**Evaluating Private Prosecutions: Reform or Abolition?**

**Introduction**

This article contributes to the ongoing debate as to the extent to which the right to bring a private prosecution should be reformed by arguing a case for abolition.[[1]](#footnote-1) The issue of private prosecutions has recently been brought to the foreground by a series of Court of Appeal decisions quashing the convictions of 59 sub-postmasters who were convicted in private prosecutions brought by the Post Office.[[2]](#footnote-2) The Criminal Cases Review Commission referred the first group of cases to the Court of Appeal, also triggering a review of the safeguards of private prosecutions by the House of Commons Justice Committee in 2020.

After a brief overview of the historical background and contemporary use of private prosecutions, the second part of this paper will focus on the need for an independent review of the case to protect the rights of the defendant. The third part will argue that private prosecutions conflict with the conceptual basis of the contemporary criminal justice system that criminal prosecutions are brought by the State. Finally, in the fourth part, the case for reform will be considered concluding that private prosecutions in their current form should be abolished.[[3]](#footnote-3)

**PART ONE**

**Historical and contemporary private prosecutions**

Historically, private citizens brought all prosecutions.[[4]](#footnote-4) With the development of organised police forces across the England and Wales in the nineteenth century the majority of prosecutions were conducted by the police, although this was by practice and convention rather than any legislative change.[[5]](#footnote-5) In 1962 the Royal Commission on the Police recommended that the practice of using police prosecutors end and that all forces consider introducing prosecuting solicitors’ departments.[[6]](#footnote-6) However, in 1981 the Philips Commission recommended that police prosecutors and prosecuting solicitors’ departments were replaced with a ‘statutorily based prosecution service.’[[7]](#footnote-7) These recommendations ultimately led to the creation of the CPS by the Prosecution of Offences Act 1985. Many of the concerns about prosecutions being controlled by the police could also be applicable to contemporary private prosecutions. The Philips Commission observed that the relationship between the Chief Constable and the prosecuting solicitor was one of client and solicitor.[[8]](#footnote-8) The police were not obliged to seek legal advice from the prosecuting solicitor and even if they did so, they were not obliged to follow it. The Commission also recognised that different evidential standards were applied across the country. The DPP's department had a higher test than many other prosecutors: whether or not there is a reasonable prospect of conviction. The Commission recommended that this test should be extended to all cases.[[9]](#footnote-9)

The Prosecution of Offences 1985 initially only required the CPS to take over prosecutions commenced by the police although this provision has subsequently been amended to require the CPS to take over prosecutions brought by a range of other agencies.[[10]](#footnote-10) These include proceedings brought by Revenue and Customs, and the National Crime Agency. Section 6 of the Act specifically preserved the right to bring a private prosecution subject to the power contained within section 6(2) to enable the DPP to take the prosecution over:

(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.

As the legislation does not specify the circumstances when the CPS should consider taking over the case, this is set out in the CPS policy on private prosecutions. The policy changed significantly in 2009 when the CPS stated that they would apply the same test to private prosecutions that is applied to public prosecutions. Whereas previously the CPS would only take over a prosecution and discontinue it on evidential grounds if there was not a case to answer, under the amended policy they would do so if the public prosecutor’s assessment of the evidence was that there was not a realistic prospect of conviction. The current policy states: ‘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.’[[11]](#footnote-11) The decision in *R (Gujra) v Crown Prosecution Service* has established that the policy of applying the Code for Crown Prosecutors to private prosecutions is lawful*.*[[12]](#footnote-12) The appellant had applied for judicial review of the decision of the DPP to take over and discontinue the private prosecution that he had brought against two men that he alleged had assaulted him. The Supreme Court dismissed the appeal with Baroness Hale and Lord Mance JJSC dissenting.

A further complexity is that there is no single definition of what amounts to a private prosecution. It is of note that section 6 does not use the term ‘private prosecution’ which has resulted in some inconsistency in its use. One interpretation of this term is that a private prosecution would include any criminal proceedings which are brought by an organisation or individual other than the CPS. A narrower interpretation would group other statutory agencies which have a prosecution function with the CPS in the category of public prosecutions.[[13]](#footnote-13) However, the CPS has indicated that it will not routinely intervene in prosecutions brought by other prosecuting agencies.[[14]](#footnote-14) Furthermore, the CPS is not notified as a matter of course when private prosecutions are commenced and so are unlikely to consider taking the prosecution over unless they are requested to review the prosecution by the defendant, the court or a third party.

**Contemporary Private Prosecutions**

Despite the historic nature of private prosecutions, they continue to be used in two broad circumstances: prosecutions brought by public and private regulatory organisations, and prosecutions brought by individuals. The most common use of private prosecutions is for specialist prosecutions brought by regulatory bodies and organisations which benefit from the expertise of a prosecutor specialising in the area. Historically, the RSPCA was one of the most prolific private prosecutors.[[15]](#footnote-15) Private prosecutions are now brought for specialist fraud and intellectual property offences that are considered to be outside the expertise of the CPS which focuses on more mainstream offences.[[16]](#footnote-16) The Justice Committee received written evidence from organisations who used private prosecutions in response to intellectual property-based fraud and copyright infringement.[[17]](#footnote-17) One of the submissions stated that ‘they have long recognised the understandable limitations, both in resource and specific expertise within the CPS to conduct such cases.’[[18]](#footnote-18) Evidence was also provided by law firms which specialise in private prosecutions including for white collar crime and fraud on behalf commercial organisations.[[19]](#footnote-19) Therefore, although there are no statistics available, there is clear evidence that private prosecutions continue to be used by a variety of organisations, particularly in areas of the criminal law which are linked to commercial interests. It was also noted that the costs regime for private prosecutions can make it an appealing alternative to civil proceedings.[[20]](#footnote-20)

Private prosecutions may also be used by individuals in response to a decision by the CPS not to bring proceedings. Although it has been argued that private prosecutions allow victims of crime to challenge inaction on the part of the public authorities, they are now of limited value. There are a number of obstacles which make private prosecutions a largely inaccessible and unappealing route for challenging decisions not to prosecute. These include the risk that the prosecution is taken over by the CPS and terminated, the prospect of costs, and the time-consuming and complex procedural requirements. In addition, there are more appropriate ways to contest such decisions such as the CPS Victims’ Right to Review scheme and judicial review.[[21]](#footnote-21)

