CONSULTATION QUESTIONS

This response is submitted on behalf of the Fraud Lawyers Association (FLA). The FLA is an organisation established in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of solicitors and barristers who practice mainly in the area of criminal and civil fraud: https://www.thefraudlawyersassociation.org.uk/

Paragraph 1.1.2 states: The Code gives *guidance* to private prosecutors, and to those who act on their behalf, on the general principles to be applied when making decisions about private prosecutions. The Code is issued primarily for private prosecutors and their advisors, but may also be of assistance to other participants in the process. It should be added that the Code is also designed to provide clarity to the Court and to defendants as to the standards they can expect from a private prosecutor.

We have an overriding concern about the general approach in the code. It seems to us that there is a tension between the definition of the term "private prosecutor" in paragraph 1.1.2, the reality of the make-up of the Private Prosecutors Association and the nature of the guidance in the Code. In reality this is not – and probably cannot be - a Code for private prosecutors, in the sense of a code that ought to be regarded as binding on anyone who happens to bring a private prosecution.

On reflection we think it would be better presented as a code for those engaged in advising, assisting and acting, professionally, in the conduct of private prosecutions and which provides information and guidance on best principles which anyone bringing a private prosecution would be advised to have in mind. The fact that representatives from some institutional private prosecutors are members of the PPA and will (hopefully) sign up to the Code is a positive thing but should not change the general approach.

As it stands the terms of the Code are such that the result may be either that actual private prosecutors are held to an unrealistic standard or that the Code is ignored. There are also aspects of the Code where the tension becomes particularly apparent, where wording is clearly aimed at those involved in the conduct of cases (who can realistically be expected to be bound by agreed principles, or called upon to justify departing from them) rather than the private prosecutor bringing the case.

This issue has made it difficult to frame responses to some of the questions. We have tried to strike a balance between addressing the questions as asked and commenting on what we think the Code might ideally set out. That balancing exercise has resulted in some responses which reflect both approaches and thus reflect a range of possible responses.

- **Re Chapter 2: Client engagement**

Re Chapter 2: Client engagement

- **Q2. Please make any comments you have on this chapter below.**

Paragraph 2.2 - the phrase used should be minister of justice (see later quotes). Minister for justice would be something different.

Paragraph 2.2.1.e - the reference should be to the need to satisfy the test in the Code, not the Code itself

Paragraph 2.2.1.j - should say the prosecutor may have to choose between waiving privilege and stopping the proceedings

Paragraph 2.2.1.k - the content of this sub paragraph should come before f

In addition, we believe you should add:

2.2.1.o the difficulties that are likely to arise where defendants or material are not located in England and Wales, which will include requirements to comply with applicable local law.

2.2.1.p the need for potential witnesses to be kept separate from the investigation process.

2.2.1.q the role and obligations of any potential expert witnesses.

2.2.3 covers a point asked about later as Q12 – the responses to Q12 need to be reflected in chapter 2 as well as chapter 5.

- **Re Chapter 3: Investigation**

  Re Chapter 3: Investigation

- **Q3. Re 3.2.1: the CPIA mandates that those "charged with the duty of investigating" pursue all reasonable lines of inquiry, whether they point towards or away from the suspect. Not all private prosecutors will fall within this definition. The Draft Code envisages a revised test, not embodied in legislation, but which we consider to represent best practice. Do you agree with the test as stated?**
- **If not, what alternative would you propose?**
  - ( )Yes
  - **(√)No**

A private prosecutor, in the sense defined, may have a level of knowledge (or perceived knowledge) which would make such investigation unnecessary.

The alteration of the test from "all reasonable lines of enquiry" to "all lines of enquiry that may be regarded as reasonable in the context of a private prosecution" imports questions of (among other matters) funding and other resources (manpower) in to what ought to be a simple test of independence and fairness. In our view, the private prosecutor ought to pursue all reasonable lines of enquiry. The alteration of the wording of the test may be slight, but it ought not to

provide excuses for private investigators, or for private prosecutors to refuse to commit funds to the investigation of those lines of enquiry.

Footnote 2 is too narrow: it might be taken to indicate that reasonable lines of enquiry is an issue solely concerning communications evidence.

The first step in any investigation should be to consider whether the private prosecutor is a person "charged with the duty of investigating" and therefore subject to section 26 of the CPIA.

Private prosecutors should be aware of the need to record relevant information as soon as practicable after the time it is obtained.

Chapter 3 does not mention the need to secure continuity of exhibits. Private prosecutors should follow CPS guidance on exhibits save to the extent they cannot be said to apply to a private prosecution.

Section 3.8 on surveillance and covert activities: references to RIPA 2000 should in addition and where relevant include also IPA 2016. Private prosecutors should be aware that some forms of surveillance available to public authorities, eg interception of communications, would be a criminal offence when done by a private investigator.

Data protection: private prosecutors should also consider their obligations under the Data Protection Act 2018 and the lawful basis for processing personal data. Private prosecutors will need to consider the specific provisions that apply to special category data. Private prosecutors should bear in mind that they are unlikely to be a "competent authority" for the purposes of Part 3 of the DPA 2018.

