Justice Committee Inquiry into Private Prosecutions: Response of the Criminal Law Reform Now Network (CLRNN)

Section 1. Introduction

1. We are pleased to submit written evidence to the Justice Committee concerning private prosecutions by large organisations, following the recent referral by the Criminal Cases Review Commission of convictions of several postmasters who were prosecuted by Post Office Ltd.

2. We are an independent research network comprising academics and practitioners with the purpose to initiate law reform proposals in areas where reform is needed and where there is no equivalent interest in government or from the Law Commission. Our co-directors are Dr John Child (University of Birmingham) and Dr Jonathan Rogers (University of Cambridge). We set up in 2017 and have received Arts and Humanities Research Council funding for activities between the years 2018/2021, during which we have completed our first project on computer misuse, launched at the House of Commons on 22 January 2020. We started our present project on private prosecutions with a symposium held at University College London in April 2018, and we expect to complete it in 2021. Further details of our network and our areas of interests concerning private prosecutions are available at www.clrnn.co.uk.

3. We have drawn upon some of our preliminary research in writing this response; however, our own proposals will only be finalised in our report due in 2021. Our research goes beyond the risks of miscarriages of justice and the role played by larger prosecutors, but we focus on these aspects in this submission. We will address the Committee's lines of inquiry, except that we do not consider that much can be gained from comparing practice with other countries, many or even most of which do not permit private prosecutions at all. We will leave until last the Committee's third line of inquiry, namely

> Alternative legislative, legal and administrative safeguards that could be used to regulate the way in which large organisations use the right to bring private prosecutions

This is because our suggestions here will follow from our observations concerning the existing safeguards and the key role played by the Crown Prosecution Service (CPS) in deciding whether to take over and discontinue a prosecution started by another organisation.

4. **<u>In summary our proposals (paras 48-57) are that</u>**

   i. Where proceedings have followed police arrest and charge, the police should notify the CPS of the institution of those proceedings, and inform the suspect when charged that he or she may ask the CPS to discontinue the prosecution

   ii. More information should be supplied by the would-be prosecutor to the CPS when the latter considers whether to take over and discontinue a private prosecution

   iii. Costs payable by convicted defendants to private prosecutors should be capped. Courts should be mandated to award no more than that which, in its opinion, would have been awarded had the CPS undertaken the work and sought an award for costs.

5. It will be noted that in principle these reforms could apply in respect of organisations of all sizes, and thus there will be no need to seek to define "large" organisations for these purposes. However, the reforms would, we believe, be especially effective to prevent malpractice and risks of miscarriages of justice arising from prosecutions by larger organisations.

Section 2. Preliminary observations

6. We understand that the ability to bring private prosecutions at all is not presently in question. Indeed, some private organisations have specialist knowledge concerning some offences and may be better equipped either or both to investigate and prosecute them. Their ability to apply for confiscation orders has occasionally led to vast windfalls for the Treasury after large frauds have been successfully prosecuted, as recognised on at least one occasion by the Court of Appeal when endorsing the assistance leant by police in using some of their powers to seize and retain evidence to a company which intended to prosecute privately: see *Scopelight & Others v Chief Constable of Northumbria* [2009] EWCA Civ 1156. We should add that the prospect of the prosecutor benefiting from a confiscation order is an improper consideration which may lead to a successful abuse of process application from the defendant: *R v Nightland Foundation* [2018] EWCA Crim 1860.

7. We should note further that the term "private prosecutions" is more than a little misleading, because it seems to imply that there is a category of "public" prosecutors, (hopefully) satisfactorily regulated, as opposed to a quite unregulated "private" sector. In fact, there are no such categories in law. The words "public prosecutor" and "private prosecutor" do not appear anywhere in statute; nor, so far as we can see, does the term "prosecuting authority". Some organisations are public bodies who (among other things) do prosecute but it can be unhelpful to speak of them as "public prosecutors" if we would then refer to them as "private prosecutors" when they are privatised. This is because their powers, level of

accountability and working practices need not have changed at all. This may well have been the case with Post Office Ltd.

