

Rationalisation and reform of private prosecutions

Introduction

Reasons for project:

- Concern at CPS underfunding combined with increased resort to private prosecutions
- Concern that not all private prosecutors are suited to acting in the interests of justice
- Outdated legal apparatus. No statutory rules regulating the investigations by would-be private prosecutors, nor the conduct of private prosecutions: oddity that the investigation must have been by the police where confiscation or restraint order sought.
- Case law somewhat divided by opposing views on potential utility of private prosecutions.
- Policy decisions aimed at limiting private prosecutions, sometimes taken without open consultation and of some controversy

History and present position of private prosecutions in England and Wales

1 Early days

- First Director of Public Prosecutions in 1879
- First half of twentieth century: politics and prosecutorial decisions
- Police as “private prosecutors”
- Farquharson guidelines

2 Advent of the Crown Prosecution Service in 1986

- Different proposals for private prosecution in Philips Commission
- Prosecution of Offences Act 1985
- Development of Whitehall Prosecutors Group and the “Phillips principle” of separation between investigation and prosecution
- Delegated powers: “default” position of private prosecution: *Rollins* 2010 UKSC 39

3 Involvement of charities and large companies

- Restrictions on charities as private prosecutors
- When charitable purposes may include prosecution

- Role of Charities Commission
- Restrictions on incorporated bodies as private prosecutors
- Whether name of individual representing company or charity must appear on indictment

4 Summary of present legal position

- Few investigative powers for would-be private prosecutors
- Practical necessity for state assistance in investigation where restraint order and/or confiscation order sought, and for assistance where extradition sought
- Seeking a summons: No need to demonstrate perceived public interest
- Disclosure obligations and relevance of CPIA Code 2015
- Possibility of CPS takeover; the 2009 policy
- Abuse of process applications
- Instruction of counsel at trial
- Application of costs regime to private prosecutors and defendants

The primary question

5 Should private prosecutions remain at all possible?

Reasons to wish to preserve the liberty:

- Upholding rights of victims, possibility of effective confiscation proceedings, and promoting deterrent effect of criminal law, where public prosecution system, policies or practice are seen to be ineffective or do not command public confidence, eg
 - a) serious fraud/cybercrime
 - b) copyright infringement
 - c) animal welfare
 - d) shoplifting or train fare evasion
 - e) driving offences
- valuable fall-back possibility where powers of special public prosecuting bodies are poorly drafted

Concerns about the liberty

- Inconsistency with existence of public prosecuting body
- Possibility of unduly automatic enforcement of the law by large (private) organisations
- Conflicts or interference with civil proceedings

- Possible disproportionate expenditure which may put D at improper disadvantage

Conclusions and Specific areas for potential reform

6 Investigative powers

- Definition of “criminal investigation” for statutory purposes: joint agreements and joint investigations
- Legality of offering incentives to the police
- *Scopelight and others v CC Northumbria* [2009] EWCA Civ 1156 and police powers of retention for benefit of private prosecutor
- Lack of internal police policy on sharing evidence: cf. *R v Zinga* [2012] EWCA Crim 2357
- Contrast with police approach to giving evidence for civil proceedings
- Contrast with discovery orders in civil proceedings

Outline of reform possibilities

7 CPS policy

- The former “far below Code tests” policy: *Duckenfeld* decision
- The “volte face” and decision in *R (on the application of Gujra) v CPS* [2012] UKSC 52
- Unclear points in 2009 policy
- Application of Victims Right to Review
- Possible need for state intervention where both confiscation and compensation order sought
- Experience with the 2009 policy
- Reasons for and against the updated policy

Outline of reform possibilities

8 Costs regime

- Non- availability of legal aid
- Practical need for counsel at trial: applicability of Legal Services Act 2007
- Post-trial: reimbursement of prosecutor’s costs: from central funds
- Post trial: reimbursement of prosecutor’s costs: from convicted defendants

- Possible incentive for private prosecutors to prefer trial on indictment
- Priorities where confiscation and/or compensation orders sought
- Limited rights of recovery for acquitted defendant: equality of arms

Outline of reform possibilities

9 Legal and ethical responsibilities of private prosecutors

- Arguable need for legal representation
- Implications of independence of counsel and legal team for client-lawyer relationship
- Disclosure of evidence and litigation privilege
- Conflicts with concurrent civil proceedings and possibility of client hiring different legal teams
- Practicality of internal regulation

Outline of reform possibilities

Conclusions

10 Summary of proposed reforms and methods of implementation

- Should private prosecutions remain at all possible? If so:
- What investigatory powers or arrangements should be available to private prosecutors?
- What should be the CPS policy on overtaking or otherwise participating in private prosecutions?
- What reforms may be needed to the costs regime as it applies to private prosecutors?
- What new obligations might private prosecutors properly assume?
- Miscellaneous and consequential reforms.