

THE UNPUNISHED CRIME: FINANCIAL FRAUD IN ENGLAND AND WALES

And the Role of Private Prosecutions to Bring Restorative Justice



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Directors: Tamlyn Edmonds, Andrew Marshall & Kate McMahon.

Tel: +44 (0)20 7583 8392

Email: enquiries@emmlegal.com

Address: 35 Cock Lane, London, EC1A 9BW

EXECUTIVE SUMMARY

In recent years there has been a profound withdrawal of the Crown in England and Wales bringing prosecutions for financial fraud:

- Only around 3% of reported financial frauds in England and Wales are prosecuted
- The number of prosecutions for fraud fell 26% in 2008-2018, mirroring the cuts in the budgets of both police and, in particular, the Crown Prosecution Service. In the last decade prosecutions for fraud have fallen a staggering 44%.
- Over the last decade, however, the number of reported financial frauds has quadrupled
- Overall, this means that England and Wales have become a global safe haven for financial fraudsters

For companies, particularly small and medium sized businesses; NGOs and individuals, increasingly abandoned by the Crown, bringing **private prosecutions can be the only viable alternative to securing justice**; to ensure offenders are punished (protecting society as they do so) and to secure a pathway to some measure of financial compensation.

The number of private prosecutions in England and Wales has grown considerably in the last decade; but it is difficult to be precise about the situation overall as the Ministry of Justice does not collate this data.

Not only can private prosecutions help to fill the vacuum by a decline in Crown prosecutions for financial fraud, they:

- May operate faster than Crown prosecution cases, with improved disclosure of evidence, and without any dilution in justice.
- Relieve pressure on police forces increasingly ill-equipped to harvest and curate evidence of financial frauds.
- Operate by exactly the same rules, in court, as Crown prosecutions and with rules of evidence disclosure that are exactly the same as for Crown prosecutions.

But even more can be done to optimise the way private prosecutions operate for the benefit of government; taxpayer; prosecutions and defendants. These include:

- Ensure **a return to investigating fraud**: no police force in England and Wales should be without officers experienced and focused on financial fraud.
- Solutions to achieve this can include **greater use of public-private partnerships** to provide the resources to do so at the investigation, prosecution, and asset recovery stages.
- **Encourage the Ministry of Justice to open a dialogue** between private prosecutors, insurance companies (to expand SME cover to include funding private prosecutions for financial fraud suffered) and to consider introducing a prosecutors' accreditation scheme.
- **Improve data collection** by the Home Office, Ministry of Justice, and the Office of National Statistics to give more clarity both as to the crown prosecution rate for financial fraud and also the total number of private prosecutions.
- **Encourage best practice in private prosecutions**, including the use of experienced prosecutors in private prosecutions, and – in larger and more complex cases – the use of disclosure counsel.

INTRODUCTION

This thought-piece has been produced by Edmonds Marshall McMahon, the first and only specialist private prosecution law firm in the UK. The firm is staffed by highly experienced prosecutors and offers private prosecution services to companies and individuals.

As we shall discuss in part one, England is becoming a safe haven for financial fraud due to the collapse in the investigation and prosecution of financial fraud crimes by the police, the Crown Prosecution Service ('CPS') and the Serious Fraud Office ('SFO'). As a result, overwhelmingly most financial fraud goes unpunished.

However, this sort of crime need not go unpunished. Even at a time when the police forces in England have competing priorities to ensure public safety, from child protection through to counterterrorism, the criminal justice system can still be brought to bear on those who commit financial fraud, using private prosecutions.

What are Private Prosecutions?

Private Prosecutions are prosecutions not brought by the Crown or other statutory prosecuting authorities. A private prosecution can be brought by any individual, charity or any company and the right is expressly preserved by section 6(1) Prosecution of Offences Act 1985. Other than the fact the prosecution is brought by a private individual or company, for all other purposes they proceed in exactly the same way as if the prosecution had been brought by the State.

However, it is important to remember that once a private prosecution is in the Crown Court, the case is brought in the name of the Queen – '*the Queen's justice*' – which is why private prosecution cases are still named **R v. [Accused]**. Because of this, private prosecutions are still heard in a normal criminal courts, as with any case brought by the Crown; with the same rules and procedures and, in more serious cases, before a jury. Critically, someone convicted in a private prosecution faces exactly the same penalties, and thus potentially the same prison sentences, as if they had been convicted in a case brought by the Crown.

The person, or company, bringing the private prosecution can also seek reimbursement from government central funds for their reasonable expenses incurred in bringing the prosecution. They can also try to recover sums lost in the fraud, from the convicted, by way of compensation orders issued by a court¹.

There are sometimes advantages to a private prosecution: they are often quicker, more focussed, and more efficient than public prosecutions, especially in cases involving fraud. People or companies might use a private prosecution where the Police or CPS have refused to investigate or prosecute a crime, where a state prosecution has failed, or where an individual or a company wishes to have more control over the timing and execution of their criminal case.

¹ We shall discuss these two issues further in this paper.

Private prosecutions are suitable for individuals, charities or companies who have been the victims of the criminal acts committed against them by others. Private prosecutions are often utilised by victims of fraud in place of civil litigation as it is considered to be both cheaper and a quicker route to justice. In some cases, civil proceedings run alongside the criminal proceedings, such is the gravity of the crime. In certain cases, private prosecutions in England and Wales can also be used in circumstances where an element of the offending has occurred outside the country.