8. The starting point is that anyone may start a prosecution by applying for a summons to be issued against the defendant at the magistrates' court. Occasionally, the general right to prosecute for a certain offence is excluded by statute by what is called a "consent provision", by which the consent of a Law Officer (or, indeed usually, the DPP) is required for a prosecution even to be instituted. But this need for statutory intervention simply illustrates what is otherwise the general rule, that anyone may prosecute for anything, and that it is not necessary for a statute to "confer" a power on anyone *to* prosecute. Where a statutory provision appears at first sight to have this effect of conferral, its true purpose is to ensure that a company or public body will be acting within its stated objects and terms if it does undertake prosecutions for specified offences. Whilst everything depends on the drafting of the legislation in question, it is quite possible for a court to decide that a body which is apparently given a power to prosecute for specified offences is nonetheless at liberty to prosecute for further offences (see the Supreme Court decision in *R v Rollins* [2010] UKSC 39). Indeed, if the further offence is not limited by a "consent provision", one would otherwise have the odd position that everyone else *except* the company in question would have the power to prosecute for that other offence.

9. Instead of a parallel set of "public" and "private" prosecutors, there are several different bodies, ranging from the CPS to ordinary individuals, who are able to start prosecutions. There is a body known as the Whitehall Group of Prosecutors, but membership of this group denotes no privileges in law. Rather, it is a set of agencies which perform a variety of public functions and occasionally use prosecution to further them, and they aim to promote best practice between themselves. To similar effect is the Prosecutors' Convention of 2009. However, statute only provides for an inspectorate for the largest prosecuting agency, the CPS. There is seemingly no power for the Attorney General (AG) to order the inspection of any other agency which conducts prosecutions.

10. It is more useful to speak of the CPS (the Director of whom has the power to take over almost any prosecution: Prosecution of Offences Act 1985, s.6(2)) and those with whom it has de facto working relationships or who are overseen by other public authorities in respect of their "regular" functions. These other bodies need not be creatures of statute. The CPS may even assign an offence which the police have investigated to another body with a relevant interest, which need not be a statutory body: Prosecution of Offences Act 1985, s.5. In its document on "Relationships with other Prosecutors", the CPS means to include both statutory and non-statutory bodies when it says

> Prosecutions are regularly brought by other prosecuting agencies where the body concerned has a particular expertise or statutory interest. In general, the CPS will neither wish nor need to intervene in such cases.

and later

> Where the CPS is asked by an outside agency to institute or take over proceedings in the absence of a related police prosecution, only in wholly exceptional cases

would the CPS exercise its authority to take over proceedings under Section 6(2) of the Prosecution of Offences Act 1985 against the wishes of the prosecuting agency.

The decision to take over proceedings should always be taken at Chief Crown Prosecutor or CCD Head level and the CPS should only accede to such a request if satisfied that there are particular difficulties or other significant public interest considerations that merit involvement. The following factors are a guide only:

1. the proceedings have been brought in blatant disregard of the Code for Crown Prosecutors;

2. there is an unsatisfactory reason for the withdrawal of proceedings or a failure to proceed.

11. So, when an organisation which has prosecuted is later thought to have acted inappropriately, the first question should not be whether it was a "private" prosecutor, but rather whether it was likely to be recognised within the CPS as a body with "particular expertise or statutory interest". If it appears that it was, then additional questions of oversight and accountability arise. It may follow that the CPS should need to explain any such *de facto* favoured status, which would have made it is especially unwilling to intervene; or that the DPP or AG should have powers to inspect and regulate such agencies.

12. We anticipate that some may call for a system of accreditation, whereby groups which prosecute a certain category or volume of cases must apply for accreditation by the DPP (or AG), which may involve periodic inspection, else be disbarred from undertaking prosecutions. We are wary however of arguments over the definition as to which groups would qualify for such regulation, and we are especially concerned about lengthy and distracting legal arguments in court as to whether the prosecutor had power to bring a case, depending on whether it was required under law to be accredited. Our preference would be for thought be given at political level to a more comprehensive system of powers of inspection and powers to act on recommendation for change within organisations. We do not make concrete suggestions for such regulation now, but they would seem to be the most single important matter to arise from recent events.

13. In the rest of our submission, we concentrate on other measures which will help to detect or pre-empt malpractice in any large organisation before they result in miscarriages of justice, including bodies with no public functions at all.