Despite these limitations of private prosecutions as a means of challenging decisions not to prosecute, it must be acknowledged that some potential benefits of bringing a prosecution on this basis remain. Firstly, private prosecutions do provide a means for victims of crime to trigger a CPS review of a police decision not to prosecute. Decisions to take no further action may be made by the police rather than the CPS either because a case did not meet the evidential threshold for referral to the CPS or because it is a less serious offence. As there is no right of appeal to the CPS of a police decision to take no further action, commencing a private prosecution is one way of prompting the CPS into reviewing the evidence and potentially taking the case over and continuing it. Although the victim could request a review under the individual police force’s VRR scheme, this would still only result in a further review by the police and not referral to the CPS.[[22]](#footnote-22)

Secondly, a further benefit of bringing a private prosecution is that it allows the victim to have the case reviewed at a higher level within the CPS hierarchy than an ordinary referral from the police. The 2009 CPS policy on Private Prosecutions states that the reviewing lawyer’s decision must be endorsed or ratified at Chief Crown Prosecutor (or Deputy Chief Crown Prosecutor or Head of Division level) and is overseen by the Special Crime and Counter Terrorism Division to ensure that the policy is complied with.[[23]](#footnote-23) As a result, the case would potentially receive a more rigorous review in these circumstances due to the degree of scrutiny that the decision is likely to be subjected to. Arguably, it is a more difficult decision to terminate proceedings that have already been commenced than to advise that no further action should be taken on a case that has not yet been charged. These benefits to victims of crime are, however, likely to only be relevant in relatively low number of cases.

Therefore, private prosecutions arguably continue to be of some value in the contemporary criminal justice system, particularly in relation to specialist prosecutions brought by organisational prosecutors and, to a lesser extent, individual victims of crime. However, a pertinent issue is whether the value of retaining them is outweighed by other factors, including the threat to the rights of defendants which will be examined in the next part.

**PART TWO**

**Private Prosecutions and the Rights of the Defendant: The need for objective review.**

To properly evaluate whether private prosecutions are a justifiable part of the criminal justice system, we must consider whether they potentially infringe the rights of defendants. Defendants have few substantive rights in relation to decisions to prosecute by public or private prosecutors. For example, they do not have a right not to be prosecuted and all prosecutions, whether public or private, are ultimately adjudicated on by the courts; the trial process and its inherent safeguards exist for private prosecutions as well as for those brought by the public prosecutor.

The right with overarching relevance to the prosecution process is the right to a fair trial under Article 6 of the European Convention on Human Rights. However, the focus of this right is the trial process itself and whether defendants receive a fair and public hearing by an independent tribunal. There are rights in Article 6(3) for suspects while they are being questioned and are under investigation, that is pre-charge, not simply for those who stand trial. None of those five separate rights, nor the case law that expounds upon them, prohibits or restricts the power to bring a private prosecution.

The trial process remains the same regardless of whether the decision to prosecute was made by a public or private prosecutor. The defendant has a common law right to a fair trial which is protected by the abuse of process doctrine.[[24]](#footnote-24) Essentially, the defendant would apply to the court for a stay of proceedings on the basis that he cannot receive a fair trial. However, the defendant would need to establish specific grounds. Although abuse of process can only be argued once proceedings have commenced, defendants can still rely on this doctrine when proceedings have been brought by way of a private prosecution. There are a number of other safeguards inherent in the trial process: exclusion of evidence,[[25]](#footnote-25) submission of no case to answer,[[26]](#footnote-26) and applications for dismissal of charges sent to Crown Court.[[27]](#footnote-27) Although all of these protections are potentially available in the context of private prosecutions, they cannot be used from the commencement of the prosecution; they can only be engaged at a relatively late stage of the proceedings, in most cases once the trial itself has commenced.

Of potentially more value to the defendant are those safeguards which can be used to challenge the actual decision to bring a private prosecution from the outset. There are two primary ways that this can be done: requesting that the case be reviewed by the CPS or challenging the application for a summons or warrant in the magistrates’ court.

Requesting a CPS review

The most straight-forward way of challenging a private prosecution for defendants is to request that the CPS review the case with a view to discontinuing it. This is the main protection for defendants from inappropriately brought private prosecutions as the CPS has the power to take over private prosecutions under section 6(2) of the Prosecution of Offences Act 1985 and apply the test in Code for Crown Prosecutors to the case. The defendant is entitled to request that the CPS conduct such a review.[[28]](#footnote-28) If that review concludes that the prosecution failed either the sufficiency of evidence or public interest stages of the Code for Crown Prosecutors, the proceedings could be taken over and discontinued under sections 6(2) and 23 of the Prosecution of Offences Act 1985. However, it became clear from the evidence given to the Justice Committee that the CPS are not routinely informed of private prosecutions and there is no appetite on the part of the government or the CPS for introducing a notification procedure. Furthermore, defendants in private prosecutions are not automatically informed of their right to request that the CPS review the case. Therefore, it falls to defendants to discover for themselves that they can request such a review and that the CPS has the power to take over and potentially terminate an evidentially weak private prosecution or one that is not in the public interest. As a result, defendants are potentially at risk of inappropriately brought prosecutions that have not been independently reviewed.

