



Bar Council response to the Ministry of Justice consultation on the oversight and regulation of private prosecutors in the criminal justice system

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation on the oversight and regulation of private prosecutors in the criminal justice system.¹

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

¹ [Oversight and regulation of private prosecutors in the criminal justice system - GOV.UK](https://www.gov.uk/government/consultations/oversight-and-regulation-of-private-prosecutors-in-the-criminal-justice-system)

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Questions 1-4

1. Not applicable to the Bar Council.

Chapter 1: Consistency of Standards and Accountability

Code of Practice

Question 5. Do you agree that some or all private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be bound by a mandatory code of practice?

2. Yes. The fair trial guarantees that are ensured by the various codes of practice, guidelines on disclosure etc. which apply to criminal proceedings brought by the Crown Prosecution Service (CPS) should be equally available to defendants who are prosecuted by private prosecutors. The fairness of criminal proceedings ought not to depend upon who brings them, and a defendant ought not to be disadvantaged (or, rather, to have their right to a fair trial compromised) as a result of being prosecuted by an organisation that is not required to observe the same standards as the CPS.

Question 6. If you agree that some or all private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be bound by a mandatory code of practice, do you think this code should apply to:

3. All private prosecutors bringing prosecutions, for the same reason as given above.

Question 7. If you agree that some or all private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be bound by a mandatory code of practice, please provide your opinions on requirements that could be included in the code (select all that apply):

- A requirement for the separation of functions between investigators and prosecutors
- A requirement for the separation of functions between those who decide whether to commence a prosecution, and those who carry out the prosecution
- A requirement to consider whether there is sufficient evidence to secure a conviction
- A requirement to review the public interest test before commencing the prosecution, and keep it under review throughout proceedings

4. Additionally, private prosecutors should be bound by the provisions of the CPIA in full, including the Codes of Practice, to which presently they merely need to “have regard”, together with the Attorney General’s Guidelines on Disclosure. There should also be an obligation to notify a defendant of the right to refer the matter to the Director of Public Prosecutions (DPP) for consideration of whether the prosecution should be taken over (whether to be continued or stopped).

Question 11. Please provide any examples of best practice ensuring consistency of standards in private prosecutions (either used by you or your organisation, or that you know of).

5. The Private Prosecutors’ Association, who we anticipate will be responding in their own right to this consultation, have produced a code to which all of its members adhere.² That is a good example of best practice in this area.

² <https://private-prosecutions.com/wp-content/uploads/PPA-Code-for-Private-Prosecutors.pdf>

Question 12. If you have any other thoughts about a code for private prosecutors which have not been captured in the questions above, please provide these.

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Inspectorate

Question 13. Do you agree that some or all private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be subject to inspections from an inspectorate?

6. Yes. This is important in order that compliance with any code may be monitored.

Question 14. If you agree that some or all private prosecutions should be subject to inspections from an inspectorate, should this requirement apply to (please select one):

7. All. For the same reasons as given in response to question 5 above. However, those in charge of conducting inspections would be expected to take a proportionate approach to these. For example, if a small organisation bringing a limited number of private prosecutions had received a clean bill of health in one inspection, a reasonable time may pass before the next such inspection may be required, subject to any complaints received or other reason for concern. Larger organisations, or those bringing a large volume of private prosecutions, may require more frequent inspections, though not all may need to be conducted in the same way (a light touch approach to a hitherto compliant entity in respect of which no complaints had been made may for example be appropriate). That would be something to be considered in guidance provided to any such inspectorate in due course.

Question 15. If you agree that private prosecutors should be subject to inspections from an inspectorate, what would be a suitable consequence if a prosecutor fails an inspection?

8. That would very much depend on the extent to which the organisation failed any inspection. It is hard to answer this question in the abstract, without any real idea of the nature of exercise that would be performed. Minor failings, or those borne of negligence, or those which are more straightforward to correct, might (and indeed should) be penalised differently from more significant, and deliberate, failings, or where the failings were repeated over time.