Section 3. The way(s) in which large organisations conduct private prosecutions

14. We do not offer a generic answer to this question, nor do we think that one is available. Some organisations may try to mimic the tests for Crown prosecutions in anticipation of the possibility that a potential defendant will ask the CPS to intervene and discontinue proceedings, but they may still "guess wrongly" what the CPS would consider appropriate.

Others will not consciously apply these tests in every case and/or may take a more calculated approach as to whether a potential defendant will in fact alert the CPS to the proceedings, or may reason (if they have a working relationship already with the CPS) that the CPS would be reluctant to discontinue "their" prosecution.

15. Different practices may also arise depending on whether the company is acting on behalf of identified victims (possibly themselves, in the case of large departments stores, though in the advent of civil recovery schemes, it appears that private prosecutions are less often resorted to than used to be the case) or acting in some other interest (e.g. animal welfare or anti-corruption). Large organisations may vary too in the size of their legal teams, and the extent to which they are used largely for advice and litigation in civil matters. If there is nonetheless an expectation that the same legal team which normally attends to other matters should also undertake prosecutions on behalf of the organisation, then inexperience with the differing rules on disclosure is a likely cause for concern. But it is altogether too difficult to say how large a problem this might be.

Section 4. The effectiveness of existing safeguards that regulate private prosecutions

16. As the Committee will know, the legal mechanisms are many and various. The following four are most applicable to large organisations: (A) the magistrates may refuse to issue a summons, (B) the prosecution may be discontinued by the CPS, (C) the prosecution may be stayed by the judge as an abuse of process, and (D) a costs order may be made against a prosecutor who has conduct the prosecution improperly.

A. The magistrates may refuse to issue a summons

17. It is noteworthy that the role of the magistrate has recently been expanded beyond the bare minimum which is considered in relation to "police/CPS prosecutions", such as whether the offence requires leave to be prosecuted and is within time. By virtue of Rule 7.2 of the Criminal Procedure Rules (as amended April 2020), other prosecutors must also

> concisely outline the grounds for asserting that the defendant has committed the alleged offence or offences;
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> disclose—(i) details of any previous such application by the same applicant in respect of any allegation now made, and (ii) details of any current or previous proceedings brought by another prosecutor in respect of any allegation now made; and
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> include a statement that to the best of the applicant's knowledge, information and belief—(i) the allegations contained in the application are substantially true, (ii) the evidence on which the applicant relies will be available at the trial, (iii) the details given by the applicant under paragraph (6)(b) are true, and (iv) the application discloses all the information that is material to what the court must decide.

18. These provisions aim to preclude prosecutions where the legal basis has not been thought through or is very contentious, and/or where there are grounds to suppose that the prosecutor is engaging on a wider legal campaign against the defendant. It is also clear that magistrates may inquire into the motives of the prosecutor. But nothing at common law, nor in in the Magistrates' Courts Act 1980 or Criminal Procedure Rules permits the magistrates to examine the evidence nor to make directions about appropriate disclosure of evidence (which would be regarded as "trial matters").

19. We note that prosecutors only have to offer details of other proceedings against the same defendant and not of its other prosecutorial practices. Nonetheless, whilst in principle it would be desirable to know about the latter, we hesitate to recommend any reform here: the resources of magistrates to scrutinise applications are limited and it is better to impose the duty of a much higher level of scrutiny on the CPS when considering whether to take over any prosecution.

20. Besides, it appears to be possible to evade even the limited scrutiny of examining magistrates. An organisation might instigate an investigation by itself but call upon police assistance to make an arrest (to enable questioning) or to exercise their powers to enter premises and search for evidence. In this situation, the police may initiate proceedings by charging the defendant (in which case the magistrate would instead primarily be concerned with questions concerning bail) but the case may still be prosecuted by the organisation. The duty of the CPS to prosecute (and for the police to send the file to them) is limited to cases where the investigation was "instituted on behalf of a police force" (Prosecution of Offences Act 1985, s.3(2)). The guidance of the CPS (under "Relationships with other Prosecuting Agencies", para. 10 above) states