Contesting the application for a summons

The magistrates’ court does have a gatekeeping function in relation to private prosecutions and is the second way that a defendant may contest the decision to bring a prosecution. However, this is of limited value in preventing abuse of private prosecutions. To commence the proceedings, the private prosecutor needs to lay an information for a summons or warrant under section 1 of the Magistrates’ Court Act 1980. This is not a purely automatic process and a formal application does have to be made which can result in a refusal as the court does have a filtering role in the procedure. The judgment of Silber J in *R (Charlson) v Guildford Magistrates’ Court* sets out the principles that the magistrates’ court should apply when considering such an application.[[29]](#footnote-29) The court should consider a number of factors such as whether the offence is known to law, the essential ingredients are present, whether it is time-barred, whether the court has jurisdiction, whether any statutory consents to prosecute have been obtained and any other relevant facts.[[30]](#footnote-30) The court should also refuse the application for a summons when a prosecution would be vexatious or improper.[[31]](#footnote-31) The Administrative Court has quashed decisions to issue summons for private prosecutions where there has been insufficient judicial consideration of whether the essential elements of the offence are present and whether or not the allegation is vexatious.[[32]](#footnote-32)

Under Rule 7.2 of the Criminal Procedure Rules the private prosecutor is required to serve the court with certain information when applying for a summons. Paragraph 6 requires the ‘grounds for asserting that the defendant has committed the alleged offence or offences’, details of previous applications and details of any ‘current or previous proceedings brought by another prosecutor.’ The prosecutor must also provide ‘a statement that to the best of the applicant’s knowledge, information and belief’ that the allegations are ‘substantially true’ and the evidence that will be available at trial. However, in its current form, this is not the most effective way of regulating private prosecutions; the court only has limited information available to determine whether a summons should be issued and does not routinely engage in a full enquiry into the reasons for the prosecution or factors such as the strength of the evidence. The court is unlikely to probe the details of the evidence and unused material to the extent that it can be sure that the case is being properly conducted.

Lack of objective review

In addition, there are protections for defendants of public prosecutions which are not routinely present in relation to private prosecutions. These protections are embedded in the decision-making processes of the CPS. Firstly, CPS decisions whether to prosecute are structured through the Code for Crown Prosecutors.[[33]](#footnote-33) Under the Code, all CPS prosecutions are reviewed against a two-stage test. For the case to proceed the reviewing prosecutor must be satisfied that there is sufficient evidence for a realistic prospect of conviction (the evidential stage) and secondly, that the prosecution is in the public interest (the public interest stage). Therefore, the decision to prosecute is based on an objective analysis of the evidence with the test as a benchmark evidential standard which must be met in order that defendants are not prosecuted in evidentially weak cases. Secondly, CPS prosecutors also take into account relevant prosecution guidelines and policies of which there are a vast number which bring a degree of consistency to prosecutorial decision-making.[[34]](#footnote-34) It is, however, accepted that this process is not perfect, and errors can be, as evidenced by the Victims’ Right to Review data where incorrect decisions have been overturned.[[35]](#footnote-35)

In the case of private prosecutions, the decision to prosecute has been made by an individual *without* a statutory obligation to objectively appraise the evidence or to act in the public interest. The risk to the defendant is that this has the potential to introduce arbitrary decision-making by private prosecutors who may not have fully assessed the strength of the evidence and are potentially emotionally attached to the case. A private prosecutor may not have reviewed the case in the same way as a public prosecutor whose discretion is structured by an established test and prosecution policies to ensure that prosecution decisions are consistent, evidence-based and in the public interest. Therefore, there must be legitimate concerns about the extent to which private prosecutions have the potential to undermine the interests of defendants. Lord Neuberger indicated in *Gujra* that he preferred prosecutorial decisions being exercised by a public prosecutor rather than a private individual by stating, ‘An objective, expert, and experienced assessment of the prospects [of obtaining a conviction] appears to me to be generally more reliable than the assessment of a person who will normally be (probably wholly) inexperienced in the criminal justice system.’[[36]](#footnote-36) He also commented that as the prosecutor is also the victim they can be ‘far from dispassionate’[[37]](#footnote-37) which is described by de Than and Elvin as ‘an inbuilt conflict of interest.’[[38]](#footnote-38) This conflict could result in a failure to take into account the public interest when deciding whether to bring a prosecution.This conflict of interest would not necessarily be eliminated by legal representation as there would still be a tension between the duty to act in the client’s best interests and the more nebulous principles of upholding the rule of law and the proper administration of justice, independence, honesty and integrity.[[39]](#footnote-39)

The risk is potentially higher when the prosecutor is unrepresented as they are likely to lack the expertise and experience to conduct a robust and independent review of the case. The case of *Holloway* illustrates how strong the personal connection can be between the private prosecutor and the substance of the allegation.[[40]](#footnote-40) Holloway had commenced a private prosecution for blackmail and conspiracy to blackmail against the sellers of a property that he wished to buy. This was subsequently taken over by the CPS and discontinued on the basis that there was insufficient evidence for a realistic prospect of conviction. Holloway brought judicial review proceedings to challenge the costs order made against him by the Crown Court on the grounds that bringing the prosecution amounted to an ‘unnecessary and improper act’ under section 19(1) of the Prosecution of Offences Act 1985. The High Court stated that private prosecutors should conduct an objective analysis of the evidence to determine whether there is a realistic prospect of conviction and failing to refer the matter to the authorities or to take legal advice may ‘give rise to an inference that a private prosecutor was determined to go ahead regardless of the prospects of success.’[[41]](#footnote-41) However, the only sanctions for failing to do this would be a costs order at the end of the trial process which does not necessarily prevent arbitrary decision-making from the outset.

Disclosure decisions

An issue that is fundamental to the need for an objective review of the evidence is disclosure. As part of their assessment of the case the prosecutor, whether public or private, has a duty to comply with both the statutory disclosure regime under the Criminal Procedure and Investigations Act 1996 and the common law duty of disclosure under *ex parte Lee.[[42]](#footnote-42)* The prosecutor is required under section 3 of the Act to disclose to the defence any unused material which ‘might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.’ The Post Office cases illustrate the particular risks associated with disclosure in private prosecutions. In *Hamilton* the Post Office failed to disclose to the defence the known problems with the Horizon computer system used by postmasters when the reliability of the computer system was central to the prosecutions. The court stated that the ‘pervasive failures of investigation and disclosure went in each to the very heart of the prosecution.’[[43]](#footnote-43) Although the Post Office had legal representation, this was by an in-house legal team which failed to properly discharge its disclosure obligations. This lack of independence (what the Justice Committee called ‘the lack of internal or external oversight’[[44]](#footnote-44)) has the potential to result in institutional blindness; this phenomenon could be accentuated further when the prosecution is brought without any legal representation. An in-house lawyer is part of the institution which is bringing the prosecution and their interpretation of the disclosure obligations could be coloured by their inculcation within the organisation’s culture in a similar way to an individual having an emotional attachment to ‘their’ case. This was described by the Court of Appeal in *Hamilton* as an ‘approach to investigation and disclosure [which] was influenced by what was in the interests of POL, rather than by what the law required.’[[45]](#footnote-45) This is a similar to the issue identified by the Philips Commission with the police having control over the decision to prosecute which formed part of the rationale for the creation of the CPS.

