



Private prosecutions

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The right of a private individual to bring a criminal prosecution is a historical one originating in the earliest days of the legal system. It has been described as a “constitutional safeguard” against the failure or refusal of the authorities to prosecute offenders. However, there are a number of procedural requirements in place designed to prevent the misuse of the right of private prosecution, including:

- the judicial discretion magistrates have to refuse to issue a summons or a warrant;
- the requirement to obtain consent from the Attorney General or the Director of Public Prosecutions prior to instituting proceedings for certain offences, for example those (such as war crimes) involving important public policy considerations; and
- the power of the Director of Public Prosecutions to take over private prosecutions (whether for the purpose of continuing or discontinuing them).

In July 2010 the Justice Secretary Kenneth Clarke announced that the Government would be legislating so as to require the consent of the Director of Public Prosecutions before an arrest warrant can be issued to a private prosecutor in respect of an offence of universal jurisdiction (e.g. war crimes).

This note provides an overview of some of these issues. It is not intended to act as a comprehensive procedural guide for constituents who are considering bringing a private prosecution. Such individuals should be encouraged to seek independent legal advice from a suitably qualified source: Library Standard Note SN/HA/3207 [Legal help: where to go and how to pay](#) may be of use.

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1 Right to bring a private prosecution

A private prosecution is “a prosecution started by a private individual who is not acting on behalf of the police or any other prosecuting authority or body which conducts prosecutions”.¹ The right of a private individual to bring a criminal prosecution is a historical one originating in the earliest days of the legal system. Although the need for private individuals to bring (and pay for) criminal prosecutions has largely disappeared since the creation of the office of Director of Public Prosecutions (DPP) in 1879,² the right to do so nevertheless remains.³ It has been described as a “useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law”.⁴

There is no requirement for private prosecutions to satisfy the *Code for Crown Prosecutors*, which sets out the factors the Crown Prosecution Service (CPS) should consider when deciding whether to institute a *public* prosecution. The “Full Code Test”, which forms part of the Code, requires the CPS to be satisfied that the following two conditions are met before commencing proceedings:

- there must be enough evidence to provide a "realistic prospect of conviction" against the defendant; and
- it must be in the public interest for the CPS to bring the case to court.

If the case does not pass the evidential element of the Test, the public prosecution must not go ahead no matter how important or serious it may be.⁵ As the Code does not apply to private prosecutions, there is no equivalent requirement for a private prosecutor to satisfy himself that the Full Code Test has been satisfied.⁶

The right to bring and conduct a private prosecution is, however, subject to a number of restrictions. In some cases, a prosecution must be brought by a particular individual or body: for example, no proceedings for an offence under the *Weights and Measures Act 1985* are to be instituted “except by or on behalf of a local weights and measures authority or the chief officer of police for a police area”.⁷ In other cases, the DPP is under a statutory duty to take over the conduct of criminal proceedings: for example, those instituted on behalf of a police force or those relating to extradition.⁸ The DPP also has a general discretion to take over the conduct of any other criminal proceedings at any stage,⁹ either for the purpose of continuing the proceedings or stopping them. Further details on the DPP’s role in taking over prosecutions are set out in section 3 of this note. There are also some cases in which the institution or carrying on of criminal proceedings is prohibited unless the consent of the Attorney General or the DPP is obtained: further details on this are set out in section 2.2 of this note.

¹ Crown Prosecution Service website, [Private Prosecutions](#) [accessed on 6 September 2010]

² “Before the *Prosecution of Offences Act 1879* there was no public prosecutor to take criminal cases to court. People had to find their own lawyers or present the prosecution case themselves.” Crown Prosecution Service website, [History](#) [accessed on 6 September 2010]

³ *Prosecution of Offences Act 1985*, s6(1)

⁴ *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70

⁵ CPS, *The Code for Crown Prosecutors*, 2004, para 5.1.

⁶ However, a private prosecution that fails to satisfy one or other of the Test’s limbs may be vulnerable to being taken over and discontinued by the DPP: see section 3 of this note for further details.

⁷ *Weights and Measures Act 1985*, s83(1)

⁸ *Prosecution of Offences Act 1985*, ss3(1) and 6(1)

⁹ *Prosecution of Offences Act 1985*, s6(2)

2 Commencing a private prosecution

2.1 Procedure

Laying an information

All prosecutions in the magistrates' court, including private prosecutions, are commenced by the laying of an information. The information is essentially a statement describing the allegation and the accused. Its form and content are governed by [Part 7 of the Criminal Procedure Rules 2010, SI 2010/60](#).