> Proceedings are instituted by the police only when they have investigated, arrested and brought the arrested person to the custody officer. A case is not instituted by the police simply because a custody officer at a police station charges the suspect (see *R. v Stafford Justices ex parte Customs and Excise Commissioners* (1991) 2 All ER 201 and Archbold Criminal Pleading Evidence and Practice 2019 Ed, paragraph 1-405).
>
> Conversely, proceedings are instituted by another prosecuting agency when they have been solely responsible for the investigation and arrest of the suspect, even though he or she is taken to the police station to be charged by a custody officer.
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> The case should probably be conducted by another prosecuting authority if any of the following factors apply:
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> • the police did not conduct the majority of the investigation;
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> • the police were only involved in overseeing a search, effecting an arrest or assisting other investigators in the conduct of an interview;
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> • the other authority is in possession of all the main exhibits;
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> • someone other than a police officer is named on the charge sheet as the person accepting the charge or as the officer in the case.

21. Not only does the making of a charge potentially evade the scrutiny of examining magistrates when issuing summons, we should also think that the involvement of the police leads many defendants to imagine that they are being prosecuted by the CPS. This means that they might not even think of asking the DPP to take over and discontinue the case, or at least not until much later in the process when evidence is disclosed. This leads us to the next safeguard:

B. The prosecution may be discontinued by the DPP

22. A defendant prosecuted other than by the CPS may ask the DPP to take over the prosecution, with a view to continuing proceedings itself or (as the defendant wishes) to terminate it. The DPP retains the power under section 6 (2) of the Prosecution of Offences Act 1985 to take over a prosecution started by another (or more precisely, any prosecution which he himself is not required to conduct) though any Crown Prosecutor has delegated power from the DPP to take such a decision: Prosecution of Offences Act 1985, s.1(7).

23. It has been left to successive DPPs to determine how to exercise this power. Under the revised policy promulgated by the CPS on 23rd June 2009, the CPS will intervene and discontinue any prosecution that does not meet the same Code tests it sets for itself; that there be a "realistic prospect" of proving the case (the "evidential test") and that bringing the prosecution would be in the "public interest". This policy has been criticised for emasculating the right of private prosecution but was held to be lawful by a majority of the Supreme Court in *R (on the application of Gujra) (FC) v Crown Prosecution Service* [2012] UKSC 52.

24. This policy needs to be read subject to the CPS document concerning "Relationships with other Prosecutors" (see above, paras 9-10). But we also suspect that the CPS is less likely to apply its policy so as to intervene in prosecutions brought by large organisations even where there is no prior working relationship, nor statutory or public function which the organisation provides, and even where the offence in question is one which the police would normally investigate. Our reasons for supposing this are as follows.

25. First, any review requested of the CPS is undertaken on the basis of the paperwork provided. According to its Policy,

> Where the CPS receives a specific request to intervene in a private prosecution, the CPS should contact the private prosecutor and invite them to supply a complete set of the papers that they intend to use to support their prosecution. The CPS should request any information which undermines the prosecution or assists the defence with their case. The private prosecutor should also be asked for details of any complaint made to the police and the result of any police investigation.

26. We think that this may favour organisations with legal teams who are better able to present their evidence in a way readily comprehensible to a reviewing prosecutor. In particular, there is no opportunity to make oral representations, nor further representations to the CPS after their decision has been made, e.g. if there has been some misunderstanding of the

prosecutor's case (a point repeated to us by a number of lawyers who specialise in this area). So good presentation "the first time around" is quite critical.

27. It should be noted too that the prosecutor is simply asked to self-certify the (non) existence of evidence which might undermine the prosecution. There appears to be no requirement to detail how the investigation was conducted, so that the Crown Prosecutor is seemingly quite unable to spot potential avenues of inquiry that have not been addressed, in a way which should be possible in respect of a police-led investigation (where, in any event there may be personal contact to supplement the reading of the files).

28. Second, there is not a question put as to whether the prosecutor has conducted many other prosecutions of like activity. We assume that in cases such as the Post Office prosecutions, the prosecutions will have been started in different magistrates' courts, or that defendants will have been charged by different police forces, in both cases depending on where the defendant lives; and any reviews requested will then be sent to the respective CPS areas. So, where a whole series of troublesome cases are started, there is a danger that they will be viewed separately by differently CPS lawyers across the country with no vision of the overall picture.