Question 16. If you have any other thoughts about an inspectorate for private prosecutors which have not been captured in the questions above, please provide these.

9. The intention appears to be that the "prosecutor" (whoever that may be) is subject to inspection. But that could (and probably should) theoretically include some information about the client, if for example the client has conducted the investigation. We anticipate that such questions ("what should an inspection look like?") are probably destined for the next phase of the process, once decisions are made as to whether any of the proposals in the consultation are taken forward at all. If that is correct, we are likely to be able to provide further input in due course.

Accreditation

Question 17. Do you think there should be a system of accreditation for private prosecutors? If so, please specify whether you think this should be mandatory or voluntary.

10. Yes, mandatory. This would ensure that potential problems are neutralised prior to a prosecution commencing, which is plainly preferable to (though complementary to) relying on errors to be identified through an inspection process after they have been made (and the consequences felt).

Question 18. If you think there should be a voluntary system of accreditation, please provide detail of what the incentive should be for acquiring accreditation or the consequences for not being accredited.

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Question 19. If you think there should be a system of accreditation for private prosecutors, do you think this should be required at an organisational level or should it be a personal professional requirement for all individuals involved in bringing a prosecution?

11. Both at an organisational level, and at the individual level of an investigator. However, lawyers are already regulated, and it would be unnecessary to require separate accreditation for any lawyer engaged in a private prosecution.

Question 20. If you have any other thoughts about accreditation for private prosecutors which have not been captured in the questions above, please provide these.

12. One concern in particular is that organisations may not have sufficient understanding of disclosure duties. Accreditation ought therefore to include some kind of examination on disclosure knowledge.

Chapter 2: Improving Safeguards to Justice in the Single Justice Procedure

Question 21. Do you think that Single Justice Procedure prosecutors should be required to take steps to engage with the defendant before commencing a prosecution, to understand their personal situation (mitigating circumstances) and assess whether the prosecution is in the public interest?

13. Yes.

Question 22. Do you think the prosecutor should be able to view the mitigating circumstances submitted to the court by a defendant before the case is reviewed by a magistrate?

14. Yes.

Question 23. If you agree that the prosecutor should be able to review the mitigating circumstances before the magistrate reviews the case, do you think there should be a statutory requirement for them to review this in all cases, and

conduct a further assessment of whether it is in the public interest to continue the prosecution, then confirm to the court that they have done this?

15. Yes.

Question 24. Should there be a requirement for prosecutors to allow a certain period of time for people to respond to an initial notification in order to provide details of any their circumstances prior to issuing an SJP Notice?

16. Yes – in line with the time limit for bringing a Judicial Review claim we suggest that there is a period of three months from the service of the initial notification. We also consider that the prosecutor would need to show that the notification has been sent to an address where it will be received by the relevant person, i.e. that there is genuine service. One challenge with these cases is that people often are in states of breakdown and do not have addresses or are moving on a regular basis. When applying the public interest test, prosecutors should take into account evidence of rejected post or evidence of loss of contact with the person. This in itself may point to unstable circumstances, including crisis, such that it would not be in the public interest to prosecute.

Question 25. Should there be a requirement to send a certain number of written notifications before issuing a Single Justice Procedure Notice?

17. Yes, as answered above. We consider that three is a reasonable number. However, consideration should also be given to other means of contact rather than repeat sending to the same address, for example email. We know of cases where a person has been homeless but would be able to go to a local retail premises for emails. This may require revision of the details required from the person at an earlier stage. However, the points made above continue to apply. If a person is homeless, it is difficult to see the public interest in prosecuting them. Such a prosecution undoubtedly impacts negatively on mental health and may set up a further barrier to them getting out of their socially punitive situation by having a criminal record.

Question 26. This question is for respondents responding to this consultation on behalf of an organisation that brings prosecutions through the Single Justice Procedure: do you currently engage with the defendant and request any

information on their circumstances prior to commencing a prosecution, including assessing their vulnerability?