Irrespective of the outcome, a court may in any private prosecution proceedings order the reimbursement of the prosecution's costs, from government central funds (to an amount as the court considers reasonably sufficient to compensate a private prosecutor for legal expenses properly incurred by the party bringing the proceedings). An order should be made except where there is good reason for not doing so, for example where proceedings have been initiated without good cause.

Where a defendant has been convicted of a criminal offence and benefited financially from their crime, it is possible to ask the court to make a confiscation order (the proceeds of which go back to the State) in addition to a compensation order (which goes to the victim). Where a victim has financially suffered as a result of the crime, it is possible for them to be compensated for this loss. Private prosecutions are often used to tackle economic or large-scale crimes that have not been understood or prioritised by traditional law enforcement agencies.

Edmonds, Marshall, McMahon ('EMM') – whose partners are all former Government prosecutors - ensures that the Attorney General's guidance on disclosure is applied to all our cases and has considerable experience in the most difficult disclosure areas on large fraud cases.

As we shall discuss below, there are public policy consequences to an increase in private prosecutions; not least about a greater transparency about the growth in private prosecutions and ensuring that private prosecutions are brought properly in the right circumstances; access to private prosecutions and that the criminal courts are being used properly. At EMM, we are committed to open and public debate that acknowledges these issues and to provides sensible, sustainable solutions that meet the challenges.

This paper only covers financial fraud in the jurisdiction of **England and Wales** (hereinafter we shall often, for the purposes only of brevity, use 'England', but this should be read also to include Wales). This report does not discuss matters in Scotland and Northern Ireland, which are separate jurisdictions.

Similarly, this report only covers financial fraud: broadly defined as "Any intentional false representation, including failure to declare information or abuse of position that is carried out to make a gain, cause loss or expose another to the risk of loss". The term fraud is used to describe many acts such as deception, bribery, forgery, extortion, corruption, theft, conspiracy, embezzlement, misappropriation, false representation, concealment of material facts and collusion.

Fraud is a crime and is also a civil law violation (for which the perpetrator can be sued).

Where the abbreviation, **PP** (or PPs), is used in this document, it refers to Private Prosecution(s).

Part One

England And Wales: A Safe haven For Financial Fraud?

There has been a profound withdrawal by the state in prosecuting financial fraud in England and Wales. This has happened to such an astonishing extent that the financial fraudster would now count themselves extremely unlucky to be prosecuted, still less convicted, to a degree that would shock the general public. As a result, it makes England the global safe haven for financial fraudsters.

In its [Quarterly Criminal Justice](#) statistics report of December 2018, the Ministry of Justice ('MoJ') revealed that there has been a **44% fall in the number of fraud prosecutions between 2008 and the end of 2018; with a staggering 26% fall in just one year (2017-2018).**

As Richard Atkins QC, the chair of Bar Council has [said](#): "Criminals up and down the country will be rubbing their hands with glee knowing that even if their crimes are detected and they are caught by the police, the chances of them being prosecuted or jailed are slim.

"These statistics make for grim reading. However, the state of the criminal justice system is far worse than the figures show...Criminals are going about their business unchallenged: fraud goes virtually unpunished and is not even included in the statistics."

For a number of reasons, not least to do with resources and the complexities of evidence, the CPS has increasingly not taken fraud cases forward to prosecution, meaning that criminal acts of financial fraud in England go unpunished. The number of financial frauds, however, has dramatically

- **A 44% fall in fraud prosecutions in the last decade; despite the sharp rises in this type of reported crime.**
- **Just around 3% of reported financial frauds are prosecuted in England and Wales**
- **The number of financial fraud prosecutions fell 26% 2008-2018...**

increased, even as state prosecution rates are falling. In 2018, for instance, there was a 12% increase in fraud and computer misuse offences; while most financial fraud committed against corporates is traditional fraud, and not cybercrime². While the Home Office Crime Outcomes statistical bulletin in March 2019 reports a 9% reduction in fraud prosecutions in England and Wales³, the MoJ data published at the end of 2018 shows a worse decline year-on-year.

Figure 3.3: Percentage change in prosecutions for offence groups, 2018 compared to 2008 and 2017 (Source Table Q3.2)