The general rule is that there is no time limit for laying an information in respect of an indictable offence;¹⁰ however, an information in respect of a summary-only offence (i.e. a minor offence triable only in the magistrates' court) must be laid within six months from the time when the offence was committed, unless there is some specific statutory exception applicable to the particular offence.¹¹

Once an information has been laid, the magistrate will consider it and decide first whether to "grant process" (i.e. to proceed with the case) and second whether to issue a summons or a warrant.

Granting process

When an information is laid before a magistrate, he must go through the judicial exercise of deciding whether a summons or warrant ought to be issued or not: in other words, whether process should be granted. The discretion to grant process is not an unlimited one: the general principle is that the magistrate ought to issue a summons or warrant pursuant to a properly laid information unless there are compelling reasons not to do so, for example if impropriety or an abuse of process is involved.¹² While recognising that "it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given", case law has established the matters that the magistrate should consider as a bare minimum:

It would appear that he should at the very least ascertain: (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not 'out of time'; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute.¹³

A magistrate who issues a summons or warrant without applying his mind to the information and completing this judicial exercise will be "guilty of dereliction of duty".¹⁴

The magistrate should also consider any action that may have already been taken by the CPS:

¹⁰ Indictable offences are those that are triable on indictment in the Crown Court (whether exclusively so or as an either-way offence): the [HM Courts Service website](#) provides further details [accessed on 6 September 2010]

¹¹ *Magistrates' Courts Act 1980*, s127

¹² *R (on the application of the Mayor and Burgesses of the London Borough of Newham) v Stratford Magistrates' Court* [2004] EWHC 2506 (Admin). An example of when a private prosecution might be an abuse of process is where the private prosecutor encouraged the crime or in some other way created the same mischief as that about which he is complaining: *R (on the application of Dacre) v Westminster Magistrates' Court* [2008] EWHC 1667 (Admin)

¹³ *R v West London Justices, ex parte Klahn* [1979] 2 All ER 221. Determining whether the informant has "the necessary authority" would usually involve considering whether any necessary consents to prosecution have been obtained: see section 2.2 of this note for further details.

¹⁴ *R v Brentford Justices, ex parte Catlin* [1975] QB 455, at 464

- where the CPS has already brought and discontinued a prosecution arising from the same events, the magistrate should not require “special circumstances” before agreeing to the issue of the warrant or summons but should instead proceed by ascertaining the minimum facts outlined above;
- where the CPS has already brought a prosecution that is still proceeding, the magistrate should (in the absence of special circumstances) be slow to issue a summons at the behest of a private prosecutor against a defendant who is already subject to those CPS proceedings.¹⁵

Assuming the magistrate decides to grant process, he will then have to decide whether to issue a summons or a warrant.

Issuing a summons or warrant

Section 1 of the *Magistrates’ Courts Act 1980* provides:

(1) On an information being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue -

(a) a summons directed to that person requiring him to appear before a magistrates’ court to answer the information, or

(b) a warrant to arrest that person and bring him before a magistrates’ court.¹⁶

There are a number of additional requirements that must be satisfied before the magistrate can issue a warrant rather than a summons:

- the information must have been in writing; and either
- the offence to which the warrant relates is an indictable offence or one punishable with imprisonment; or
- the accused’s address is not sufficiently established for a summons to be served on him.

A warrant should not, therefore, be issued initially for a minor offence (unless the accused’s address is not sufficiently established). A warrant should also not be issued where a summons would be equally effectual, except in cases of a very serious nature.¹⁷

Requirements for the form and contents of a summons are set out in [Rule 7.4 of the Criminal Procedure Rules 2010, SI 2010/60](#). It must contain notice of when and where the defendant is required to attend the court, specify each offence in respect of which it is issued and identify the person under whose authority it is issued (i.e. the magistrate). The equivalent provisions for warrants are set out in [Part 18 of the 2010 Rules](#). A warrant of arrest must contain the name or a description of the person to be arrested and details of the offence. It must require the persons to whom it is directed (usually the police) to arrest the named person.