C. Abuse of process

29. A defendant may ask the magistrate or trial judge to stay the proceedings against him as an abuse of process. There are many grounds for such an application, and they are applicable to prosecutions brought by Crown prosecutors too. However, the remedy is one of last resort and recent Court of Appeal cases suggest that judges should not be "more" ready to stay "privately" brought proceedings: *D Ltd v A and Others* [2017] EWCA Crim 1172. Even in cases where the prosecutor has failed to comply with duties of disclosure, the proper response may be to grant an adjournment (if necessary, with costs borne by the prosecutor) rather than to stay the proceedings altogether. It is for the defendant to prove the facts which might justify a stay of proceedings, and this is a further hurdle. If the defendant wishes to complain that the prosecution is improper (e.g. because its real motivation is to force him to agree to a disadvantageous civil settlement in parallel proceedings, or that failings in disclosure are rooted in a desire to hide important material rather than incompetence) he may well find it too difficult to prove this state of affairs to the satisfaction of the judge.

30. A judge may also order an acquittal in the Crown Court on the basis that there is no case for the accused to answer, but this again is true of all criminal proceedings and does not necessarily imply criticism of the decision to prosecute.

D. Cost orders

31. We are not sure whether this is the kind of safeguard which the Committee has in mind. It is possible to regard cost orders against a prosecutor in favour of the defendant as a measure which might serve to deter wholly ill-conceived prosecutions. A prosecuted person may seek costs against a prosecutor where there has been "an unnecessary or improper act or

omission" on the part of the prosecution (Prosecution of Offences Act 1985, s.19**)**; and this jurisdiction does not turn on whether there has been an acquittal. Convicted defendants can still make a claim for costs under section 19, provided that they can show that they incurred costs at some stage of the proceedings because of some unnecessary acts by the prosecutor. However, we know of no evidence to suggest that this possibility restrains improper prosecutions (either public or private) or plays a significant role in averting potential miscarriages of justice.

32. **Our conclusion** is that none of the existing safeguards would be expected necessarily to apply so as to prevent the sorts of miscarriages of justice with which the Committee is presently concerned. Where there is nothing more than apparent disputes about the reliability of evidence in what appears to be an isolated case, the view of magistrates, CPS reviewers and trial judges alike will likely regard these as matters best resolved at contested trial – and many defendants might by then plead guilty (in order to receive a lighter sentence) if they expect to be convicted in any event.

Section 5. The role of the courts in private prosecutions

33. When a case has reached court, however, the same rules of evidence and procedure apply to all prosecutions, including the power of the judge to stay a case for abuse of process or order an acquittal if no jury could properly convict on the evidence adduced by the prosecution. It is difficult to see what one might expect a judge to do differently in respect of any prosecution "privately" brought. To the extent that it was disquieting that so many postmasters appear to have been convicted, the problems appear to be the consequences of some defendants being advised by their own counsel to plead guilty in the face of apparently overwhelming evidence (in order to receive a discount in sentencing), and of defendants being unable to reveal the true shortcomings of the prosecution case by virtue of lack of full disclosure regarding the deficiencies in the computer software. Sadly, these are potential causes of injustices in relation to CPS prosecutions too.

Section 6. Whether the existing investigatory standards and duties of disclosure that apply to private prosecutions are effective

34. In terms of law, it may be helpful to talk of investigatory standards, but not of legal rules. The Code issued pursuant to the Criminal Procedure and Investigations Act 1996 s.23 (1) applies only to police officers. Otherwise "persons other than police officers who are charged with the duty of conducting an investigation as defined in the Act" are only to "have regard" to the Code (and in respect of some investigators, it will not even be clear whether they are properly to be regarded as "charged with the duty" of conducting investigations).

35. That said, we believe that many private investigators are retired police officers and the difference in standards may be less in practice than one might suppose. Our understanding from discussions with a leading investigations consultancy is that the most reputable investigators regard themselves as independent from the victim and able to undertake inquires which the latter might not welcome. They include their own disclosure officer and are operationally independent from potential prosecutors. Their view is that investigators should be trained to the national detective standard (at least PIP level 2 or equivalent), should log their activities and keep contemporaneous records of important decisions. Where other expertise is required, e.g. in forensic accountancy, such persons should again be trained to the minimum standard required in police investigations.