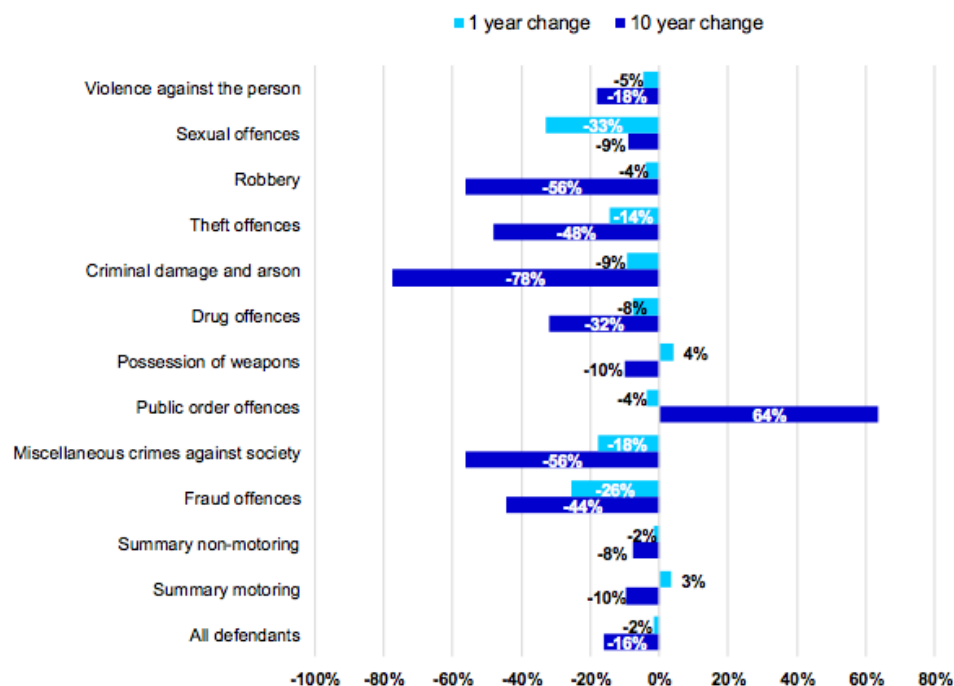


Figure 1 From the MoJ December 2018 Quarterly Justice Statistics

The National Statistics Office data shows a four-fold increase in reported fraud cases over the same period. In 2011, the number of financial frauds reported to police was 142,991: while in 2017, this number has risen to a staggering 641,539. However, in 2016, just 8,304 frauds were prosecuted. This

² [Source: Office of National Statistics, Crime in England and Wales experimental tables](#), 25 April 2019. In 2018, over 185,000 of these reported matters were non-bank and non-consumer fraud cases. 59% of financial fraud (non-bank, credit account or consumer fraud) were non-cyber cases. Conversely, 44% of bank and credit account fraud were cybercrimes; while over 82% of consumer fraud was cyber-crime.

³ [Home Office Crime Outcomes](#) (year to end March 2019), p.21, table 4.2

suggested that just 1.3% of reported frauds are prosecuted; underlining how attractive England and Wales had become for fraudsters.

However, since this data was published the Office for National Statistics ('ONS') has now recalibrated the way it counts fraud⁴ and we believe that, excluding bank/credit account and consumer fraud, around **just around 3% of financial fraud cases are prosecuted in England and Wales**⁵. It should be said that the data sets in this area are only partial, as the Chairman of the Bar Council has said.

Astonishingly, even this data *understates* the extent to which England has been a safe haven for fraudsters, when it is considered that many individuals or organisations *don't even bother to report* frauds to the police (either from a sense of 'embarrassment' or, sadly, from an expectation that police forces do not take fraud seriously and will not investigate). In its annual Crime Survey, the British Retail Consortium ('BRC') found that 80% of members surveyed described the police response to retail crime as 'poor' or 'very poor'; and suggested that financial fraud was up 5% in 2018 on 2017's figures⁶.

The police also recognise that investigating fraud is rarely seen as a priority as it does not "bang, bleed or shout"⁷. In 2019, Her Majesty's Inspectorate of Constabulary found that 7 out of 11 police forces interviewed were not able to provide even basic data about their responses to reported fraud; were ineffectual in the use of intelligence relating to fraud; officers unaware of fraud investigation best practice; and some forces sought reasons not to investigate fraud.

⁴ See section 1.1 ('publication of crime statistics') of the current User Guide for Crime Statistics for England and Wales. The National Fraud Intelligence Bureau also changed its data collection in October 2018 with the ambition of providing "richer information on outcomes against fraud offences recorded" (Home Office Crime Outcomes 2019, p. 24); however, "it has not yet been possible to provide this information for publication and the Home Office continues to work with the NFIB to improve data quality".

⁵ In 2018, there were over 3.6 million reported frauds: Crime Survey for England and Wales (CSEW); of which 2.4 million were bank or credit account frauds and over 1 million were consumer frauds. There were over 185,000 non-bank or consumer frauds reported to police. CPS Report, 25 February 2019 Assuming around 6,200 financial fraud prosecutions in 2018 (a 26% reduction) in England and Wales, this is a prosecution rate of 3.4% compared to reported crime

⁶ Source: BRC Crime Survey 2019

⁷ 'Fraud: time to choose', HM Inspectorate of Constabulary, April 2019, p. 5.

One unnamed police force filed, with no further action, 96 percent of the cases it received from the National Fraud Intelligence Bureau, despite the fact that some of these cases had a good degree of evidence, including identified suspects. Staff performing this role were clear that their function was to 'reduce demand'.

What is the cost of fraud? Experian estimated that the cost to the UK economy of all fraud to be £193 billion every year: or more than £6,000 *a second*⁸. Many of the victims of fraud will be companies and other organisations such as charities and other NGOs, as in a recent case of R. v Bishop, where £800,000 was defrauded from a modestly sized charity⁹).

The cost to the UK economy of financial fraud is **£193 billion every year: or more than £6,000 a second**

It is wrong to say that corporate fraud is a victimless crime. EMM knows that many corporate victims of financial fraud find themselves having to downsize – making people redundant – and some (especially small and medium-sized businesses, 'SMEs') cannot recover from the scale of discovered fraud, and collapse into insolvency, destroying lives, careers and wealth.

Despite this mammoth increase in financial fraud, victims – especially if they happen to be companies - are finding it increasingly hard to obtain justice in England and Wales, of which the recent private prosecution of **R v. Lawless** is a good example¹⁰. This sends a bad message both about the quality of justice in England and Wales, but also serves to be the opposite of a disincentive for criminals, and would-be criminals, considering fraudulent behaviour against corporates.