¹⁵ *R (on the application of Charlson) v Guildford Magistrates’ Court and the South Western Magistrates’ Court and Walsh (interested party)* [2007] 3 All ER 163

¹⁶ *Magistrates’ Courts Act 1980*, s1(1)

¹⁷ *O’Brien v Brabner* (1885) 49 JPN 227

2.2 Offences requiring consent to prosecute

A number of offences require the consent of either the Attorney General or the DPP in order for a prosecution to be instituted.¹⁸ Examples include the institution of prosecutions under section 2 of the *Suicide Act* (assisting another's suicide), for which the DPP's consent is required,¹⁹ or the institution of prosecutions for war crimes under the *Geneva Conventions Act 1957* or the *International Criminal Court Act 2001*, for which the Attorney General's consent is required.²⁰ The CPS website provides details of the rationale behind consents to prosecution:

Consent cases are statutorily created, with the requirement for consent being imposed in order to prevent certain offences being prosecuted in inappropriate circumstances. In a memorandum to the 1972 Franks Committee, the Home Office set out five reasons why certain offences require consent:

- To secure consistency in prosecution, e.g. where it is not possible to define the offence very precisely so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
- To prevent abuse or bringing the law into disrepute, because the offence is a kind which may result in vexatious private prosecutions;
- To enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;
- To provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations; and
- To ensure that prosecution decisions take account of important considerations of public policy or international nature such as may arise, for example, in official secrets or hijacking.²¹

If the magistrate is considering issuing a summons in respect of an offence requiring consent, case law has established that he is under a duty to satisfy himself that such consent has been obtained *before* issuing the summons.²² However, most offences requiring consent to prosecute are serious in nature and (assuming process is granted) will therefore usually lead to the magistrate issuing a warrant for arrest rather than a summons. By virtue of section 25 of the *Prosecution of Offences Act 1985*, and in contrast to the issue of a summons, there is no requirement for a magistrate to satisfy himself as to consent before issuing a warrant of arrest:

25 Consents to prosecutions etc

- (1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except—
- (a) with the consent (however expressed) of a Law Officer of the Crown or the Director; or

¹⁸ For a general overview of the Attorney General's functions, see [Library Standard Note SN/HA/4485 The Law Officers](#)

¹⁹ *Suicide Act 1961*, s2(4)

²⁰ *Geneva Conventions Act 1957*, s1A and *International Criminal Court Act 2001*, s53(3)

²¹ CPS website, [Consents to Prosecute](#) [accessed on 6 September 2010]

²² *Price v Humphries* [1958] 2 All ER 725

(b) where the proceedings are instituted or carried on by or on behalf of a Law Officer of the Crown or the Director;

and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).

(2) An enactment to which this section applies—

(a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; (...)

The purpose of section 25 is:

...to enable the arrest, charging and remand in custody or bail of a person against whom proceedings may have been commenced without the consent of the Attorney General or Director; it covers action that needs to be taken to apprehend the offender and detain him if there is not time to obtain permission.²³

A magistrate may therefore issue a warrant of arrest prior to the prosecutor having sought or obtained any necessary consent from the Attorney General or the DPP, although consent would subsequently need to be sought before the prosecution could proceed any further. The fact that an arrest warrant can be issued without consent has led to some recent controversy in the context of arrest warrants issued in respect of political and military figures for alleged war crimes:

- In September 2005, Bow Street Magistrates' Court issued a warrant for the arrest of Major Doron Almog, former head of the Israeli forces in the Gaza Strip. The warrant was issued following the laying of an information by the law firm Hickman & Rose, backed by evidence from the Palestinian Centre for Human Rights.²⁴ Major Almog landed at Heathrow but received warning that the police were waiting at the airport to execute the warrant; the police decided against boarding the aeroplane to arrest Major Almog and he flew back to Israel without disembarking.²⁵
- In September 2009, lawyers for 16 Palestinians laid an information at Westminster Magistrates' Court seeking the issue of an arrest warrant for Israeli defence minister Ehud Barak. The court declined to issue a warrant on the grounds that Mr Barak had diplomatic immunity.²⁶
- In December 2009, it was reported that Westminster Magistrates' Court had issued a warrant for the arrest of Tzipi Livni, Israel's former foreign minister and current opposition leader. Unlike Mr Barak, Ms Livni would not have had diplomatic immunity due to her status as a former rather than serving minister. However, the warrant was later withdrawn after it emerged that Ms Livni had cancelled a proposed visit to the UK and was therefore not on British soil.²⁷

In response to the news of the Livni arrest warrant, the then Foreign Secretary David Miliband said:

²³ *R v Lambert* [2009] EWCA Crim 700

²⁴ Hickman & Rose press release, [UK court issues warrant against Israeli General](#), 11 September 2005

²⁵ ["Investigation urged after Israeli officer avoids arrest"](#), *Guardian*, 13 September 2005

²⁶ ["Israeli minister Ehud Barak faces war crimes arrest threat during UK visit"](#), *Guardian*, 29 September 2009

²⁷ ["UK ponders law change after Tzipi Livni arrest warrant"](#), *BBC News website*, 15 December 2009

'Israel is a strategic partner and a close friend of the UK. We are determined to protect and develop these ties. Israeli leaders – like leaders from other countries - must be able to visit and have a proper dialogue with the British Government.

