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## **The Public-Private Divide in Prosecutions and Obtaining of Evidence: Towards a Code?**

*Claire de Than and Jesse Elvin*

In English law, in spite of the existence of the Crown Prosecution Service, every person still has the right to bring a criminal prosecution. Nowadays, this right is little used by individuals acting in a personal capacity, but private prosecutions have become much more common in recent years as corporations have attempted to use them to protect their commercial interests, and as some law firms have encouraged individuals and corporations to bring them as a means of obtaining redress. In 1977, Lord Diplock stated that the right to bring a private prosecution is ‘a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of [the relevant state] authorities to prosecute offenders against the criminal law.’<sup>1</sup> However, there is more recent judicial authority for the view that the right to prosecute privately is a historical anomaly of little worth, and potentially dangerous.<sup>2</sup>

It is with both of these judicial views in mind that we examine the relationship between certain organisations which exist solely to protect the commercial interests of particular corporations, and English and Welsh state agencies such as police authorities and local councils, which have a duty to consider the public interest but which sometimes work in partnership with such organisations. We argue that this relationship raises serious concerns about the potential abuse of state power by private organisations, and that a specific code of conduct may be required to guard against such abuse.

**Keywords:** private prosecution

### **Introduction**

In English law, in spite of the existence of the Crown Prosecution Service, every person still has the right to bring a criminal prosecution<sup>3</sup>. This right is largely unregulated, slipping underneath the net of filters and protections which have been introduced to facilitate consistency and uphold human rights in relation to

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<sup>1</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 498.

<sup>2</sup> *Jones v Whalley* [2006] UKHL 41, [16]. (per Lord Bingham).

<sup>3</sup> The ‘right’ might more accurately be labelled ‘ability’, and ‘bring’ might more accurately be replaced by ‘commence’, since the Crown Prosecution Service has a power to take over a private prosecution and either continue or discontinue the prosecution.

state prosecutions. Most people would think of private prosecutions as being brought by individuals who believe that they have been victims of crime, where the state is unwilling or unable to prosecute. But there have been significant changes in how and why private prosecutions are brought: nowadays, the right is apparently<sup>1</sup> little-used by aggrieved private individuals attempting to achieve redress for wrongs against themselves, but as we shall see, organisations frequently use it to protect their commercial interests. In 1977, Lord Diplock stated that the right to bring a private prosecution is ‘a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law’.<sup>2</sup> However, there is more recent judicial authority for the view that the right to prosecute privately is a historical anomaly of little worth, and potentially dangerous: as Lord Bingham put it in 2006,

*‘[a] crime is an offence against the good order of the state. It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted[...].The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest’.*<sup>3</sup>

It is with both of these judicial views in mind that we examine the relationship between certain organisations which exist solely to protect the commercial interests of particular corporations, and English and Welsh state agencies such as police authorities and local councils, which have a duty to consider the public interest but which sometimes work in partnership with such organisations. We will start by explaining what is meant by a private prosecution, and how the right to bring a private prosecution is used in practice. We will then describe the relationship between private organisations and English and Welsh state agencies (such as the police) as this relationship applies to prosecutions and obtaining of evidence. Finally, we will argue that this uneasy relationship raises serious concerns about the potential abuse of state power by private organisations; that such concerns are heightened by the use of public money to pay for aspects of private proceedings brought by companies; and that a specific code of conduct will be required to guard against such concerns.<sup>4</sup>

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<sup>1</sup> It is impossible to be sure how often private individuals bring criminal prosecutions, since no official statistics exist.

<sup>2</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 498.

<sup>3</sup> *Jones v Whalley* [2006] UKHL 41, [16].

<sup>4</sup> In a recent case, *R (on the application of Gujra) v CPS* [2012] UKSC 52, the Supreme Court of England and Wales considered the merits of the right to bring a private prosecution. Lord Wilson observed at [26]: ‘[t]he value to our modern society of the right to bring a private prosecution is the subject of lively debate’. We do not intend to focus upon this debate here except in so far as it relates to the subject matter at hand. However, we believe that the existence of the right to bring a private prosecution is significant, and that it requires reconsideration.