⁸ [Experian: 'Identity and Fraud', 25 May 2016](#). However, audit firm, PwC estimates losses, *to individuals*, from financial fraud at around £10 billion a year

⁹ <https://www.newburytoday.co.uk/news/news/27266/charity-treasurer-who-stole-80-000-is-jailed.html>

¹⁰ <https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-45889102>

In 2018, EMM acted in a private prosecution (**R v. Lawless**) where a Hertfordshire accountant was convicted of defrauding almost £2 million from his employer. He was jailed for seven and a half years. This case was taken to private prosecution despite having been reported to the police.

The **police had refused to investigate** (the first police case officer went on extended sick leave, while his replacement refused to investigate citing a 'lack of resources'). Since Lawless was convicted and jailed, despite the refusal of the police to act, Hertfordshire police announced it will launch *"an immediate review to examine the circumstances surrounding the decisions made in November 2016 concerning this case."*

Following conviction and imprisonment, EMM is pursuing confiscation orders against Mr Lawless , in partnership with the police's Regional Asset Recovery team (or 'RART'); as well as partial reimbursement of the victim's prosecution costs from government central funds. This is one of the first examples of a partnership between private prosecutors and a police RART to fulfil confiscation orders.

In some ways it is fair to say that police forces – doubtless solely as a result of the near 20% budget cutbacks¹¹ they have faced - have been forced to 'withdraw' from investigating financial fraud. The police have many competing priorities on their sharply limited resources and investigating financial fraud has, in most constabularies, fallen way down the list.

By way of example in the 2017 British Retail Consortium's '2017 Retail Crime Survey'¹² the BRC observed:

- Of police forces in England and Wales, six did not have any officer focused on economic crime

¹¹ Since 2010-2016, when Theresa May became Home Secretary, and until the end of the later Prime Minister May's government, total police officer numbers have fallen by 21,500 ([The Guardian, 5 June, 2017](#)); reflecting a 19% cut in police budget 2010-2018. This 19% is an average figure. In Northumbria, for instance, police budgets in the period have been cut by 25% ([FullFact.org, 28 September 2018](#)).

The situation for the Crown Prosecution Service is even worse: 2010-2017 the CPS has suffered a 27% budget cut, including a 33% cut in staff. Invariably this meant the CPS was unable to prosecute as many cases, or was forced to discontinue cases after charges have been brought. In 2014 over 24,00 criminal cases were discontinued, but then the number started to fall ([CPS Freedom of Information request](#)).

This fall in discontinuances, however, mirrors a fall in the number of overall criminal cases prosecuted by the CPS – [source: CPS Annual Report](#) - from almost 101,000 Crown Court cases in 2014/15 to under 81,000 in 2016/17; despite increases in reported crime.

¹² [British Retail Consortium, 2017 Retail Crime Survey](#)

- Nine forces had no officer focused on cybercrime (a growing source of financial fraud): that's over 20% of the 43 police forces in England and Wales
- There is one notable exception: the City of London police. The police force, which specialises in financial crime, in 2016 established a panel of firms and investigators to offer advice to victims of financial fraud and assist the constabulary with asset recovery. The panel was dubbed a joint working partnership internally¹³.

Equally, one of the reasons police forces have 'withdrawn' from investigating fraud, is the complexity of fraud investigations.

By way of example, in terms of major fraud investigations¹⁴, in the 2018 Serious Fraud Office Annual Report, it noted: *"last year, the Director drew attention to the complexity of the SFO's cases by highlighting that **more than two million documents** were processed each month [by the SFO]"*, but now the SFO is processing over **six million documents per month**.

This massive paper trail (and more especially, electronic data) is despite the fact that the SFO only started **eight** cases in 2017 and charged only four companies and 24 individuals¹⁵.

Taken against headcount cuts in both the police and the CPS, and the growing amount of evidence to be reviewed – not least from a burgeoning of electronic devices such as smart phones and other portable electronic devices - the UK criminal justice system has never been less well-structured or resourced to investigate and prosecute crime.

¹³ City of London Police launches inaugural fraud panel, [12 May 2016](#). *Disclosure: EMM was a member of this panel.*

¹⁴ Which of course is only a tiny minority of all financial frauds

¹⁵ The SFO's record on serious prosecution is not without controversy. The 2018 Annual Report reveals that it only achieved a conviction rate of 68.9% by individual defendants (compared to a [2017/18](#) overall criminal conviction rate in England and Wales of 80.0% (Crown Court) and 85% at Magistrates, recovering only £5 million in confiscation orders and seizures.

By contrast, in just one private prosecution, in 2017 (brought by EMM), **R v. Ketan Somaia**, a confiscation order of over £20 million was secured.

Part Two

The Use of Private Prosecutions for Financial Fraud

After the staggering decline in CPS prosecutions for financial fraud (2010-2018), despite a massive quadrupling of even just *reported* frauds, England and Wales has become a safe-haven jurisdiction for financial fraudsters; with more and more victims left high and dry and without justice from the Crown prosecution system.

An alternative, however, can be found in private prosecutions ('PPs') as an effective way to obtain criminal justice as evidenced by the outcome of a growing number of recent cases. As we shall see below, such prosecutions may be dealt with faster than the CPS can bring them, but also end up costing the taxpayer less than police/CPS-brought prosecutions.

How far and fast private prosecutions for financial fraud is growing is not a precise science, because neither the National Statistics Office, nor the Ministry of Justice, publishes a count of PPs. As we discuss below, improving data collection by central government in this area is an important step needed.