Disclosure is a complex and specialist area which clearly benefits from the expertise of a professional prosecutor; an in-house team may not have the detailed knowledge of the disclosure regime which could be gained from the experience of handling a range of criminal cases and specialist disclosure training provided to CPS lawyers.[[46]](#footnote-46) It is, of course, accepted that disclosure problems can still arise with public prosecutions such as in the Liam Allan case and so the risk cannot be completely eliminated.[[47]](#footnote-47) Although it is likely to be only a minority of private prosecutors which depend entirely on internal legal teams, there is no guarantee that legal representatives will conduct a review of the case equivalent to the Code for Crown Prosecutors. Although there are law firms that specialise in conducting private prosecutions in a way which is comparable to public prosecutions, these are clearly not instructed in all cases. For example, the Private Prosecutors Association (PPA) which has developed its own code of practice which seeks to ensure that rigorous legal and ethical standards are followed in private prosecutions conducted by its members.[[48]](#footnote-48) However, there is no requirement that such specialist legal advice and representation be obtained.

Therefore, there is a risk that private prosecutions are brought which lack a sound evidential basis. Although there are some safeguards in place to protect defendants, these are insufficient as they do not mandate an objective and independent assessment of the evidence. Although this may take place in some private prosecutions, there will be inconsistencies depending on the identity of the prosecutor, whether they have legal representation and the nature of that representation. The Horizon cases highlighted the risks associated with the lack of independent legal representation and inadequate disclosure of undermining unused material. In the next part, the discussion will be broadened out to consider the relationship between private prosecutions and the conceptual basis of the contemporary criminal justice system.

**PART THREE**

**The incompatibility between private prosecutions and the conceptual basis of the contemporary criminal justice system.**

Notwithstanding the historical background, the modern system of criminal prosecutions in England and Wales is now based on a contest between the State and the individual defendant.[[49]](#footnote-49) Prosecutions are brought by the State acting in the public interest as a sanction against the defendant for breaching the criminal law.[[50]](#footnote-50)

The public nature of prosecutions is also apparent from the established theoretical frameworks of the criminal justice system which have been developed by legal scholars; the vast majority focus on prosecutions brought by the State. A useful starting point is Herbert Packer’s crime control and due process models which, ‘represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process’ and can loosely be seen as a contest between the State prosecutor and the individual defendant.[[51]](#footnote-51) Private prosecutions fit awkwardly with the assembly line imagery of the crime control model which dominates the criminal justice system as the private prosecutor is more likely to be dealing with a single case than a high volume.[[52]](#footnote-52) As such, the private prosecutor’s focus is more likely to consist of a dogged determination to obtain a conviction than the efficiency concerns associated with crime control. The values of efficiency, speed and finality are not easily identifiable with private prosecutions. Crime control stresses the value of screening out weak cases, high guilty plea rates and effective plea bargaining.[[53]](#footnote-53) Individuals who bring a private prosecution are unlikely to be aware of, or be guided by, these values. This is, perhaps, because crime control operates at a more macro level: the focus is on the broader objective of crime reduction rather than the minutiae of individual cases. The crime control model also identifies the public prosecutor as the official who should control the decision to charge which a private prosecution undermines.[[54]](#footnote-54)

Furthermore, private prosecutions do not fit easily within the majority of the different criminal justice models which have evolved from Packer’s original paradigms as these are also generally based on public forms of justice system. These include Beloof’s ‘victim participation model’, Roach’s ‘punitive’ and ‘non-punitive’ models, and Sebba’s ‘adversary-retribution’ and ‘social defence-welfare’ models.[[55]](#footnote-55) Although Sebba’s adversary-retribution model does consider private prosecutions, they would be as part of a criminal justice system where the role of the State was minimised and the adversarial structure was between the victim and the defendant in the majority of cases.

Ashworth has argued that the purpose of criminal liability is ‘to declare public disapproval of the offender’s conduct’ and to ‘punish the offender by imposing a penal sanction.’[[56]](#footnote-56) This focus on the imposition of sanctions and punishment distinguishes criminal liability from civil liability which is primarily concerned with financial restitution for the harm caused to an individual. Ashworth describes this difference in terms of ‘offences against society as a whole rather than mere matters between individual citizens.’[[57]](#footnote-57) This distinction between public and private wrongs is not without controversy; conduct is criminalised on the basis of the public value in doing so that goes beyond the harm or potential harm to individuals.[[58]](#footnote-58) Ashworth argues that it should be ‘a fundamental role of the State to maintain a system for the administration of justice’ to ensure full procedural safeguards for defendants.[[59]](#footnote-59) This conceptualisation of the State providing the machinery of justice is based on the notion of a social contract in which citizens ‘agree to obey laws in return for protection of their vital interests.’[[60]](#footnote-60) These principles arguably underpin the concept of the public interest; the State prosecutes on behalf of citizens collectively including the individual victim of the offence.

Prosecution by the State is, therefore, about more than achieving redress for the individual victim; it is an official response to offending behaviour, or censuring, which includes a punitive element based on the principle of retributive justice.[[61]](#footnote-61) On this basis, Campbell et al have argued that, ‘the primary interests in the application of the criminal sanction… are those of the State and the suspect/defendant/offender.’[[62]](#footnote-62) This model prioritises culpability on the part of the offender and the application of a proportionate sanction based on the seriousness of the offending. It is important to note, however, that the traditional justice system based on culpability and proportionality is not universally accepted. The most prominent alternative models originate from the various incarnations of restorative justice. Christie, for example, proposes a ‘victim-oriented court’ which would incorporate additional stages to focus on the impact and needs of the victim and offer appropriate support to the offender separately from punishment.[[63]](#footnote-63) The institutional framework for a system based on restorative principles may not be based on State agencies bringing prosecutions against individuals and, as a result, a fundamental re-structuring of the criminal justice system would be required.