The procedure by which arrest warrants can be sought and issued without any prior knowledge or advice by a prosecutor is an unusual feature of the system in England and Wales. The Government is looking urgently at ways in which the UK system might be changed in order to avoid this sort of situation arising again.²⁸

Some called for the law to be changed so that the Attorney General's consent would be required for the issue of an arrest warrant as well as any subsequent prosecution. Andrew Dismore, then chairman of the Joint Committee on Human Rights, said:

...I would like to see our courts protected from being used as campaign forums by politically motivated groups that are not really interested in justice, but are interested in scoring party political or other political points in this long-running conflict in the middle east, which is not going to be resolved in courts of law. Our courts have been left dangerously open to political manipulation and being brought into disrepute. There is a way forward by allowing the Attorney-General to decide whether this should happen. The Attorney-General is, in the end, responsible for deciding which prosecutions should go ahead, based on the likelihood of both a conviction and a public interest test. We may have the embarrassment of leaders being arrested but no prosecution following on from that.²⁹

However, others criticised this proposal on the grounds that it would politicise the judicial process:

Justice, the all-party law reform and human rights organisation, believes instead that the Director of Public Prosecutions (DPP) is better placed than the Attorney for such decisions.

It says: "The role of the Attorney-General has been in issue since the controversial intervention of Lord Goldsmith in a case relating to Saudi Arabia and a subsequent consultation as part of the Government's Governance of Britain programme."

(...)

Daniel Machover, chairman of [Lawyers for Palestinian Human Rights], ... warns:

"Restricting the present system, including the long-standing judicial arrest warrant procedure, for narrow political interests will risk endangering human rights everywhere. Meanwhile, there is no evidence of judges falling short of high standards in making these decisions."³⁰

On 4 March 2010, the then Justice Secretary Jack Straw set out proposed changes to the law governing the issue of arrest warrants in respect of certain specified "universal jurisdiction" offences.³¹ In essence, the right to bring a prosecution for such an offence

²⁸ Foreign and Commonwealth Office news release, [Response to UK arrest warrant for Tzipi Livni](#), 15 December 2009

²⁹ [HC Deb 12 January 2010 c200WH](#)

³⁰ "War crimes: should a magistrate still have the right to issue a private arrest warrant?", *Times*, 14 January 2010

³¹ [HC Deb 4 March 2010 cc118-9WS](#). In very general terms, a "universal jurisdiction" offence is one that can be prosecuted in this country even where it is alleged to have been committed outside the UK by a foreign national: including war crimes, piracy, hostage-taking, hijacking and torture. For further details, see [Library Standard Note SN/IA/5422 Universal jurisdiction](#).

where it was alleged to have been committed by a foreign national on foreign soil would have been restricted to the Attorney General or the DPP. No arrest warrant could have been issued in relation to such offences unless the information had been laid by or on behalf the Law Officers or the DPP. A private individual or organisation would therefore only be able to bring a private prosecution or apply for an arrest warrant in respect of such an offence where either the suspect was a UK national or the offence was alleged to have been committed on UK soil. A background briefing on the proposals and a draft clause setting out the necessary legislative amendments were made available on the [Ministry of Justice website](#).

Recognising the controversial nature of the proposed changes, Mr Straw indicated that he would undertake a brief consultation prior to legislating. On 6 March 2010 he therefore wrote to the Justice Committee asking it to consider the Government's proposals and requesting a response by 6 April 2010.³² The Committee indicated that given the proposed timetable for consultation it would be unable to undertake an appropriate process, and recommended instead that interested parties should respond directly to the Ministry of Justice.³³ The Committee also "commended this topic to our successor in the new Parliament for early attention", noting that any legislation implementing changes to the private prosecution regime would not be brought forward until after the May 2010 general election.

Following the general election, the new Justice Secretary Kenneth Clarke announced that the coalition would be continuing with plans to change the law:

Announcing plans to bring forward legislation, Justice Secretary Kenneth Clarke restated the Government's commitment to upholding international law and said:

'Our commitment to our international obligations and to ensuring that there is no impunity for those accused of crimes of universal jurisdiction is unwavering.

'It is important, however, that universal jurisdiction cases should be proceeded with in this country only on the basis of solid evidence that is likely to lead to a successful prosecution – otherwise there is a risk of damaging our ability to help in conflict resolution or to pursue a coherent foreign policy.