However, anecdotal evidence suggests that the number of PPs is growing, as many businesses and individuals have come to realise the police and Crown prosecutors have, overwhelmingly, withdrawn from financial fraud cases.

The police, even before the case reaches the CPS, have declined to investigate reported financial fraud crime and this has led to a rise in private prosecutions, despite the costs involved. We have identified a number of reasons for this:

- The route to trial in a PP may be **faster** than with the CPS or SFO; perhaps because of a more focused marshalling of resources and a deeper expertise in financial fraud, amongst private

prosecution specialists, (including, for instance, using in-house investigators to collect and analyse evidence).

- A case brought by the CPS can easily take 12-24 months between reported crime and trial (in the very rare cases where the CPS brings a financial fraud case: as we suggest, the CPS prosecutes only around 3% of reported cases). By contrast, private prosecutions for financial fraud can be ready for trial in around 6-9 months.
- Contrary to a misleading (and insufficiently challenged) media consensus, long practical experience shows that juries **do understand** financial fraud cases and are perfectly able to try cases satisfactorily.

In R v. Sultana, a private prosecution led by Mischoon de Reya, conviction secured the eight-year prison sentence of a former car dealer, after a £88 million scam. The Crown Prosecution Service had refused to prosecute the case, saying the evidential tests were not met.

However, during the private prosecution, the Defence asked the Director of Public Prosecutions to use his power to stop the case. The DPP refused: the CPS said "When asked to take over and stop the private prosecution by the defence, we considered the evidence again and were satisfied the CPS did not need to intervene".

Indeed, after the private prosecution was successful, the CPS itself said: "*We will consider the outcome to see whether any lessons can be learned*"

- The issue sometimes is not a lack of intellectual ability among jurors, to determine fact and understand criminal behaviour, but problems with *the prosecution* caused by poor evidence management and case presentation (as can arise, for instance, out of chaotic disclosure of evidence).

Indeed, the problems in evidence disclosure in financial fraud cases more than mirrors – and perhaps exceeds - recent high-profile CPS prosecution collapses in rape and other sexual assault cases, as a result of inadequate or failed evidence disclosure. The recent case of R v.

James Hamer¹⁶ is a good example. The root causes of evidence disclosure have been explored in detail elsewhere, but it is worth summarising (see box, right).

In **R v. James Hamer**, a Crown prosecution case brought in relation to a horse-racing fraud, where the defendant faced 23 separate fraud and theft charges, the case collapsed after six weeks of trial evidence.

This happened after the judge agreed with the Defence that there had been an '*abuse of process*' by the CPS and prosecution counsel, based on non-disclosure and late disclosure of vital evidence

Why does evidence disclosure in financial fraud cause such a problem for the police and CPS?

- Curating evidence for disclosure at trial in a case may not be a fulltime job in many police constabularies, as officers have to fit this task into their 'spare' work time, around other front-line police duties. This leads to both delays and mistakes.
- By contrast, in PPs, disclosure may be managed better than the CPS and police may be able to achieve; due to focused resources including, sometimes, use of a specialist Disclosure Counsel¹⁷.

If a PP fails on an evidence disclosure matter (where evidential material vital for the proper conduct of the defence was not appropriately disclosed), that is a failure of the client bringing the prosecution. It is right that their case fails and, of course, the money lost in bringing the prosecution is theirs, and not that of the state or taxpayer.

¹⁶ [The Guardian, May 23 2018](#)

¹⁷ A Disclosure Counsel is a lawyer focused purely on evidence **disclosure** obligations by the prosecutor – in this case a private prosecutor – to the defence legal team. They are not themselves prosecuting the case, they are curating and managing evidence and its full disclosure in a *timely* and complete way. Crown prosecutors – under huge budget pressure – invariably do not have the luxury of this service.

The Issue of Costs

One of the frequent criticisms of private prosecutions is that it represents ‘rich men’s justice’. While certainly the costs of bringing a private prosecution are not trivial, nonetheless, there may be new routes opening up to fund such cases (analogous to the way in which litigation funders have expanded access to civil actions).

It may well be that the insurance sector evolves products to help, particularly SMEs, in funding restorative justice for financial fraud, through legal fees insurance, both for PPs and for the subsequent pursuit of the convicted via compensation and confiscation orders.

Additionally, we have already seen precedent for the use of ‘crowd-funding’ for private prosecutions. The crowd-funding model may be particularly apt for cases with a social interest, where there is a benefit to the public at large, such as R v. Purcell, which was brought by the Cyclist Defence Fund.

Currently, there may be restrictions on how money raised through crowdfunding can be used to fund PPs. These will depend on various factors, such as:

- the specific platform through which money is raised:
platforms such as CrowdJustice require that money be paid directly to the account of the legal representatives
- whether the body seeking funding is a registered charity. If it is then regulatory restrictions and considerations will apply

The case of R v. Purcell, was a private prosecution brought against Gail Purcell (where EMM were the prosecuting solicitors).

Teacher Michael Mason was a cyclist killed by Ms Purcell when he was struck from behind by the car she was driving. The case was brought by the Cyclists Defence Fund (‘CDF’), after the Metropolitan Police declined to refer the matter to the CPS for charging advice (contrary to CPS guidance in fatal collision cases).

The case was the first-ever example of a crowd-funded PP, after more than 20,000 people donated over £80,000 to fund the prosecution.

Purcell was subsequently acquitted. As to costs, the CDF had paid out more than the £80,000 raised in the crowdfunding, to complete the prosecution. Subsequently, the judge made a costs order from government central funds, to allow the CDF to recover that amount spent *over and above* that raised by crowd funding (but ruled that the crowdfunded amount could not be reimbursed from central funds).