The contemporary criminal justice system is, however, clearly dominated by the traditional retributive model of which the concept of prosecution in the public interest is integral. Although historically prosecutions were brought by private citizens, the decision to prosecute has gradually been appropriated by the Crown purportedly acting in the public interest. From its inception, it was clear that the CPS would act in the ‘public interest’ and not on behalf of individual victims.[[64]](#footnote-64) This is reasserted by the Code for Crown Prosecutors which clearly states the public function of the service as ‘the principal public prosecution service for England and Wales’ and emphasising its independence from investigatory bodies and other persons and agencies.[[65]](#footnote-65) The distinction between the private interests of the victim and the assessment of the public interest is stressed by the requirement that prosecutors ‘take into account the views expressed by the victim about the impact that the offence has had’, but the Code also emphasises that ‘the CPS does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.’[[66]](#footnote-66)

Private prosecutions are, therefore, inconsistent with this conceptual basis of the modern criminal justice system on both a theoretical and operational level. There is little justification for permitting third parties, such as victims of crime and organisations which have suffered harm, to have such substantial procedural rights in the criminal justice system which is a contest between the State and the defendant. To do so could introduce inconsistency depending on the particular victim’s feelings towards the offender. Ashworth argues that the ‘victim’s interest is surely not greater than yours or mine’ but the ‘victim’s interest is as a citizen.’[[67]](#footnote-67) To increase victim involvement could result in too much weight being placed on the effect of the crime on the victim and less focus on the culpability of the offender; particularly, as some victims would be much more vengeful than others. Private prosecutions undermine the adversarial criminal prosecution by allowing the individual private prosecutor full party status without appropriate safeguards to ensure that prosecutions are only brought that are in the public interest and not purely in furtherance of individual interests.

As the power to bring a private prosecution allows the individual private prosecutor to make their own decision as to whether to prosecute this may result in a decision which is contrary to the public interest despite the power of the CPS to take the prosecution over and discontinue it. In *Jones v Whalley*, Lord Bingham questioned the continuing value of private prosecutions now that we have a public prosecution service and a system of law enforcement which is no longer dependent on prosecutions brought by private individuals: ‘It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted.’[[68]](#footnote-68) One of the key benefits of a public justice system is that they ‘turn hot vengeance into cool, impartial justice’ potentially avoiding the risk of ‘escalating feud and vendetta’ if victims were solely responsible for responding to criminal misconduct.[[69]](#footnote-69) In order for private prosecutions to be properly accommodated, the criminal justice system would need to undergo fundamental structural changes to adjust it from one based on State/defendant adversarialism to one which allows individual citizens full party status with the role of the State reduced to providing the process by which individual prosecutors would bring their cases.

It will be argued in the next part that the power to bring a private prosecution should be reformed as a result of the lack of adequate safeguards for defendant and their lack of compatibility with the modern criminal justice system.

**PART FOUR**

**Private Prosecutions and the case for Reform**

The Horizon Post Office cases have identified the potential for miscarriages of justice arising from private prosecutions on a scale previously unimaginable. These cases have brought private prosecutions into the public eye and have resulted in both an examination of the issues by the House of Commons Justice Committee and a public inquiry.[[70]](#footnote-70) Although proposing reforms of private prosecutions are beyond the remit of the inquiry, the systemic failures in these cases emphasise the need for reform. There are, therefore, three broad options: maintain the status quo, reform private prosecutions by introducing additional safeguards for defendants or abolish private prosecutions either partially or absolutely.

Maintaining the status quo

In the circumstances, the first option of maintaining the status quo is not defensible in view of the inadequacy of the current safeguards for defendants and clear lack of fit in the contemporary criminal justice system. As discussed in part two, many of the conventional protections for defendants are only available in the latter stages of the prosecution process after they would have endured potentially many months of anguish and uncertainty awaiting trial. As a result, defendants are having to rely on either the power of the CPS to take over the prosecution or the ‘gatekeeping’ function of the court as the means of contesting the decision to bring a private prosecution as the main protections available during the pre-trial stage. However, there are significant limitations to both of these safeguards. The magistrates’ court is clearly not going to be furnished with sufficient information to be in a position to conduct an in-depth review of the case when deciding whether to issue a summons. Furthermore, the inherent shortcoming of the right to request that the CPS review the prosecution is that defendants are not automatically informed of the right. In light of the scale of the miscarriage of justice caused by the Horizon case and the resulting public inquiry maintaining the status quo for private prosecutions is not justifiable.

Reform and regulate, or abolition

An alternative approach would be to reform private prosecutions by increasing the extent to which they are regulated. The Justice Committee received evidence on the protections for defendants to consider whether private prosecutions should be reformed. The committee recommended a package of measures to increase the regulation of private prosecutions to address what the report described as the ‘lack of internal or external oversight’ and the ‘regulatory gap’ in how private prosecutions are governed compared to public prosecutions. In addition to recommending a code of standards for private prosecutions and an inspection regime for organisations which regularly conduct private prosecutions, the Justice Committee’s report outlined three ‘simple measures that could enhance the effectiveness of the existing safeguards and procedures.’[[71]](#footnote-71) Firstly, the report recommended the implementation of a central register of private prosecutions. Secondly, this register would incorporate a notification procedure to ensure that the CPS are made aware of all private prosecutions. Thirdly, the Committee recommended that all defendants in private prosecutions should be made aware of their right to request a review of the private prosecution by the CPS.

Unfortunately, however, the Government rejected all but one of these recommendations. The Government latched on to a particular part of the report which stated that the existing safeguards are ‘effective at filtering out weak claims’ and that the ‘judicial process that applies to all prosecutions ensures that private prosecutions are rigorously tested.[[72]](#footnote-72) Essentially, the Government response was that it was not persuaded that introducing additional safeguards would be a proportionate response when the Justice Committee had concluded that the process was ‘rigorous.’[[73]](#footnote-73) Arguably, the wording in the report did not support the case for additional safeguards as effectively as it could have done; it was essentially saying that the procedures were sufficient, but then went on to suggest that additional safeguards could be introduced. As a result, therefore, the Government has only committed to the introduction of a central register of private prosecutions.