## What is a private prosecution, and how is the right to bring one used in practice?

In England and Wales, most criminal prosecutions are brought by the state, via the Crown Prosecution Service (CPS). Created in 1986 by section 1 of the Prosecution of Offences Act 1985, the CPS is responsible for prosecuting cases investigated by the police. However, section 6(1) of the 1985 Act specifically retained the right to bring a private prosecution, subject to limited controlling mechanisms. This means that private prosecutions still occur in England and Wales today. A private prosecution is a prosecution instigated by a private individual or organisation ‘not acting on behalf of the police or any other [state] prosecuting authority or body which conducts prosecutions’.<sup>1</sup>

A major difficulty in researching this field is that there are no official statistics on the prevalence of private prosecutions in England and Wales.<sup>2</sup> Thus, it is impossible to be sure about their exact extent or the proportion of private prosecutions brought by individuals, as opposed to commercial or other private organisations. Nonetheless, the information that is available makes it clear that private organisations frequently use private prosecutions to protect or promote their interests or goals, and that some of these organisations work in partnership with state agencies such as local councils and police forces in relation to certain law enforcement matters. At least one of these private organisations, the Federation Against Copyright Theft (FACT), seems in an important respect to be the contemporary equivalent of an eighteenth or nineteenth ‘prosecution association’. Prosecution associations were common in eighteenth and nineteenth century England, when there was no centralised state prosecutor<sup>3</sup>. As described by Mark Koyama<sup>4</sup>:

*‘Associations for the prosecution of felons were clubs whose members joined together to subsidize the cost of prosecutions and reward individuals who provided information that led to convictions. Prosecution associations [...] never tried or punished suspects. They cooperated with, and supplemented, the legal system.’*

FACT defines itself as “the UK’s leading trade organisation established to protect and represent the interests of its members’ Intellectual Property”.<sup>5</sup> It is one of the most prominent of the contemporary private organisations that regularly uses the right to bring a private prosecution; indeed, Russell Cooke solicitors claim that FACT is the leading private prosecutor in relation to

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<sup>1</sup> Crown Prosecution Service (CPS), “Private Prosecutions”, at [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an01](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an01).

<sup>2</sup> See the reply to the request for such information at [http://www.whatdotheyknow.com/request/private\\_prosecutions](http://www.whatdotheyknow.com/request/private_prosecutions).

<sup>3</sup> For further discussion of such associations see Langbein, (1999).

<sup>4</sup> Koyama (2011).

<sup>5</sup> FACT, ‘About FACT’, at <http://www.fact-uk.org.uk/about/>.

intellectual property issues in England and Wales.<sup>1</sup> FACT has twenty five members, on behalf of whom it regularly conducts private prosecutions; it is these regular prosecutions that make FACT similar to an eighteenth or nineteenth century prosecution association. One of these members, British Sky Broadcasting (BSB) Ltd, claims that ‘in recent years’ there have been ‘over 1,500 successful criminal [private] prosecutions’ in relation to ‘those who continue to show Sky programming without the correct subscription agreement’<sup>2</sup>. This suggests that FACT has been responsible for many thousands of private prosecutions in recent years, if the number of prosecutions in relation to the other twenty four members is taken into account (it must also be remembered that there must have been more private prosecutions in relation to BSB programming than the number of convictions, since criminal prosecutions do not always result in conviction, and since a private prosecutor may continue with a case which the CPS would consider to have little prospect of success). However, it is necessary to be aware that other commercial organisations have also instigated numerous private prosecutions in recent years: for example, there have been many private prosecutions on behalf of the Football Association Premier League<sup>3</sup>. Furthermore, it must be recognised that private prosecutions are brought by a variety of organisations, some of which have charitable rather than commercial purposes. As one legal commentator has put it<sup>4</sup>:

*‘Reference to material readily available on the internet discloses [...] Trades Unions have threatened private prosecutions against persons who attack their members. Friends of the Earth threaten prosecution for maritime pollution. The League against Cruel Sports has successfully prosecuted a professional huntsman for illegal hunting with dogs[...]The Licensed Taxi Drivers’ Association has brought a prosecution to enforce the prohibition against unlicensed vehicles plying for hire.’<sup>5</sup>*