- the specific wording of the appeal and in particular the extent to which it is restricted for use on specific purposes

Ultimately, it is for members of the public to decide whether they wish to donate to a private prosecution project. For example, the founder of [#BrexitJustice](#), Marcus J Ball, set up two separate projects on crowd funder, one to fund legal action (a private prosecution against Prime Minister Boris Johnson) and another to fund a salary and expenses to enable him to run his #BrexitJustice campaign. In total Ball was able to raise over £500,000 from donors to fund his (eventually unsuccessful) PP¹⁸.

As another commentator on PPs has written¹⁹, given the recent growth in crowdfunding platforms, there is no reason why charities should not become more active in the field of private prosecutions, provided they can demonstrate that they act with consistency, fairness, and balance in holding to account those who break the law.

Charities representing the elderly or disabled, the environment, or other areas which feel that they are underserved by the police and CPS, might well be among those in the third sector who will become more active in the field of private prosecutions in future.

Furthermore, in Part One we saw that the majority of members of the British Retail Consortium feel that the police response to crime is inadequate. Perhaps the BRC might consider following the model of Cycling UK, which set up the charitable Cyclists Defence Fund, to help its members bring private prosecutions.

¹⁸ Although this case is also a salutary reminder that those who bring PPs which a court subsequently finds were wrongfully brought, may face significant financial consequences in doing so: '[Boris private prosecutor liable to pay over £100,000 in costs](#)'.

¹⁹ <https://www.kingsleynapley.co.uk/insights/blogs/regulatory-blog/private-prosecutions-and-the-shape-of-things-to-come>

Despite the acquittal in Purcell, this case shows that bringing a private prosecution may be a visible way for charities to further their charitable objectives for the public benefit. Crowdfunding makes this easier.

As another recent case²⁰ demonstrated, it is controversial when significant central funds are expended on private prosecutions, particularly in the case where the outcome is an acquittal. This has led some to question whether a judge's discretion to award central costs to the party bringing a private prosecution should be limited only to those cases where the outcome is a conviction. Such a development would be a mistake and would risk undermining the rule of law.

The purpose of a private prosecution is to ensure justice: lawyers acting for the private prosecutor have a duty to act as 'ministers of justice' when dealing with the case.

While confiscation orders may be pursued, following a conviction, they are by no means guaranteed. It is important that, just as in a CPS prosecution, the private prosecutorial team *does not have a financial incentive* in securing a conviction.

2 Private Prosecutions: Legal Costs: written question (Hansard, 23 July 2018)

Andrew Rosindell:

[167197]

To ask the Secretary of State for Justice, how much funding from the public purse has been allocated on covering the legal costs of private prosecutors in the event that the private prosecution fails in the last five years.

Andrew Rosindell:

[167198]

To ask the Secretary of State for Justice, when his Department last reviewed its policy of reimbursing private prosecutors' costs from the public purse in the event that the private prosecution fails.

Lucy Frazer:

Prior to October 2014 Legal Aid Agency payment data did not separately identify private prosecution costs from other costs awarded from central funds. Data is available for the last three years for private prosecution costs, but these figures do not distinguish between costs awarded in successful and unsuccessful prosecutions. Total payments to private prosecutors were:

2015-16 £4,263,000

2016-17 £1,821,000

2017-18 £3,674,000

Central Funds policy is kept under regular review.

²⁰ [The Times, May 4 2019](#)

The duty of the private prosecutorial legal team, just as with State prosecutors, is to disclose relevant material even (and, in fact, especially) where that material *undermines the prosecution's case*.

Limiting PP costs reimbursement only to those cases where there is a successful conviction might risk the outcome that the private prosecutors do not comply with disclosure duties for fear of weakening their chance of central costs reimbursement. Such a development would clearly not be in the interests of justice.

In 2017/18, the cost of PPs to central funds was under £4 million; or less than 1% compared to the CPS budget in the same period of around £506 million²¹. Thus, even while the number of PPs are increasing, they cannot remotely be described as a significant Treasury cost. In the 2017/18 period CPS expenditure fell again, as it has each year since 2010, as the CPS reacted to further budget cuts.

In 2017/18, the CPS expenditure was a shade under the cost that year of free TV licenses to the over 75s²². By contrast, expenditure on international aid that year rose to £11 billion (almost twenty-two times greater)²³.

Of course, the financing of a PP is a major disincentive for many victims. However, it must be noted that it is possible for the party bringing the PP to apply to the judge for costs reimbursement from government central funds²⁴.

The decision to award costs to a private prosecutor is a decision made by a judge. The judge may refuse to make such an order where there are circumstances that may it appropriate to do so, for example the private prosecutor has failed to disclose relevant information or whether they have acted improperly in the bringing or conduct of the proceedings.

²¹ [Source: CPS Annual Report and Accounts 2017/18 p.11](#)

²² [Source: 2017/18 TV license fee statistics, House of Commons library](#)

²³ [Source: DFID Annual Report and Accounts 2017/18 p/17](#)

²⁴ Noting this reimbursement comes from central funds and not from CPS or police budgets.