18. This question is not applicable to the Bar Council.

Question 27. If you have any other thoughts about the SJP which have not been captured in the questions above, please provide these.

Overview

19. There has been a reported significant increase in the use of the Single Justice Procedure³. The current form does not allow an affected person to flag that there is no public interest.

20. In 2023, there was a 70% no response rate to the letter/form and there was no data produced or available to provide an insight on the non-response rates. We have suggested some reasons for the lack of response, as gleaned through discussions with colleagues and journalists who raise awareness of the injustices of the Single Justice Procedure.

21. The system at court also follows a process where the cases are sent directly to a lay magistrate, who is not a lawyer, with the magistrate having the option of consulting a lawyer (clerk). However, this was the wrong way around as the magistrate would not contact a lawyer unless they identified an issue – that only a lawyer might identify. In other words, we recommend a return to a system of screening of cases by a lawyer, with a specific question as to whether the case should proceed in the circumstances.

22. We question whether there are sufficient lawyers allocated to lay magistrates. Over the previous five years we received information that the number of clerks working on Single Justice Procedure cases was reduced.

³ <https://www.telegraph.co.uk/news/2024/03/26/almost-two-thirds-magistrates-court-cases-held-in-secret/>

23. Further the system has been referred to as “conveyor belt justice” as it is rapid. It is apparent that speed replaces just decision making.⁴

Mitigation and Transparency of Decisions

24. In addition, mitigation does not appear to be considered by magistrates. It is a regular occurrence that fines are imposed or a conditional discharge with costs at around £150, irrespective of the circumstances of the person.

25. The Magistrates’ Association has recognised that the procedure is not transparent, and the Justice Select Committee has called for its reform. Journalist Tristan Kirk⁵ provides regular updates on social media of convictions and fines imposed upon people. Kirsty Brimelow KC, former Chair of the Criminal Bar Association, previously said:

“Openness has been sacrificed at the altar of speed. The Government previously defended the process on the grounds that trials in absence have operated without complaint for centuries. It takes little analysis to note that there were many processes 300 years ago that we would not have wished to continue in a modern criminal justice system.”

26. The examples Mr. Kirk posts on “X” should be considered.

27. They range from those who are in terrible personal circumstances – who still are convicted and fined or have to pay costs- to those who have omitted to pay very small sums of money (some under £5) and yet are pursued.

28. Examples of prosecutions that appear not to apply the public interest test, include a person in and out of a mental health unit owing £15 tax on a car, which they subsequently remedied, a woman being treated for breast cancer and failing to renew her car insurance when the car was off the road and she was in an out of hospital undergoing gruelling chemotherapy and a person with autism who was convicted for failing to pay £4.17 in car tax. These are some of the cases where public

⁴ <https://www.standard.co.uk/news/uk/single-justice-procedure-fast-track-courts-magistrates-justice-system-b1147422.html>

⁵ <https://www.standard.co.uk/news/crime/secret-single-justice-procedure-prosecutions-covid-lockdown-fines-b1104910.html>

interest in prosecuting is very difficult to ascertain and the cases are overturned after publicity⁶. The fairness of convictions, fines and costs is even more opaque.

29. Even with transparency, including reasons, the decisions appear unjustifiable in terms of public interest and proper consideration of mitigation.⁷

Sentencing Guidelines

30. We also point to the requirement to revise the Sentencing Council Guidelines for “TV Payment Licence Evasion”. Currently it has lesser harm as “under 6 months unlicensed use” with the lowest sentence being a range from a conditional discharge. We suggest that there should be a range including an absolute discharge if these cases proceed.

31. Further, the guideline on imposition of costs currently is contained within the Equal Treatment Bench Book (copied below):

Where an offender is convicted of an offence, the court has discretion to make such order as to costs as it considers just and reasonable (Prosecution of Offences Act 1985, s.18).