### **The relationship between private organisations and state agencies**

Several of the organisations which bring private prosecutions work in conjunction with state agencies such as local councils and police forces in relation to certain law enforcement matters. Although there are various examples of such partnerships, for the sake of brevity our argument here will concentrate on private prosecutions for intellectual property offences, and hence will look in particular at some of the private organisations who bring or initiate such prosecutions. FACT is a clear example of such a private organisation. Its

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<sup>1</sup> Russell Cooke Solicitors, at <http://www.russell-cooke.co.uk/service-detail.cfm?id=213>.

<sup>2</sup> BSB Ltd (2013).

<sup>3</sup> Binham (2008).

<sup>4</sup> Leigh (2007)

<sup>5</sup> At 293-4

publicity materials claim that it ‘works closely with Police, Trading Standards, HM Revenue & Customs, UK Border Agency, Serious and Organised Crime Agency and other agencies in the UK and globally’.<sup>1</sup> It is generally impossible to be sure about the precise nature of this close working relationship between FACT and various state agencies because the relevant information does not appear to be in the public domain. However, there are many illustrations of it. These include the creation of:

*‘A new police unit dedicated to combating film piracy and the organised criminal networks sustaining the manufacture and distribution of counterfeit film product is launched [...] [in 2006] by the [...] [Metropolitan Police Force’s] Economic and Specialist Crime Command, in partnership with the Federation Against Copyright Theft’.*<sup>2</sup>

While he was a Home Office minister, Andy Burnham MP reportedly praised this new police unit as ‘another excellent example of cooperation between the police and business to tackle crime’.<sup>3</sup> As this comment from Burnham MP suggests, co-operation between state agencies and commercial organisations in relation to prosecutions and the obtaining of evidence is wide-ranging. There are many ways in which it occurs. In no particular order of importance, these involve, amongst other things: (1) information-sharing between state and private organisations; (2) sharing of evidence; (3) training of state officials by commercial organisations; (4) employees of such organisations providing assistance in police interviews; (5) employees of private organisations appearing as expert witnesses to support CPS prosecutions and providing forensic evidence in relation to such charges; (6) state officials accompanying employees of commercial organisations while these employees raid the properties of suspected criminals. As we shall see below, there have even been accusations that a commercial organisation has effectively directed a CPS prosecution.

The Alliance against Intellectual Property Theft, ‘a coalition of trade associations and enforcement groups’ that includes organisations such as the British Phonographic Industry,<sup>4</sup> claimed in 2006 that ‘information sharing [between public the sector and the private sector] is already taking place and delivering tangible results’ in the context of intellectual property crime<sup>5</sup>. However, it is clear that co-operation between public and private organisations go well beyond information sharing in this context. Guidance for trading standards authorities available on the UK Intellectual Property Office website contains a section on industry bodies which ‘offer support and assistance to trading standards professionals’<sup>6</sup>. Within this guidance, FACT states that it

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<sup>1</sup> FACT, ‘Partners’.

<sup>2</sup> FACT, ‘Metropolitan Police Film Piracy Unit’

<sup>3</sup> Ibid.

<sup>4</sup> Alliance against International Property Theft et al (2007).

<sup>5</sup> Alliance against Intellectual Property Theft (2006).

<sup>6</sup> Alliance against Intellectual Property Theft et al (2007).

provides ‘advice and assistance in any enquiry... concerning ... pirate films’, that it ‘accompanies or advises [trading standards] officers on any related enforcement action or planning for a forthcoming operation’, that it ‘assists in PACE interviews when requested’, that it ‘attends court as expert witnesses to support CPS prosecutions’, and that it ‘provides forensic evidence to examine computers seized to support a charge’<sup>1</sup>. The relationship between private organisations and state agencies does not simply involve the commercial organisations ostensibly providing support or assistance to activities led by these public authorities. In many situations, it would appear to an observer that operations are led jointly by state officials and private organisations. Thus, in 2005, Wandsworth council reported:

*‘Two market traders were arrested and nearly £70,000 worth of counterfeit goods seized during a trading standards raid on New Covent Garden Market on Sunday morning. A joint operation led by the council’s trading standards team aided by local police officers and representatives of the film and music industry, was staged at the Sunday market in Nine Elms’.*<sup>2</sup>

Moreover, the relationship between private organisations and state agencies sometimes involves these state agencies providing assistance or support to activities led by private organisations. This assistance or support can involve state officials working closely with trade organisations, e.g. receiving referrals from such organisations and then investigating them using state resources.<sup>3</sup> Similarly, it appears that the police regularly support the RSPCA in relation to this charity’s enforcement of animal welfare legislation.<sup>4</sup> For instance, in a recent case involving suspected cruelty to horses at a farm, two RSPCA inspectors ‘arrived at [the farm] with police constable support to gain entry to the farm and check the equines’.<sup>5</sup>

In at least two recent cases, private prosecution organisations have been accused by defendants or campaign groups of effectively controlling the work of the CPS. Of course such allegations may not be neutral, but the perception of bias in state bodies is a dangerous one, whatever its merits. In 2010, the CPS dropped a prosecution against a teenager who was accused of having distributed copyrighted material via the internet. David Cook, a solicitor who represented the defendant, stated: ‘Cleveland Police and the CPS allowed themselves to be manipulated throughout the investigation and were content to rubberstamp reports commissioned by private bodies rather than scrutinise the merits of the

<sup>1</sup> Alliance against Intellectual Property Theft et al (2007).

<sup>2</sup> Wandsworth Council, ‘Pirate Goods Seized in Market Raids’ (2005).

<sup>3</sup> British Recorded Music Industry, ‘ApUpdate: BPI Enforcement News March 2009, Issue 1’.

<sup>4</sup> See *Scopelight Ltd v Chief Constable of Northumbria Police Force* [2009] EWCA Civ 1156, [47], explaining how the RSPCA enforce this legislation in practice.

<sup>5</sup> *RSPCA v Gray* (Aylesbury Crown Court, unreported 6 May 2012), [2], at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/rspca-gray-others.pdf> [23 September 2013].

case'<sup>1</sup>. Cook claimed: 'At no time during the course of this prosecution did the CPS actually produce any evidence that the material in question was in fact copyrighted'<sup>2</sup>. In 2011, the CPS similarly dropped a prosecution for conspiracy to defraud against two administrators of a website known as FileSoup. Cook, who also represented one of the defendants in this case, stated that it was FACT 'who controlled this investigation. Little or nothing independent was carried out by the police. FACT's role was effectively that of investigators, witnesses and experts in their own case'<sup>3</sup>. One of the defendants added: '[t]his would be a private prosecution, but for FACT choosing to use the CPS as a vehicle with which to present the case. In such circumstances, this was a quasi-private prosecution'<sup>4</sup>.

### **The problem and a potential solution**

The relationship between state agencies and private organisations which we have described above raises serious concerns about the potential abuse of state power by private organisations. Private organisations such FACT and the BPI exist solely to protect the commercial interests of particular corporations or individuals; state agencies, on the other hand, have a duty to consider the public interest. The problem here is that there is a potential conflict of interest and duty: what is in the public interest is not necessarily in the commercial interest of particular private organisations or individuals, and vice versa. Charles Erwin Wilson, a former CEO of General Motors, once infamously claimed that he could not conceive of a conflict between the interests of the United States on the one hand and General Motors on the other: 'I cannot conceive of [a conflict of interest] because for years I thought that what was good for our country was good for General Motors, and vice versa'.<sup>5</sup> His questionable reasoning was that General Motors made a vital contribution to the economic health of the United States, and that there was therefore no difference in practice between the economic health of the United States and that of General Motors. The current unofficial partnership mechanisms and initiatives between English and Welsh state agencies and commercial organisations in relation to private prosecution seems to be based upon similar reasoning. Politicians, other state officials, and the commercial organisations concerned typically present this relationship as unproblematic. For instance, a memorandum of understanding between FACT and The Trading Standards Services Regional Intelligence Network and the Trading Standards Services Regional Intelligence Network (RIN) states:

*'FACT and the RIN recognise that IPR Crimes and infringement can amount to serious and organised crime and accept, therefore,*

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<sup>1</sup> Richardson (2010).