Private prosecution costs can be offset by:

- a. ***Partial reimbursement of costs***: these cases invariably still represent a ‘win’ for the taxpayer, inasmuch as government central funds do not cover the whole cost of bringing a PP²⁵. Reimbursement of costs occurs after a process known as Detailed Assessment (also often referred to by lawyers as ‘the taxation of costs’). In most PPs, the party bringing the private prosecution might recover from government central funds about a proportion of their costs (perhaps, in large cases, around somewhat over half.)
- b. Moreover, using a criminal conviction secured in a PP, the victim (whether a corporate or individual), can then apply for compensation orders from convicted defendants to recover the balance of costs and to recover as much as possible of the stolen amounts.

In the 2016 case of R v Ketan Somaia²⁶, confiscation and compensation orders amounting to over £38.6 million were awarded following his conviction for fraud. Following Somaia’s failure to pay these confiscation orders, a further term of ten years’ imprisonment was added to his sentence²⁷.

It is important to note that confiscation receipts *go back to the state*, not to the victim of fraud, further offsetting any net cost to the state (after reimbursement of PP costs from government central funds); whereas the receipts from any compensation orders made by a judge are returned to the victim.

²⁵ We believe that PPs might indeed be cheaper than cases brought by the CPS, but there is no hard data in this area.

²⁶ [Daily Mail, 12 January 2016](#)

²⁷ Source: <https://www.lexology.com/library/detail.aspx?g=090e156d-3287-439d-aec8-a0be2ec8f076>

The 'fairness' of private prosecutions

Of course, over and above financial compensation, the reason why those who have suffered financial fraud bring private prosecutions is to receive criminal justice; so that the guilty are punished (including, as appropriate, where a judge sentences the convicted to a term of imprisonment). What is often frustrating for the victims of financial fraud, where the police/CPS refrain from acting, is the frustration that criminals have 'gotten away with it'.

Increasingly we believe that not only will insurers support corporates, including SMEs, in bringing PPs but that new and innovative funding models will emerge, mirroring third-party funding in civil litigation. These may also see the emergence of crowd-funding models (that may be particularly important for charities and other NGOs which fall victim to financial fraud).

There are already important safeguards in place to ensure PPs do not mask any attempt to abuse the legal process. While any individual or corporate can bring a PP, there are several occasions for the defence to ask the judge to discontinue the trial; while the law already provides that PPs can be stopped by the Director of Public Prosecutions²⁸ ('DPP'). It is important to note that it remains rare for the DPP to intervene to stop a private prosecution, which is a testament to the care with which most are brought. Indeed, only a tiny number of PPs seem to be stopped by the DPP but, again, MoJ does not publish this data²⁹.

This is not to say that there are not risks inherent in private prosecutions, as the recent Bar Standards Board case of barrister, **Mark Smith**³⁰, shows.

In Summer 2018, barrister Mark William Smith was suspended from practice for one month by the Bar Standards Board.

This followed his 2015 failure properly to advise his client who was bringing a private prosecution, which was subsequently taken over by the CPS and the case discontinued; resulting in a costs order against the client.

²⁸ [section 42 Supreme Court Act 1981](#), as amended by [section 24 Prosecution of Offences Act 1985](#)

²⁹ This is an area where Ministry of Justice ('MoJ') data is weak.

³⁰ [Bar Standards Board, 5 July, 2018](#).

It is important that parties bringing private prosecutions are fully informed of the process and that their legal advisers include former prosecutors. While anyone may bring a private prosecution for financial fraud, it is critical to remember that, before a PP is brought, lawyers acting for the private prosecutor should apply the same test that is applied by Crown prosecutors before commencing proceedings, known as the '**Full Code Test**'.

Full Code Test. This is a two-stage test which must be applied each time a charging decision is made, whether it is made by the police, the CPS, or private prosecutors.

This is the evidential stage – where prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge - and the public interest stage. The evidential stage must be met before the public interest stage can be considered

The critical issue is to ensure that there is sufficient evidence *to provide a realistic prospect of conviction* before a case is brought. A private prosecution is unlike bringing a civil case. The weight of evidence required to win – 'the balance of proof' – is different. To win in a PP, the private prosecutor needs to marshal evidence to convince a jury "beyond all reasonable doubt"; whereas in a civil case they need only bring evidence sufficient to 'on the balance of probabilities'. Equally, building a case to

convince *beyond all reasonable doubt*' is very different from the normal work of being a criminal defence lawyer, where the focus is on demonstrating doubt (particularly where not immediately obvious from the weight of prosecutorial evidence).

In practical terms, the whole structure of the legal team bringing a PP is different from most law firms; and more closely mirrors the proportion of activity between police and CPS. Specifically, in a private prosecution around 50% of all the work is in the investigative phase, collecting and analysing raw evidence. This is done by investigative lawyers and is not the typical skills-set of most law firms (which curate and collate evidence that already exists, rather than search for and harvest it)³¹.

³¹ In a typical, civil, or criminal defence case, perhaps only 10-20% of workload is in the investigatory phase, or considerably less than half the investigative workload for a PP firm.

To this end, EMM would support the development of the accreditation scheme for prosecutors (public and private alike) and would encourage and support the Ministry of Justice to begin a dialogue with stakeholders, including private prosecutors, that could lead to such a Scheme which, EMM feels, would be of benefit to the public as a whole.

Part Three

Best Practice and How to Optimise Use of Private Prosecutions for the Public Good

As we have seen, in recent years there has been a profound withdrawal from prosecuting financial fraud by the Crown's criminal justice system in England and Wales. The reality of the public finances, and the pressures both on police and CPS headcount, are such that there is no realistic prospect of a return to the state prosecuting financial fraud to the degree that best serves the public interest.

