations, which empowers

[1] [2018] 4 WLR 91

[2] *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn [1979] WLR 933*, at 935F – 936E

[3] *R (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin), paragraph 20

[4] https://private-prosecutions.com/code-for-private-prosecutors/

the court to order a party to criminal proceedings to pay the costs of another party if satisfied that their costs were incurred "*as a result of an unnecessary or improper act or omission*," JUSTICE is concerned that the ability of the private prosecutor to recoup their costs from central funds, even when the private prosecution fails, may represent an undue incentive to would-be private prosecutors. While JUSTICE recognises that a private prosecutor's ability to recoup costs is an important protection for legitimate private prosecutors who lack resources, the costs of private prosecutions may be an important issue for the Committee Inquiry to interrogate. In the civil courts, costs follow the event. Introducing a similar regime into the sphere of private prosecutions may rebalance the motivations of a would-be private prosecutor seeking to use the criminal courts for commercial gain.

Victim judicial review and appeal access

6. Private prosecution is one way in which a bone fide victim can seek justice for criminal acts committed against them that the DPP refuses to prosecute. We recognise that it is important for this right to persist and to be accessible.

7. A fairly recent improvement in the avenue of accountability for victims is their ability to challenge the DPP's decision-making, through the internal Victims' Right to Review Scheme and, if necessary, through judicial review in the courts.

8. It is an anomaly of judicial review in England and Wales, however, that such claimants have no access to the Court of Appeal should they be unsuccessful at first instance.[5] This is at odds with the right of access to the courts, which claimants in civil judicial review enjoy – there, to the Court of Appeal Civil Division. While this may limit a vexatious private prosecutor's access to an additional avenue to appeal, it may also undermine legitimate victims' access to accountability. Indeed, JUSTICE considers this anomaly to be a violation of the non-discrimination right protected by Article 14 European Convention on Human Rights, in conjunction with Article 6 – the right to a fair trial. This is because victims of crime have unjustifiably worse access to appeal a first instance judicial review decision than civil claimants. JUSTICE considers that Parliament should address this anomaly in any event. But if additional limitations to private prosecution are being considered, other avenues of accountability will be even more important to bone fide victims of crime.

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[5] The combined effect of s.18 Senior Courts Act 1981 and s.1 Administration of Justice Act 1960 is that first instance judicial reviews in a "criminal cause or matter" have no route of appeal to the Court of Appeal. They can only be appealed to the Supreme Court, and then only if the High Court certifies them as concerning a point of law of general public importance – a much higher bar than the first instance appeal test for civil judicial reviews. This is despite the original legislation referring to appeals from "prosecutors and defendants" and not anticipating the possibility of a victim judicial review in the High Court at all. See recent consideration in *Thakrar v Crown Prosecution Service* [2019] EWCA Civ 874 following *Belhaj v DPP* [2018] UKSC 33. In *Thakrar* the claimant (also the private prosecutor) commenced judicial review proceedings challenging the decision of the DPP to discontinue the private prosecution he had commenced. Permission to apply for judicial review was refused by the Divisional Court on two separate occasions, firstly on the papers and secondly at an oral hearing. Following this, the claimant sought permission to appeal the second of those refusals to the Court of Appeal. The Court of Appeal decided that no appeal could lie to it because, as per s.18(1) of the Senior Courts Act, the judgment in the Divisional Court was in a "*criminal cause or matter*." The UK Supreme Court also recently determined that it lacked jurisdiction in the case of *Monica v DPP*, where the appellant had sought review of the DPP's refusal to prosecute an undercover police officer for sexual assault on the basis of vitiated consent.