<sup>2</sup> Curtis (2010).

<sup>3</sup> Computer Weekly.Com (2011).

<sup>4</sup> TorrentFreak (2011).

<sup>5</sup> Quoted by GM Heritage Center, 'Wilson, Charles E.'

*that they have an important part to play bringing offenders to justice. They are committed to working together with other bodies to disrupt and detect those involved in IP Crime [...]*

*This [Memorandum of Understanding] accepts the principles and roles described within and the parties commit themselves and their organisation in the public interest to shared efforts to counter IP Crimes.*

*FACT also has an important role in ensuring that the government and public understand the threat to the UK's film and Broadcasting industries and to the community at large from the growing threat of online piracy.*

*It is accepted that FACT is a prosecution authority in its own right and facilitates the investigation and prosecution of those involved in this type of crime'.<sup>1</sup>*

The difficulty with this Memorandum of Understanding is that it is based upon the false premise that FACT (and every similar organisation) 'brings offenders to justice [...] in the public interest'.<sup>2</sup> It actually prosecutes on the basis of what is in the commercial interest of its members, many of which are powerful United States entertainment companies such as the 20<sup>th</sup> Century Fox Film Company, Universal Studios International, and the Walt Disney Company. This is why it is only interested in certain kinds of cases. As noted above,<sup>3</sup> FACT defines itself elsewhere as an organisation created solely to promote the commercial interests of its members. Its primary goal is the protection and representation of its members; unlike English and Welsh state agencies, it is not required to consider the public interest as it relates to England and Wales. Furthermore, FACT is not 'a prosecution authority in its own right';<sup>4</sup> it is a trade organisation that brings private prosecutions and undertakes other activities to promote the interests of its members. There is of course nothing wrong per se with trade organisations seeking to promote the interests of their members. Intellectual property offences merit investigation and prosecution, and it may be beyond the financial means of the state prosecution organisations to do so effectively. Furthermore, the state utilisation of services provided by trade organisations may provide public benefit; for example, it appears that financial investigation services provided by FACT enabled Bedfordshire County Council to confiscate at least £600,000 in proceeds of crime from criminals in Bedfordshire in 2008.<sup>5</sup> However, state agencies should bear in mind that what is in the interests of the members of such commercial organisations may not be in the public interest, and that they need to take appropriate account of the interests of all private individuals or organisations. Unlike commercial organisations,

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<sup>1</sup>FACT and RIN, 'Memorandum of Understanding'.

<sup>2</sup>Ibid.

<sup>3</sup>Op cit, n 12.

<sup>4</sup>Op cit, n 34.

<sup>5</sup> Bedfordshire County Council, 'Future Trading Standards Service Task Force Meeting 4<sup>th</sup> June 2008'.

state officials are supposed to take the public interest into account in making decisions. In investigating crime, they should act independently of alleged victims, who may be ‘far from dispassionate’<sup>1</sup>, regardless of whether they are individuals or organisations.

This need to act independently of alleged victims is important. It is a fundamental principle of the English legal system that justice must not only be done, but seen to be done. As Lord Hewart put it in *R v Sussex Justices, Ex p McCarthy*<sup>2</sup> ‘it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’. This remains the position under Article 6 of the European Convention on Human Rights, which provides the right to a fair trial, including the appearance of procedural fairness.<sup>3</sup> Let us take the example of intellectual property crime. FACT represents parties who may be the victim of such offences. However, as noted above, it also plays an active role in the investigation and prosecution of such crime by state agencies such as trading standards authorities and the police; for instance, by assisting the police in raids on suspected offenders, by carrying out forensic examinations of computers on behalf of the police, and by providing expert witnesses who appear in court in support of CPS prosecutions. It is possible that FACT may make an allegation against D, participate in a police raid on D, help the police question D at a police station, and carry out forensic examination of property seized by the police during the raid on D: indeed, this appears to be exactly what happened in the case of *R v Vickerman*<sup>4</sup>. This is a problem because the party who made the allegations is also playing an active role in the investigation of these allegations by state authorities. Our point here is not that FACT has no right to make and pursue criminal allegations or have its voice heard by the state: rather, it is that the state authorities in question are not acting independently of the party which made the allegations and which represents the alleged victims, and that the principle that justice must not only be done but seen to be done is thus in danger of being infringed by the relationship between private commercial organisations and state agencies as it relates to the investigation and prosecution of crime. Since there are clear duties on the state to ensure that ECHR and other rights are upheld, a state needs independent mechanisms to monitor compliance with rights and assure itself that there are no substantive or procedural violations; there is no specific mechanism currently in existence. Where no public/private partnership is in place, different issues of concern arise, since the current law provides only limited opportunities for such monitoring to occur: the state has only three opportunities to intervene in or supervise a private prosecution, and their application is minimal in practice. Firstly, a magistrate will check the paperwork<sup>5</sup> submitted by the prosecutor for such matters as whether it contains