Private prosecutions have therefore a role to play in allowing individuals and, in particular, corporates (including, increasingly, SMEs) to seek criminal justice for the financial fraud they have suffered.

In order to best optimise this, and for best practice and safeguarding of those thinking of bringing PPS; and to benefit the public interest, EMM makes the following recommendations³²:

1. ***Ensuring a return to investigating financial fraud.*** Notwithstanding the growth in PPs, it is not in the public interest that police forces choose not to investigate financial fraud. The City of London police force ('City police') is an outlier in the withdrawal from investigating and prosecuting financial fraud. The police in England and Wales must meet the needs of the twenty-first century. While cost pressures on local constabularies mean that they cannot all emulate City of London, nonetheless minimum statutory guidelines should ensure that local police forces have officers trained and experienced in financial crime (as distinct from, but not ignoring the need for officers focused on, cybercrime)³³.

³² EMM is aware that the [Private Prosecutors' Association](#), which EMM has hitherto chosen not to join, has recently circulated a draft Code of Conduct to its membership. EMM has seen this draft and, while we see nothing in it objectionable, we are not convinced it meaningfully advances safeguards in the PP sector for either clients or defendants.

³³ EMM is concerned that police forces, recognising the high profile of cybercrime, may look to resource this area but further retreat from investigating 'traditional' financial fraud, which is the majority of fraud suffered by corporates generally.

2. **More partnerships between public and private sector.** The [Insurance Fraud Enforcement](#)

[Department \('IFED'\)](#) is a specialist police unit dedicated to tackling insurance fraud. It is funded by Association of British Insurers (ABI) and Lloyds of London members, and is hosted by the City of London Police within the Economic Crime Directorate. It provides a model as to how other forces might consider ways of obtaining the resources adequately to investigate reported financial frauds.

Such partnerships allow the police to bring in specialised expertise and skills, not easily replicated inside the police force, making the investigation of financial crime efficient, whereas it might not otherwise be possible at all.

Equally, the recent, pioneering partnership between EMM and the Regional Asset Recovery Team from Hertfordshire police (following the **R v. Lawless** case), to pursue and implement confiscation and compensation orders against a convicted fraudster, provides another example of how partnership can optimise resources and outcomes. Such partnerships can not only offset any net costs to government central funds, but also provide reimbursement to the victims of fraud.

3. **More data with more clarity.** Currently neither the MoJ, nor National Statistics, collates or publishes annual data on the number of PPs. They should be encouraged to do so. It would be helpful to develop the government's statistical reporting to include:

- a. Annual data collection, reporting and analysis on the number of private prosecutions and – just as with CPS prosecutions – the breakdown between cases brought, discontinuances etc, so as to give appropriate transparency to this growing area of prosecution.
- b. To achieve this, it may be useful to change 'case designation' in legal reporting of cases already concluded at first instance.

While PPs are still brought in the name of the Crown ('**R v. ...**'), it may be useful for overall clarity to identify PP cases (e.g., **R (pp) v.**) to facilitate better PP case tracking by the MoJ and National Statistics.

An important point to note here, however, is that only *at the conclusion of a case* a judge can assign such a designation. There are two very important reasons for this:

- i. Judges often instruct counsel for prosecution and defence in PP cases *not* to refer to the fact that a case has been brought privately, rather than by the CPS. This is so juries remain entirely unbiased and are not distracted or confused by the nature of a PP; and
- ii. Some PPs are taken over by the DPP during preparation for, or during the course of, trial and therefore become CPS cases and no longer private prosecutions³⁴.

4. ***Safeguarding the parties who bring PPs.*** It is important to ensure that the parties bringing PPs can be reassured the legal system in England has their interests in mind. To ensure this we recommend PPs should only be brought by law firms where there is at least a senior practicing lawyer with prosecutorial experience (i.e., with real prosecutorial experience of applying the Full Code test). This experience could either be with the CPS, or another government regulatory body that bring criminal prosecutions, but ensuring such experience lies within teams being private prosecutions will do much both to ensure that the Full Code test is properly met – removing any risk of failed prosecutions – and will protect prosecuting

³⁴ The CPS might take over and continue with a prosecution if it becomes clear that:

1. The evidential sufficiency stage of the Full Code Test and the public interest stage of the Full Code Test are met; and
2. there is a particular need for the CPS to take over the prosecution (such as, but not limited to, the prosecution requires the disclosure of highly sensitive material; or involves applications for special measures, such as for witness anonymity).

clients from the costs of bringing hopeless cases. **We would also support and encourage the Ministry of Justice in opening a dialogue with stakeholders, including private prosecutors, leading to a prosecutors' accreditation scheme, open to prosecutors from government agencies other than the CPS (such as the Health and Safety Executive, amongst other public bodies), as well as private prosecutors.**

5. **Consider use of a dedicated Disclosure Counsel:** can make an important difference to the curating of evidence in financial fraud cases. CPS prosecutions often cannot afford the resources to provide this whereas, in larger and more complex financial fraud private prosecutions, this may be more reasonably achievable for law firms bringing PPs on behalf of a client.
6. We call upon the Ministry of Justice to **encourage the insurance sector in the development of business insurance packages**, particularly for SMEs, to cover private prosecutions in cases where they suffer financial fraud. Equally, following the Cyclist Defence Fund model, bodies like the Federation of Small Business and the British retail Consortium, amongst others, might consider how they can **apply the crowd funding model among their own memberships**, to support members bringing PPs where they suffer financial fraud.