In their evidence to the Committee, the CPS was also resistant to the proposal of a mandatory notification procedure because of the ‘significant legal and administrative implications.’[[74]](#footnote-74) The Government response was supportive of the CPS position suggesting that such a procedure would generate an obligation on the CPS to ‘conduct an initial review, to make a proper assessment, and call for evidence from the prosecutor and the defendant’ resulting in ‘a significant burden on resources.’[[75]](#footnote-75) The Government’s unwillingness to accept the proposal that all defendants are put on notice of their right to request a CPS review of a private prosecution was particularly disappointing.[[76]](#footnote-76) In reality, this proposal would simply ensure that defendants are fully aware of the relevant law in order that they can make a fully informed decision as to whether to request a CPS review. This was opposed by the Government for the same reasons as the notification procedure. De Than and Elvin have also argued that the dual roles of being a victim and a prosecutor are problematic and that, in the absence of being abolished, private prosecutions should be reformed to have a pre-trial filtering mechanism, a statutory code and sanctions for inappropriate conduct of a private prosecution.[[77]](#footnote-77)

Although increased regulation of private prosecutions would mitigate the risk to defendants by introducing an element of oversight by the public prosecutor, it is submitted that this would not sufficiently address the objections to private prosecutions outlined in this paper. The Post Office cases have highlighted a clear regulatory gap. Whilst a miscarriage of justice on the scale of the Post Office cases is perhaps unlikely, there remains a risk that defendants could still be exposed to inappropriately brought prosecutions. The lack of an independent and structured decision-making process means that prosecutions may be brought without a firm evidential basis or application of established public interest criteria. Routinely informing defendants in private prosecutions of their right to have the case reviewed by the CPS and a system which notified the CPS of a private prosecution would not be an adequate substitute for a structured, objective decision-making process. The risk would remain that the initial decision to bring a private prosecution would be made by a private party who had a vested interest in the case.

The introduction of an element of oversight by the public prosecutor could, to some extent, improve the fit of private prosecutions within the criminal justice system on the basis that such cases would no longer exist *completely* outside the State/Defendant dichotomy of the criminal justice system. However, it seems unlikely that private prosecutions would be rigorously reviewed as a matter of course and that the level of oversight would more likely vary according to the identity of the private prosecutor. Although a light touch review of experienced private prosecutors, such as organisations which regularly bring such proceedings, might appear justifiable, the potential for a conflict of interest would still remain. Historically, the Post Office would have probably been considered to be a trustworthy and reliable prosecutor that did not need close oversight by the public prosecutor. However, these cases have clearly demonstrated that the power to bring a private prosecution can still be misused by an established organisational prosecutor.

The lack of support for increased regulation of the power to bring a private prosecution on the part of the Government or the CPS further supports the case for abolition. The unwillingness to introduce additional safeguards in this area essentially means abolition is the only alternative to maintaining a system which allows a private party to control a criminal sanction that it normally the preserve of the constitutionally appointed prosecutor. Abolition would inevitably be controversial in itself and attract a degree of resistance from those organisations which regularly bring private prosecutions. It could be argued that the power to bring a private prosecution should be only partially abolished, limiting prosecutions to be brought by established organisational prosecutors and regulators. However, the issue would remain as to how those organisations would be regulated more effectively in the absence of a commitment to increased safeguards. Essentially, partial abolition would need to be coupled with increased regulation of the reduced power to prosecute. A system of self-regulation, such as the code for private prosecutors introduced by the PPA, would be purely voluntary and could not be imposed on private prosecutors who did not wish to comply.

An argument against abolition might be that this would leave a gap in the enforcement of those criminal offences that are currently prosecuted privately. However, the decision to abolish should not be taken in isolation; the future enforcement of these offences would need to be factored into such reforms. This may mean that certain offences would need to be absorbed by the CPS. In the past, the CPS has extended its remit to take on Department of Work and Pensions prosecutions and there are protocols with other agencies in relation to areas such as work related to deaths to determine who will prosecute in particular cases.[[78]](#footnote-78) Arguably, therefore, it would not be impossible for the CPS to prosecute cases which have previously been brought by other organisations. Alternatively, once the volume of private prosecutions for particular types of offences has been established through the new central register of private prosecutions, it may be more appropriate to allocate statutory responsibility for enforcing them to an agency other than the CPS. There are a number of other agencies which have a prosecution function including the Financial Conduct Authority, Health and Safety Executive and the Serious Fraud Office.

Therefore, if maintaining the status quo is unacceptable, some degree of reform must be necessary. Although increased safeguards may reduce the risk of further miscarriages of justice, the more radical course of the abolition of private prosecutions is a more robust way of tackling the issues related to private prosecutions.

**Conclusions**

Clearly private prosecutions have provided a useful means of enforcing those criminal offences which are outside the expertise of the CPS as the public prosecutor. However, the benefits of retaining the power of private prosecution are significantly outweighed by the conflict between private prosecutions and the conceptual basis of the modern criminal justice system and the need to reduce the risks to defendants.

Essentially, these problems originate from the lack of independent in private prosecutions; private prosecutions have permitted a party with a vested interest enforce the criminal law. In that sense, private prosecutions have been used in a similar way to civil claims, they have been brought by the aggrieved party themselves. However, prosecutions are of a fundamentally different nature to civil claims in that the contemporary criminal justice system is firmly rooted in the adversarial contest between the State and the defendant. Although victims, and indeed other individual interests, are gradually being accommodated in the criminal justice system this should not enable individual or private interests to dominate, or control, criminal proceedings.

The established basis of criminal justice is the State commencing prosecutions as a sanction against individual defendants for breaching the criminal law. Private prosecutions potentially introduce an element of arbitrary and inconsistent decision making into the prosecution process by the lack of a structured process by which the evidence is objectively assessed. Although defendants should not be able to mandate when they should or should not be prosecuted, it is reasonable for them to expect to only be prosecuted when there is an evidentially sound case against them. The paucity of protections for defendants against capricious decision-making from private prosecutors, and the lack of a desire on the part of policy makers to increase safeguards for defendants strengthens the case for fundamental reform of the power to bring private prosecutions. The combined weight of these individual strands of conflict with the adversarial system and risk to defendants leads to the conclusion that private prosecutions should no longer be accommodated within the contemporary criminal justice system and should be abolished.