36. There is no requirement in law that prosecutors should engage such investigators. However, nor are we sure that there should be such a universal duty. Many agencies rely on their own officers detecting crime "as it happens", e.g. in the case of shoplifters and fare evasion. Similarly, some large companies might investigate their own staff for other reasons, e.g. with a view to disciplinary proceedings or dismissal and may only belatedly uncover evidence which appears to warrant prosecution. Also, it may reasonably be thought in some cases that the limited or non-existent powers of non-police investigators to arrest suspects or seize evidence would mean that the extra expenditure would provide little new material. We consider that the more proportionate response is to have an agreed ideal as to what good investigative practice might be. Then in cases where the CPS is invited to take over and discontinue a private prosecution, it should ask for more details of the investigation than is currently the case. It should then be more ready to find that the further an investigation has departed from the ideal, without good cause, the more readily it should intervene, on the basis that the evidential test (whether a case is likely to be proven) is not met.

37. In terms of duties of disclosure, there is no legal difference. All prosecutors are bound by the same duties of disclosure in the Criminal Procedure and Investigations Act 1996. As is well known, the ethos should be one of firm but fair prosecution serving the interests of justice (taking account of the proper interests of the victim) but not striving for conviction at all costs. That in turn is dependent on proper independence so that the duty of the prosecutor to act in the interests of justice does not become subservient to any organisational needs.

38. Whether an in-house legal team will both understand its duties and be sufficiently robust in resisting pressure from within the organisation (especially where the organisation perceives itself to be the victim) will depend on many factors. Lawyers in some organisations might lack experience in criminal litigation, and those accustomed to starting civil proceedings may not appreciate the more extensive disclosure regime which may apply to prosecutions.

39. However, we would not suggest that an organisation should be required in law to instruct an external legal team, any more than that it should be required to hire external investigators. The in-house lawyer may become aligned and sympathetic to organisational issues but does have the protection of employment law if he takes a stand against an unethical proposal. The external lawyer has no such constraint and may also be conscious

that the client is a valuable one. Whether any organisation "properly" understands disclosure is likely to be best revealed when there is a system of oversight (see para. 12 above), and this oversight was seemingly the most important missing factor in the case of the Post Office prosecutions.

Section 7. The role of the Crown Prosecution Service in taking over private prosecutions

40. We outlined above (paras 24-28) our reasons for supposing that the CPS is in practice (or in the case of some other prosecutors, by virtue of their document concerning relationships with other prosecutors) less likely to intervene and discontinue prosecutions started by larger organisations.

41. We note that in one of the House of Common debates (19th March 2020), it was asserted by Kevan Jones MP, representing one of the convicted postmasters, that

> When Tom Brown asked whether he could get the police or the Crown Prosecution Service involved in looking at the evidence against him, he was told no. Likewise, it was the same for everyone else.

42. We cannot vouchsafe the correctness of this. Nonetheless, we tend to believe that, had any referral been made to the CPS, it would have been unsuccessful. Post Office Ltd would have been able to present the results of its own investigation with no hint of its shortcomings, and the required statement that it knew of no evidence that needed to be disclosed would likely not be challenged. No doubt the papers would have made little or no mention of the remarkably high number of prosecutions being brought throughout the country against other persons so far of known good character. The defendants for their part might not have been able to say anything more convincing than that he or she could not understand the figures generated by the (faulty) Horizon software.

43. This being so, it may well have been that the CPS would not have intervened even if the Post Office had been a purely private company. However, given that the Post Office has been long associated with public bodies, and even today is a trading arm of the government which is overseen by the Department of Business, Energy and Industrial Strategy, we think it especially unlikely that reviewing lawyers in different CPS areas would have given much thought to intervention.

44. As part of the independent research of the Criminal Law Reform Now Network, we sought and in October 2018 obtained a meeting with two representatives of the CPS concerning the application of their policy on taking over private prosecutions. We were told that there is a template which reviewing CPS lawyers must complete when making their decisions but that this is designed only to ensure that the reviewer have adverted to and applied the policy. We were not given sight of the template. We nonetheless hope that the Committee will see it, and that it might be possible for the CPS, by examining past returns of the template, also to provide statistics concerning their rate of interventions.