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<sup>1</sup> *R (On the Application of Gujra) (FC)* [2012] UKSC 52, [69], per Lord Neuberger, discussing the right to bring a private prosecution)

<sup>2</sup> [1924] 1 KB 256, 259

<sup>3</sup> See *R v Abdroikov (Nurlon)* [2007] UKHL 37).

<sup>4</sup> (Newcastle Upon Tyne Crown Court, 2012: Indictment No. T2009 7188)

<sup>5</sup> According to Part 7 of the Civil Procedure Rules

an offence known to English law, whether the prosecution is being commenced within time limits, and is being brought to the correct court. Secondly, the Attorney-General or Director of Public Prosecutions may filter cases by refusing consent for prosecution where the offence is one which requires it; but there are thousands of criminal offences which do not require any consent. Thirdly, the CPS can take over a prosecution and discontinue it if it does not have reasonable prospects of success or would be an abuse of process<sup>1</sup>; but this can only occur where the CPS knows about a private prosecution, and there is no general duty to notify them. Hence a sensible private prosecutor might well keep very quiet about the case if believing that it has a low chance of resulting in a conviction, and thus the case might well proceed to trial without intervention or monitoring of compliance with procedural requirements and human rights standards. It might even result in a challengeable conviction, with fairness and resources convictions for all private parties and the state.

## Conclusion

For monitoring, consistency and compliance purposes, there needs to be a duty to notify the CPS on commencing a private prosecution, as suggested by the Law Commission.<sup>2</sup> We submit that a detailed statutory Code of Practice is required to cover all aspects of private prosecutions, from commencement to conclusion. An overarching aim of such a Code would be to balance the rights of victims of crime against those of defendants, while ensuring that the usual safeguards and standards for state-initiated criminal prosecutions apply so far as is possible to those brought privately. A key aspect of such a Code would be a statutory set of procedures designed to ensure that power and resource imbalances between prosecutors and suspects do not result in breaches of the rights of suspects during the investigation stage of private prosecutions; the procedures for public-private partnerships in investigation of crime should thus be standardised, since a Memorandum between cooperating bodies does not go far enough to ensure such vital rights are upheld. To enable consistency and uphold the UK's international obligations in human rights law, breach of the new Code provisions should have the same consequences as breach of parallel provisions within Codes which apply to state investigations and prosecutions, such as PACE<sup>3</sup>; hence failure to comply with the Code might result in inadmissibility of evidence at trial, a finding that a conviction is unsafe, or a duty on the CPS to discontinue the case, depending upon the severity of the breach. We also submit that there should be a compensation scheme for victims of Code breaches, whether or not a private prosecution was instigated, since even a dropped prosecution may have a severe effect on the private life and well-being of suspects or defendants.

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<sup>1</sup> CPS, *The Code for Crown Prosecutors*, [2010], 4.12

<sup>2</sup> LC255 (1998) *Consents to Prosecution*, at 7.9- available at

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<sup>3</sup> Police and Criminal Evidence Act 1984.

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- RSPCA v Gray (Aylesbury Crown Court, unreported 6 May 2012)
- Scopelight Ltd v Chief Constable of Northumbria Police Force [2009] EWCA Civ 1156