1. I would like to thank Dr Ian Edwards and the anonymous reviewers for their comments on previous drafts of this article. [↑](#footnote-ref-1)
2. *Hamilton v Post Office Ltd* [2021] EWCA Crim 577; see also Umar Azmeh, ‘*Hamilton v Post Office Ltd*’ [2021] Crim LR 684 (note); *Ambrose v Post Office Ltd* [2021] EWCA Crim 1443; *Allen v Post Office Ltd* [2021] EWCA Crim 1874; *White v Post Office Ltd* [2022] EWCA Crim 435. [↑](#footnote-ref-2)
3. Crown Prosecution Service, ‘Victims’ Right to Review – Policy and Guidance 2020’ (CPS 2021) [↑](#footnote-ref-3)
4. David Bentley, English Criminal Justice in the Nineteenth Century (The Hambledon Press 1998) 4-7 [↑](#footnote-ref-4)
5. Andrew Sanders, ‘Prosecution Systems’ in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP 2002) 149 [↑](#footnote-ref-5)
6. HMSO, Royal Commission on the Police: Final Report (Cmnd 1728, 1962) [380]-[381]; J Edwards, *The Law Officers of the Crown* (Sweet & Maxwell 1964) 336. Edwards states that in 1960 the Director only prosecuted in 525 of 1,044,833 cases in the magistrates’ courts and 1505 out of 30,591 cases in the Assizes and Quarter Sessions [↑](#footnote-ref-6)
7. HMSO, Report of the Royal Commission on Criminal Procedure (Cmnd 8092-I and II, 1981)ibid [7.4] [↑](#footnote-ref-7)
8. ibid [6.4]-[6.5] [↑](#footnote-ref-8)
9. ibid [8.8] [↑](#footnote-ref-9)
10. Prosecution of Offences Act 1985, s 3(2) [↑](#footnote-ref-10)
11. CPS, ‘Private Prosecutions’<www.cps.gov.uk/legal-guidance/private-prosecutions> accessed 24 October 2022; CPS, ‘Code for Crown Prosecutors’ (CPS October 2018) [↑](#footnote-ref-11)
12. [2012] UKSC 52, [2013] 1 AC 484 [↑](#footnote-ref-12)
13. Examples could include the Health & Safety Executive, the Environment Agency and local authorities. [↑](#footnote-ref-13)
14. CPS, ‘Relations with other prosecuting agencies’ <www.cps.gov.uk/legal-guidance/relations-other-prosecuting-agencies> accessed 24 October 2022. [↑](#footnote-ref-14)
15. Stephen Wooler, ‘The Independent Review of the Prosecution Activity of the Royal Society for the Prevention of Cruelty to Animals’ (September 2014) [↑](#footnote-ref-15)
16. Chris Lewis and others, ‘Evaluating the Case for Greater Use of Private Prosecutions in England and Wales for Fraud Offences’ (2014) 42 IJLCJ 3; Matt Bosworth, ‘Time to Adopt a Private Prosecution Policy? Private Prosecutions Are Taking off as a Useful Way to Protect Your Brand & Products’ [2018] NLJ 14; Rupert Wheeler, ‘Private Prosecutions in Financial Crime: A Novel Solution?’ (2019) 34 JIBFL 56; Gwilym Harbottle, ‘Private Prosecutions in Copyright Cases: Should They Be Stopped’ [1998] E.I.P.R. 317. [↑](#footnote-ref-16)
17. House of Commons Justice Committee, ‘Written evidence from FACT, Sky UK Limited, The Football Association Premier League Limited’ (PPS0016), ‘Written evidence from Kingsley Napley’ (PPS0011) and ‘Written evidence from the Private Prosecutors’ Association’ (PPS0021). [↑](#footnote-ref-17)
18. House of Commons Justice Committee, Written Evidence from FACT, Sky UK Limited, The Football Association Premier League Limited (PPS016) [4] [↑](#footnote-ref-18)
19. House of Commons Justice Committee, ‘Written evidence from Edmonds Marshall McMahon’ (PPS0009) [↑](#footnote-ref-19)
20. House of Commons Justice Committee, ‘Private Prosecutions: Safeguards’ (9th Report of Session 2019-21 HC 497) [29] [↑](#footnote-ref-20)
21. CPS, *Victims’ Right to Review – Policy and Guidance*’ (n 3) [↑](#footnote-ref-21)
22. Metropolitan Police, ‘Victims’ Right to Review Scheme’ < www.met.police.uk/advice/advice-and-information/victim-support/victims-right-review-scheme> accessed 27 February 2023 [↑](#footnote-ref-22)
23. CPS, *Private Prosecutions* (n 11) [↑](#footnote-ref-23)
24. For a discussion of abuse of process, see: Jonathan Rogers, ‘The Boundaries of Abuse of Process in Criminal Trials’ [2008] CLP 289 and Peter Hungerford-Welch, ‘Abuse of Process: Does it really protect the Suspect’s Rights?’ [2017] Crim LR 3. [↑](#footnote-ref-24)
25. Police and Criminal Evidence Act 1984, s 78 [↑](#footnote-ref-25)
26. *R v Galbraith* [1981] 1 WLR 1039 [↑](#footnote-ref-26)
27. Crime and Disorder Act 1998, sch 3 (2) [↑](#footnote-ref-27)
28. CPS, *Private Prosecutions* (n 11) [↑](#footnote-ref-28)
29. [2006] EWHC 2318 (Admin), [2006] 1 WLR 3494 [↑](#footnote-ref-29)
30. ibid 3500. [↑](#footnote-ref-30)
31. *R v (Belmarsh Magistrates’ Court) ex p Watts* [1999] 2 Cr App R 188 and *West London Metropolitan Stipendiary Magistrate ex p Klahn* [1979] 1 WLR 933. [↑](#footnote-ref-31)
32. *R (DPP) v Sunderland Magistrates’ Court* [2014] EWHC 613 (Admin) [↑](#footnote-ref-32)
33. CPS, *The Code for Crown Prosecutors* (n 11) [↑](#footnote-ref-33)
34. CPS, ‘Prosecution Guidance’ <www.cps.gov.uk/prosecution-guidance> accessed 27 February 2023 [↑](#footnote-ref-34)