The Court of Appeal has given the following guidance (R v Northallerton Magistrates’ Court, ex parte Dove [2000] 1 Cr App R (S) 136 (CA)):

- i. an order for costs should never exceed the sum which, having regard to the offender’s means and any other financial order imposed, he or she is able to pay and which it is reasonable to order him or her to pay;*
- ii. an order for costs should never exceed the sum which the prosecutor actually and reasonably incurred;*
- iii. the purpose of the order is to compensate the prosecutor. Where the conduct of the defence has put the prosecutor to avoidable expense, the offender may be ordered to pay some or all of that sum to the prosecutor but the offender must not be punished for exercising the right to defend himself or herself;*

⁶ <https://www.standard.co.uk/news/crime/tv-licence-conviction-overturned-downs-syndrome-greenwich-single-justice-b1138609.html>

⁷ <https://www.thetimes.com/comment/columnists/article/prosecutions-by-post-are-a-poor-form-of-justice-3lrwvvpw2>

- iv. *the costs ordered to be paid should not be grossly disproportionate to any fine imposed for the offence. This principle was affirmed in BPS Advertising Limited v London Borough of Barnet [2006] EWCA 3335(Admin) QBD, in which the Court held that, while there is no question of an arithmetical relationship, the question of costs should be viewed in the context of the maximum penalty considered by Parliament to be appropriate for the seriousness of the offence;*
- v. *if the combined total of the proposed fine and the costs sought by the prosecutor exceeds the sum which the offender could reasonably be ordered to pay, the costs order should be reduced rather than the fine;*
- vi. *it is for the offender to provide details of his or her financial position so as to enable the court to assess what he or she can reasonably afford to pay. If the offender fails to do so, the court is entitled to draw reasonable inferences as to means from all the circumstances of the case;*
- vii. *if the court proposes to make any financial order against the offender, it must give him or her fair opportunity to adduce any relevant financial information and to make appropriate submissions.*

Where the prosecutor is the Crown Prosecution Service, prosecution costs exclude the costs of the investigation, which are met by the police. In non-CPS cases where the costs of the investigation are incurred by the prosecutor a costs award may cover the costs of investigation as well as prosecution. Further guidance is provided in the [Criminal Costs Practice Direction and the Criminal Procedure Rules Part 76](#) . However, where the investigation was carried out as part of a council officer's routine duties, for which he or she would have been paid in the normal way, this is a relevant factor to be taken into account when deciding the appropriate amount of any costs order.

*Where the court wishes to impose costs in addition to any of the following: a fine; compensation; the surcharge, but the offender has insufficient resources to pay the total amount, the court **must** apply the following order of priority:*

1. *compensation;*
2. *surcharge;*
3. *fine;*
4. *costs.*

32. This is not followed as costs routinely are imposed in Single Justice Procedure cases. We suggest that the costs guidelines are further considered with a view to providing particular guidance in Single Justice Procedure cases where the form currently does not allow a full consideration of the person's financial situation.

Review of SJP convictions and also review of the £10,000 Fixed Penalty Notices.

33. Our view is that there should be a review of some of the cases where convictions have occurred using the SJP procedure, with a view to overturning those convictions due to an unfair procedure having been used.

34. Our proposal is that all convictions under the SJP procedure relating to the Covid-19 pandemic (i.e. under the emergency health protection regulations) are potentially unsafe because the SJP procedure is not suited to dealing with relatively complex offences which involve a defence of "reasonable excuse".

35. Whilst this may be outside the scope of this consultation, we raise the ongoing issue concerning Fixed Penalty Notices. There also should be a review of Fixed Penalty Notice payments under the emergency health protection regulations⁸, or at least a review of those where £10,000 was paid.⁹

36. The criteria we suggest include:

- Where the value owed is under a certain amount (for example £100) and has been paid (unless there are exceptional circumstances)
- Mitigation involves serious illness and/or
- Other exceptional circumstances
- Other applications where the applicant considers that the public interest test was not appropriately applied or applied at all
- Covid-19 pandemic SJP convictions
- Fixed Penalty Notice payments of £10,000 under the Covid-19 emergency health protection regulations (note the Joint Committee on Human Rights