Section 8. The role of the Attorney General in supervising private prosecutions

45. The AG has no formal role in supervising private prosecutions. The closest power he or she has in relation to restraining private prosecutions is the power to apply to the High Court, under Senior Courts Act 1981, s.42, to have a prosecutor disbarred from commencing actions (without the leave of the High Court) on the ground that he is a vexatious litigant. The criteria for being regarded as vexatious appears to relate to a prosecutor's motive for bringing the case and not his competence to investigate and prosecute fairly. In practice few such persons appear to be restrained in this way, and we suspect that it is regarded as better suited to the possibility of individuals bringing multiple civil and criminal activities (sometimes in tandem) than the activities of large organisations.

46. The AG's Office is relatively small, and not as well equipped to intervene with everyday matters as the CPS. His or her supervisory role of public prosecutors relies on reports from Her Majesty's Inspectorate of the Crown Prosecution Service. There is no reason why the AG should not be given a role in appointing additional persons to inspect the processes of other organisations, but as noted above (para. 12), this would require deeper thought as to the practicality, benefits and consequences of overseeing prosecutorial practice other than in the CPS.

Section 9. Alternative legislative, legal and administrative safeguards that could be used to regulate the way in which large organisations use the right to bring private prosecutions

47. We suggest that the following three measures would contribute to reducing the risk of miscarriages following private prosecutions by large organisations. The options are presented as a package – that is, we consider that all should ideally be implemented together – but even the pursuit of some individual options would potentially be of benefit.

A. Referral to the CPS by the police on arrest/charge

48. We are uneasy about the possibility of the police charging defendants who are then to be privately prosecuted (paras 20-21) although we lack data as to how often this happens. Where it does, we think it likely that the prosecuted person, having been charged by the police, assumes that he is being prosecuted by the CPS and it may not occur to him or his advisor to refer the case to the CPS. We consider that it would be best if the police were under a duty to inform both i) the CPS when they have made a charge in a case which the CPS is under no duty to prosecute, and ii) the person charged that they do not expect the CPS to conduct the prosecution, and that they may ask the CPS to overtake and discontinue the prosecution. Such a duty should perhaps be best enacted by primary legislation, by

amending Police and Criminal Evidence Act 1984, s.38, concerning the custody officer's duties after charge.

49. We imagine that some respondents will suggest that all magistrates' courts should notify the local CPS area of any private prosecution. For our part, we anticipate this being a significant addition to their workload, and we would anticipate that little will be done by the CPS with such information by itself. Our greater concern is that the police should tell the CPS of other prosecutions which *they* know about, and that the charged defendant understands the position fully. We imagine that this may not have happened in many of the cases prosecuted by the Post Office (para. 41 above).

B. Extra information to be required by reviewing CPS lawyers

50. When a private prosecution comes to the attention of the CPS, and especially when they are asked to discontinue it, further inquiries need to be made. If they are thought appropriate, the new DPP should be encouraged to revise his policy accordingly.

51. The papers requested of the would-be prosecutor should include details of their practices, in particular with regard to the following matters:

    i. Number of other prosecutions started by the organisation within the last two years and whether any were discontinued by the CPS, halted or stayed by the judge

    ii. Whether external investigators were used, and their level of training

    iii. Whether reviewing lawyers were independent from the investigators; and

    iv. To what extent the defendant was involved in the investigation

52. Further steps too may be necessary, depending on the response, if any, given by the defendant. If, for example, the defendant offers details of his defence, then the prosecutor's file should be revisited, in case it becomes apparent that the investigators appear not to have considered this line of defence sufficiently carefully. This may not seem to add much to the current situation, where the defendant is already invited to send his own material, but we consider that if prosecutors were better apprised of the extent of the investigation, then material offered by the defendant, the credibility of which they otherwise have little way of assessing, may alert them to the risk of serious gaps in the investigation and to the potential for a miscarriage of justice.