'The Government has concluded, after careful consideration, that it would be appropriate to require the consent of the Director of Public Prosecutions before an arrest warrant can be issued to a private prosecutor in respect of an offence of universal jurisdiction.'

The Government will bring forward legislation as soon as Parliamentary time allows.³⁴

The plans differ from the Labour Government's in that only the DPP will be involved in deciding whether to issue an arrest warrant to a private prosecutor in respect of a universal jurisdiction offence: there will not be any role for the Attorney General.

3 Continuing a prosecution: the role of the DPP

Once a private prosecution has been successfully commenced, it can either continue to its conclusion under the control of the private prosecutor or be taken over by the DPP under

³² Letter from Jack Straw to Alan Beith, [Arrest warrants – universal jurisdiction](#), 6 March 2010

³³ Justice Committee press release (No. 18 of Session 2009-10), [Informal reference of matter to the Committee: arrest warrants - universal jurisdiction](#), 19 March 2010

³⁴ [HC Deb 22 July 2010 c47WS](#) and Ministry of Justice news release, [New rules on universal jurisdiction](#), 22 July 2010

section 6 of the *Prosecution of Offences Act 1985*. The DPP may then either continue or discontinue the prosecution. The CPS website says:

In principle, there is nothing wrong in allowing a private prosecution to run its course through to verdict and, in appropriate cases, sentence. The fact that a private prosecution succeeds is not an indication that the case should have been prosecuted by the CPS. Parliament has specifically allowed for this possibility by the way section 6 is constructed: there is no requirement for the CPS to take over a private prosecution.³⁵

Under sections 3 and 6(1) of the 1985 Act, the DPP has a *duty* to take over the conduct of certain proceedings, for example:

- any criminal proceedings instituted by an immigration officer;
- all proceedings begun by summons issued under the *Obscene Publications Act 1959*; and
- any extradition proceedings.

Under section 6(2) of the 1985 Act, the DPP also has the *discretion* to take over any other proceedings instituted by a person or body other than the CPS. The CPS website explains how the CPS may become aware that a private prosecution has been instituted:

The private prosecutor is not under a duty to inform the CPS that a private prosecution has commenced. The CPS may therefore find out about a private prosecution in one of five ways:

- where the private prosecutor, or a representative of the private prosecutor, asks the CPS to take over the prosecution;
- where the defendant, or a representative of the defendant, asks the CPS to take over the prosecution;
- where a justices clerk refers a private prosecution to the CPS under section 7(4) of the *Prosecution of Offences Act 1985*, because the prosecution has been withdrawn or unduly delayed and there does not appear to be any good reason for the withdrawal or the delay;
- where a judge sends a report to the CPS;
- where the CPS learns of the private prosecution in another way, for example, from a press report.³⁶

Having become aware of a private prosecution, the CPS may decide to take it over either for the purpose of continuing the proceedings, for example where the offence is so serious that it merits a public rather than private prosecution, or for discontinuing them, for example where the private prosecution is vexatious or malicious or would interfere with the investigation of another criminal offence. The CPS may also decide to discontinue a private prosecution where either the evidential sufficiency stage or the public interest stage of the “Full Code Test”, which sets out the conditions that should be satisfied before a *public* prosecution is instituted, is not met. However, the CPS does not apply the Test in the same way as it does when it is deciding whether to institute a public prosecution:

³⁵ CPS website, [Private Prosecutions](#) [accessed on 6 September 2010]

³⁶ Ibid

...it could not be right for the DPP to apply across the board the same tests, in particular the 'reasonable prospect of conviction' test ... in considering whether to take over and discontinue a private prosecution as the code enjoins crown prosecutors to follow in deciding whether to institute or proceed with a prosecution themselves; the consequence would be that the DPP would stop a private prosecution merely on the ground that the case is not one which he would himself proceed with. But that, in my judgment, would amount to an emasculatation of s 6(1) and itself be an unlawful policy; ... The very premise of s 6(1) must be that some cases will go to trial which the DPP himself chooses not to prosecute.³⁷

Detailed guidance on the factors that the CPS will consider when deciding whether to take over a private prosecution and, if so, whether to continue it or discontinue it are set out on the CPS website.³⁸

³⁷ *R v Director of Public Prosecutions, ex parte Duckenfield and another; R v South Yorkshire Police Authority and another, ex parte Chief Constable of the South Yorkshire Police and others*, [2000] 1 WLR 55

³⁸ CPS website, [Private Prosecutions](#) [accessed on 6 September 2010]