⁸ 'Coronavirus review findings, March–August 2021', Crown Prosecution Service, 30 September 2021, www.cps.gov.uk/cps/news/coronavirus-review-findings-march-august-2021

⁹ The Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2020, (UKSI 2020/562) and The Prosecution of Offences Act 1985 (Specified Proceedings) (Coronavirus) (Amendment) Order 2021, (UKSI 2021/126). The effect of this instrument is explained in this letter from the Attorney General, 3 June

2020: www.committees.parliament.uk/publications/1420/documents/12931/default

recommended that every fixed penalty notice be reviewed). It also has been considered by Select Committees in 2021.¹⁰

Chapter 3: Improving Transparency

Question 28. Do you agree that some or all private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be required to register with HMCTS prior to bringing a prosecution?

37. Yes.

Question 29. If you agree that some or all private prosecutions should be required to register with HMCTS prior to bringing a prosecution, should this requirement apply to (please select one):

38. All. This need not be a particularly onerous requirement.

Question 30. Do you agree that some or all private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be required to publish their own data on the prosecutions they bring?

39. Don't know. However, it may be preferable for a central register to be developed to record basic details such as the volume of private prosecutions brought by entities, the outcomes, costs, and other such metrics.

Question 31. If you think some or all private prosecutors should publish data, what data should they be required to publish? (Select all that apply)

¹⁰ Joint Committee on Human Rights: every Fixed Penalty Notice issued under coronavirus regulations must be reviewed', 27 April 2021, committees.parliament.uk/committee/93/human-rights-joint-committee/news/154842/joint-committee-on-human-rights-every-fixed-penalty-notice-issued-under-coronavirus-regulations-must-be-reviewed; <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/1364/136409.htm>

- Number of prosecutions brought per year
- Offence types of prosecutions brought
- Resulting number of convictions
- Number of defendants who pleaded guilty
- Equalities data

40. Either the above should be published or (probably preferably) recorded on a central register.

Question 32. Do you agree that private prosecutors (apart from individuals bringing private prosecutions on their own behalf) should be required to assess their performance and/or regularly audit their own prosecutions?

41. No. This is likely to be unnecessary provided that a proper system of accreditation and inspection is introduced. And it is unlikely to be sufficient to safeguard against the risk of unfairness. (One assumes that the Post Office would likely have assessed its performance positively even during the height of its *Horizon*-related failures.)

Question 33. If you agree that private prosecutors should be required to assess their performance and/or regularly audit their own prosecutions, do you think this information should be published?

42. -

Question 35. If you have any other thoughts about transparency in private prosecutions which have not been captured in the questions above, please provide these.

43. -

Equalities Analysis Questions

Consistency of standards and accountability

Question 36. From your experience are there any groups with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in Chapter 1 of this paper? Please include which groups/individuals

and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views.

44. -

Question 37. What do you consider to be the equalities impacts of each of the proposals in Chapter 1 on individuals with protected characteristics? Are there any mitigations the government should consider? Please provide reasons and evidence where possible.

45. -

Improving safeguards to justice in the Single Justice Procedure

Question 38. From your experience are there any groups with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in Chapter 2 of this paper? Please include which groups/individuals and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views.

46. -

Question 39. What do you consider to be the equalities impacts of each of the proposals in Chapter 2 on individuals with protected characteristics? Are there any mitigations the government should consider? Please provide reasons and evidence where possible.

47. -

Improving transparency

Question 40. From your experience are there any groups with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in Chapter 3 of this paper? Please include which groups/individuals and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views.

48. -

Bar Council¹¹

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For further information please contact:

The General Council of the Bar of England and Wales
289-293 High Holborn, London, WC1V 7HZ

¹¹ This response was prepared for the Bar Council by members of the Law Reform Committee, Legal Services Committee, Kirsty Brimelow KC, and Adam Wagner KC