53. We consider that it would not be unduly burdensome for the prosecutor to have to tell the CPS how many prosecutions it has started over the last two years, and of that number how many have been stayed for abuse of process or ended in an ordered acquittal, and of details of the investigation. It should rather be a matter of concern were these details not readily to hand. It is possible (we can say no more than) that, had many of the prosecuted postmasters been aware of the possibility of inviting the CPS to overtake their prosecution, and had the various reviewing caseworkers spread across the CPS areas been aware of the full pattern of their activity, they may already have had greater pause for thought. Any concerns might then have been amplified if they were in a position to liaise with each other and discover that in very many cases, the defendants were querying the evidence generated by computer

software and detailing their negative experiences with it. Those concerns would have risen again if they had noticed that the software had not been both externally scrutinised and approved.

54. At the very least, the opportunity to ask for CPS review is the most valuable safeguard to the prosecuted defendant. We consider it vital not only that he should know of it, but that reviewers are in a better position to conduct effective reviews when asked to do so. We are aware of the lack of resources facing the CPS. But when defendants are motivated to refer their prosecutions to the CPS, it is incumbent on the latter to ask more questions and to listen with an open mind to the responses.

C. Costs payable by convicted defendants should be capped

55. As Committee members will know, most criminal cases end in guilty pleas, and guilty pleas are often incentivised by a discount in sentencing. No one doubts that many innocent people do plead guilty for this reason, assuming they will be disbelieved in court. That pressure (to plead guilty) is controversial enough, but it does apply to all prosecutions. However convicted defendants may also be required to contribute to prosecution costs as the court "considers just and reasonable": Prosecution of Offences Act 1985, s.18 (1). Whereas the CPS only asks for a relatively modest fixed sum in all cases, there is nothing to stop private prosecutors, who will engage their own legal teams and possibly more expensive counsel than would the CPS, from seeking considerably more from convicted defendants, and we gather that this is quite common.

56. We consider that there is a real risk that very high costs bills may be as coercive towards defendants who anticipate being convicted (whether guilty or not) as the threat of higher sentences if a trial is contested. Indeed, in cases where there is little risk of imprisonment, we imagine that they may be the key deciding factor. They may even be as potent a contribution to miscarriages of justice as failings in disclosure. We cannot see a justification for this, since prosecutors not acting on behalf of a public authority may also seek recompense from central funds under Prosecution of Offences Act 1985, s.17 (2).

57. We consider that it is important that prosecutors may not be awarded more costs against a defendant than would be sought by and awarded to the CPS. At the moment, CPS costs are not capped as such in law; it is, rather, their practice to ask for no more than fixed amounts for different types of proceedings and hearings. Nor do we propose reform to this. Should their practices change, such that they seek and are awarded more costs from defendants, then other prosecutors should be able to seek similar costs. Equality in the matter of costs for convicted defendants regardless of who prosecutes them should be of great concern, and the courts should be mandated to award costs accordingly. This change might suitably be brought about by means of a Practice Direction.

Section 10. Summary

58. The ability of defendants who are not prosecuted by the CPS to ask the DPP to take over and discontinue a prosecution against them is the most effective tool for preventing inappropriate prosecutions. We hope that the CPS will be able to provide to the Committee their template for reviewing cases that are referred to them (see para. 44) and to provide statistics concerning the number of prosecutions in which they have been asked to intervene; and the number taken over and discontinued.

59. However, we doubt that this safeguard works as well as it might for some defendants, and especially in relation to larger organisations. Accordingly, we have proposed that

    (i) it should be made clear, when suspects are charged by the police, that the latter expect the prosecution to be conducted other than by the CPS and that referral to the DPP is possible (see paras 48-49) and

    (ii) more information should be required by the CPS and supplied by the would-be prosecutor concerning their other prosecutorial activities and the details of their investigative process (see paras 50-54).

60. We also propose, as a further measure which may reduce the risks of miscarriages of justice, that costs recoverable from convicted defendants should be at the same level as are sought and recovered by the CPS (see paras 55-57).

61. We have not made proposals here concerning the oversight and inspection of organisations (other than the CPS) who prosecute regularly, coupled with powers to enforce any consequent recommendations. However, such a system, if successful, could address the present lack of accountability and thereby improve prosecutorial practice in organisations where it is needed, rather than leaving the DPP with no option other than to discontinue an individual prosecution where he or she is dissatisfied with it.

62. We remain available to assist the Committee in any other way as it may request.

The Criminal Law Reform Now Network (CLRNN)
1st July 2020