35. CPS, ‘Victims’ Right to Review Data’ <www.cps.gov.uk/publication/victims-right-review-data> accessed 24 October 2022. [↑](#footnote-ref-35)
36. *Gujra* (n 12) 504-505 [↑](#footnote-ref-36)
37. ibid505 [↑](#footnote-ref-37)
38. Claire de Than and Jesse Elvin, ‘Private Prosecution: A Useful Constitutional Safeguard or Potentially Dangerous Historical Anomaly?’ [2019] Crim LR 656, 667. [↑](#footnote-ref-38)
39. SRA, SRA Principles, <www.sra.org.uk/solicitors/standards-regulations/principles/> Accessed 11 August 2022; Bar Standards Board, Code of Conduct, Part 2 – B. The Core Duties, <www.barstandardsboard.org.uk/the-bsb-handbook.html?part=E3FF76D3-9538-4B97-94C02111664E5709&audience=&q=> Accessed 11 August 2022. [↑](#footnote-ref-39)
40. *R (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin) [↑](#footnote-ref-40)
41. ibid [20] [↑](#footnote-ref-41)
42. *R v DPP ex parte Lee* [1999] 2 All ER 737 [↑](#footnote-ref-42)
43. *Hamilton* (n 2) [123] [↑](#footnote-ref-43)
44. House of Commons Justice Committee, *Private Prosecutions: Safeguard*’ (n 20) [56] [↑](#footnote-ref-44)
45. *Hamilton* (n 2) [129] [↑](#footnote-ref-45)
46. CPS, ‘National Disclosure Improvement Plan’ (CPS, January 2018) [↑](#footnote-ref-46)
47. Tom Smith, ‘The “near miss” of Liam Allan: critical problems in police disclosure, investigation culture and the resourcing of criminal justice’ [2018] Crim LR 711 [↑](#footnote-ref-47)
48. Private Prosecutors’ Association, ‘Code for Private Prosecutors’ (2019) Available at: <www.private-prosecutions.com/ppa-code-foreword/> accessed 9 July 2021 [↑](#footnote-ref-48)
49. John Spencer, ‘The Victim and the Prosecutor’ in Anthony E Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge 2012) 141. [↑](#footnote-ref-49)
50. The concept of the public interest is not solely associated with the common law tradition and is firmly rooted in both adversarial and inquisitorial criminal trial systems. See: John Spencer, ‘Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?’ (2016) 20 IJHR 601, 608. [↑](#footnote-ref-50)
51. Herbert Packer, *The Limits of the Criminal Sanction* (University Press 1989) 153. [↑](#footnote-ref-51)
52. ibid [↑](#footnote-ref-52)
53. ibid 160–161. [↑](#footnote-ref-53)
54. ibid 206–207. [↑](#footnote-ref-54)
55. Douglas Evan Beloof, ‘The Third Model of Criminal Process: The Victim Participation Model’ [1999] Utah Law Review 289; Kent Road, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice’* (University of Toronto Press 1999); Leslie Sebba, ‘The Victim’s Role in the Penal Process: A Theoretical Orientation’ (1982) 30 American Journal of Comparative Law 217. [↑](#footnote-ref-55)
56. Andrew Ashworth, ‘Punishment and Compensation: Victims, Offenders and the State’ (1986) 6 OJLS 86, 89. [↑](#footnote-ref-56)
57. ibid 89–90. [↑](#footnote-ref-57)
58. See John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence. Fourth Series* (Oxford University Press 2000). [↑](#footnote-ref-58)
59. Andrew Ashworth, ‘Rights, Responsibilities and Restorative Justice’ [2002] Crim LR 578, 591. [↑](#footnote-ref-59)
60. ibid 579. [↑](#footnote-ref-60)
61. Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005) 17–21. [↑](#footnote-ref-61)
62. Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edition, Oxford University Press 2019) 50–51. [↑](#footnote-ref-62)
63. Nils Christie, ‘Conflicts as Property’ (1977) 17 Brit J Criminol 1, 10–11. [↑](#footnote-ref-63)
64. Prosecution of Offences Act 1985, s 1 [↑](#footnote-ref-64)
65. CPS, *The Code for Crown Prosecutors* (n 11) [1.2] and [2.1] [↑](#footnote-ref-65)
66. ibid [4.14] [↑](#footnote-ref-66)
67. Ashworth (n 59) 585. [↑](#footnote-ref-67)
68. *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63, 73 [↑](#footnote-ref-68)
69. Neil MacCormick and David Garland, ‘Sovereign States and Vengeful Victims: The Problem of the Right to Punish’ in Andrew Ashworth and Martin Wasik (eds*), Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press 2004) 26–27. [↑](#footnote-ref-69)
70. Post Office Horizon IT Inquiry, <www.postofficehorizoninquiry.org.uk> accessed 27 February 2023 [↑](#footnote-ref-70)
71. *House of Commons Justice Committee* (n 20) 3 [↑](#footnote-ref-71)
72. ibid [↑](#footnote-ref-72)
73. House of Commons Justice Committee, *Private Prosecutions: Safeguards: Government response to the Committee’s Ninth Report* (HC 2019-21, 1238) [↑](#footnote-ref-73)
74. Crown Prosecution Service, ‘Written Evidence to the Justice Committee’ (PPS0044) (16 September 2020) [Conclusions] [↑](#footnote-ref-74)
75. House of Commons Justice Committee, *Government Response* (n 73) 6 [↑](#footnote-ref-75)
76. ibid [↑](#footnote-ref-76)
77. de Than and Elvin (n 38) [↑](#footnote-ref-77)
78. CPS, ‘Prosecuting Welfare and Health Fraud Cases’ <www.cps.gov.uk/legal-guidance/prosecuting-welfare-and-health-fraud-cases> accessed 27 February 2023 [↑](#footnote-ref-78)