

Private prosecutions



AN INTRODUCTION TO UK LEGISLATION | JULY 2020 | SECOND EDITION

It is a common misconception that only the Crown, government agencies and other public bodies can bring prosecutions. In England and Wales, a private prosecution can be brought by any private individual or body – including the victims of fraud.

WHAT IS A PRIVATE PROSECUTION?

A private prosecution is a criminal prosecution started by a private individual or body, who is not acting on behalf of the police or any other statutory prosecuting authority or body that conducts prosecutions.

WHO CAN BRING A PRIVATE PROSECUTION?

A private prosecution can be brought by any private individual or body.

Private prosecutions have increased in recent years and are now regularly brought by individuals and organisations (including SMEs, insurance companies, global brands and large corporates) who have fallen victim to fraud.

The right to bring a private prosecution is set out in s6(1) of the **Prosecution of Offences Act 1985**. Fraud offences (unlike some other offences) do not require the prior permission of the Attorney General, the Director of Public Prosecutions, or the Director of the Serious Fraud Office to commence.

WHY BRING A PRIVATE PROSECUTION?

Crimes which do not pose an immediate safety risk to the public are often seen as a lesser priority by the authorities, in particular economic crime. The budgetary constraints on enforcement agencies have also led to a deficit of expertise to investigate and/or prosecute fraud. Victims may often see their cases being referenced by law enforcement as 'civil issues' despite overwhelming evidence of crime.

It is for this reason that many individuals and organisations turn to private prosecutions to obtain justice and to tackle economic crime such as counterfeiting or fraud.

A successful private prosecution can result in a criminal conviction and custodial sentence for the offender,

and compensation being awarded to the victim. It can also act as a powerful deterrent to those considering engaging in criminal activity against the victim.

KEY CONSIDERATIONS

There are a number of potential risks associated with private prosecutions that need to be considered at the outset. These include the following.

- The potential financial costs associated with bringing a private prosecution.
- The Crown Prosecution Service may take over a private prosecution and either continue or discontinue it. The factors considered during the decision-making process are outlined in **CPS legal guidance**.
- A defendant may institute a civil claim for malicious prosecution if the private prosecution should not have been brought, for example if it is alleged the evidence was fabricated or the prosecution was brought with malice.
- If the prosecution fails, in certain circumstances – such as where there has been an unnecessary act or omission – an adverse order for costs may be made against the private prosecutor.

As with public prosecutions, a prosecution may fail for a number of reasons, including the defendant being found not guilty, the court ruling that there is no case to answer (or insufficient evidence), or it may be stayed as an **abuse of process**.¹

COSTS

Anyone bringing a private prosecution must be prepared to fund the investigation and prosecution.

A private prosecution is subject to the same obligations and rules as a public prosecution. This means that a private prosecutor has a duty to pursue reasonable lines of enquiry and obtain, retain and disclose relevant material.

An order may be made for payment out of central (government) funds to compensate the prosecutor for expenses properly incurred in the proceedings, but no such order will be made if the prosecution is instigated or continued without good cause. If a defendant is convicted, an order for costs can also be made against the defendant.

Legal aid is not available for private prosecutions.

HOW TO BRING A PRIVATE PROSECUTION

Anyone contemplating a private prosecution should seek professional legal advice from a specialist solicitor or barrister.

Step 1: investigate the fraud and gather evidence

Be mindful of disclosure duties at the outset. Ensure that all material gathered in the course of the investigation that may be relevant to the case is recorded and retained.

Consideration should be given to using experienced investigators to gather evidence, applying the same codes of practice that apply to law enforcement. If relevant material is held by the police it may be possible – once the case is in court – to obtain a witness summons to secure the production of the relevant material from them.

Step 2: assess the evidence and draft charges

The private prosecutor should consider whether the case meets the full code test in the **Code for Crown Prosecutors** and draft the charges (where appropriate). In order to meet the test, there must be sufficient evidence to provide a realistic prospect of conviction and be in the public interest to pursue the prosecution. If the test is not met, the likelihood is that the CPS will take over the prosecution and discontinue it.²

Step 3: charges are laid before the court

Once draft charges have been decided, an 'information' will be laid before the Magistrates' Court. The information provides details of the alleged offence and the relevant legislation that creates it.

The Magistrates' Court will then decide whether to issue a summons or warrant. A summons, which is served on the accused details the offence(s) to be answered and the date, time and address of the court that the defendant is required to attend.³

Step 4: case is heard in court

Depending on the nature of the charge(s), the case may be tried before the Magistrates' or Crown Court.

NOTIFYING THE POLICE AND CPS

There is no requirement to notify the police before bringing a private prosecution; however, failure to do so may have an impact on cost recovery at a later stage. It may also be relevant to the Magistrates' Court's considerations when considering an application for a summons.

There is also no requirement to notify the CPS, but they may be notified at any stage by the defendant or a third party and may decide to intervene and either continue or discontinue the proceedings themselves.

FINANCIAL PENALTIES AND COMPENSATION

The Magistrates' and Crown Courts can order a convicted fraudster to pay compensation to the victim for personal injury, loss or damage resulting from the crime. 'Loss' may include a sum by way of interest. An award may be made whenever it can fairly be said that a particular loss results from the offence. Evidence is required to show what that loss is.

The power of the court to make a compensation order is governed by ss130-134 of the **Powers of Criminal Courts (Sentencing) Act 2000**.

The Crown Court can also make a confiscation order to deprive the defendant of the financial benefit they have gained from their criminal conduct. To do this, the court has to decide whether the defendant has a criminal lifestyle, or failing that has obtained a benefit from particular criminal conduct. Confiscation orders act as very powerful deterrents to criminals as, more often than not, they are more concerned about holding onto their assets than serving a custodial sentence.

It is possible to ask the Crown Court to make both a confiscation and a compensation order. In these cases, the victim is compensated out of the confiscation receipts.

FURTHER INFORMATION

The Bar Council to **find a barrister**.

The Law Society to **find a solicitor**.

Private Prosecutor's Association for the voluntary **code for private prosecutors**.

Also see the **resources** section of our website.

Notes

¹ The CPS legal guidance on abuse of process states that a case may be stopped if there is 'something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed'.

² *R (on the application of Gujra) v Crown Prosecution Service* [2013] 1 All ER 612.

³ Section 1, Magistrates' Court Act 1980. Also see Part 7 Criminal Procedure Rules.

This helpsheet was kindly reviewed and updated by Tamlyn Edmonds at Edmonds, Marshall, McMahon.

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