- **Q4. Re 3.5.2: Section 34(4) of the CJPOA provides that an adverse inference can be drawn where a suspect, when questioned by a person other than a constable charged with the duty of investigating an offence, fails to provide answers which s/he later relies upon in her/his defence. The extent to which a private prosecutor comes within section 34(4) may vary in different circumstances. Do you feel that paragraph 3.5.2 of the Draft Code, as drafted, adequately addresses this point?**
    - **( )Yes**
    - **(√)No**

Paragraph 3.5.2 makes an assertion of law which may or may not be correct, in the context of a situation where an interview is being conducted (which in itself, arguably, indicates that someone has been charged with a duty, as is reflected in other parts of the Code where prosecutors are enjoined to act as if they fall within the same test).

The first step should be to consider whether the private prosecutor is "a person other than a police officer who is charged with the duty of investigating offences or charging offenders" under section 67(9) of PACE. If so, a private prosecutor is entitled to give warning about adverse inferences.

Paragraph 3.5.2 should make clear that the questioning needs to be under caution for 34(4) CJPOA to apply. Paragraph 3.5.2 suggest that the default position is that a private prosecutor is not entitled to give a warning about adverse inferences, but case law suggest that it is equally likely that they would be, clearer guidance on when adverse inference warnings may be given ought to be included (see *R v Twaites, R v Brown* (1991) 92 Cr. App. R. 106). The Code should reference Archbold (paras 15-7, 15-18) as well as Blackstones.

- **Q5. Re 3.9.2: It is unclear to what extent, particularly having regard to the Police Act 1996, law enforcement agencies are able to enter into agreements with private citizens or entities to provide services relating to the investigation or private prosecution of criminal conduct. The Draft Code is not intended to opine on this question. However, it recognises the importance of transparency where any such arrangement is entered into. Do you consider the inclusion of this paragraph is appropriate in the circumstances?**
    - **(√)Yes**
    - **( )No**
- **Q6. Please make any additional comments you have on this chapter below.**

Paragraph 3.6.1 - it would be helpful to spell out which PACE rules are referred to governing the conduct of interviews with witnesses

Paragraph 3.8.1 - as it has already been set out that RIPA does not apply, the word "obligations" should be replaced with principles.

Paragraph 3.8.2 – "A written document" should be "A written record"

Paragraph 3.8.3 - the reference to "innocent third parties", without further comment, suggests that the guilt of the suspect has already been prejudged.

The Code should make clear that private prosecutors should have regard to relevant case law, including *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52 and *R v Hounsham* [2005] EWCA Crim 1366.

- **Re Chapter 4: Disclosure**

  Re Chapter 4: Disclosure

- **Q7. Re 4.1.3: Do you agree that a disclosure management document should be produced in most private prosecutions?**
    - ( )Yes
    - ( )No

We do not think that this is easily answered with a yes or a no. It will be best practice in many large and complex cases to introduce a degree of accountability and transparency to the disclosure exercise. Such a document would also reassure any court about the propriety of the

conduct of the private prosecutor and provide a benchmark against which any disclosure decision or request can be measured. But we doubt that it is necessary in every, or even most, cases.

- **Q8. Re 4.2.3: Do you agree that material which is subject to LPP must be listed on a disclosure schedule by a private prosecutor?**
  - **(√)Yes**
  - ( )No

- **If so, which schedule: the sensitive or non-sensitive schedule?**
  - **(√)Sensitive schedule**
  - ( )Non-sensitive schedule

We consider that if something touching on LPP is to be included on an unused schedule, it will be the sensitive schedule. However there is an issue with the way the sub-paragraph is worded. The purpose of any schedule is as a vehicle for disclosure and to inform the defence about what is held which they might be entitled to inspect. Whilst communications between the police and the CPS might be on a schedule, we do not believe that anyone would suggest that the advice (written of oral) given by Prosecution counsel to the CPS was disclosable or that it ought to appear on a schedule. The issue is the nature of the material, if it is not in any sense evidential and is purely advisory, then it need not be put on any schedule and there are no (save very exceptional) circumstances in which it could ever be disclosed. In addition, including in a schedule cannot constitute any sort of waiver.

- **Q9. Please make any additional comments you have on this chapter below.**

It is unclear whether the question about LPP relates to the prosecutor's privilege or the suspect's privilege. Either could arise in the context of a private prosecution.

Generally speaking, if a matter is serious enough for an organisation to commence a private prosecution, then it may be serious enough to produce a disclosure management document. However where, for example, a private prosecutor brings multiple similar and relatively straightforward prosecutions, it may be appropriate to produce a general disclosure management policy instead of bespoke documents for each case.

Paragraphs 4.1.3-4.1.5 should give more detail about what a disclosure management document should be expected to cover. The guidance at para 51 of the Attorney Generals guidance on disclosure should be incorporated into the Code.

The Code should also make clear that all material which may be relevant should be made available to the disclosure officer – and that the client must not withhold inconvenient material from them (this corresponds to para 2.2.1h)

Paragraph 4.2.3 - scheduling does not involve an element of waiver.

Paragraph 4.3.1 is rather obscurely worded and seems to suggest keeping the prosecutor out of the process rather than emphasising the need for the prosecutor to reveal material. Again this goes to the general tension point.

Footnote 4 should make the point that the civil court can be asked for permission, otherwise it suggests this is a reason not to deal with material.

- **Re Chapter 5: Charging and commencing proceedings**

  Re Chapter 5: Charging and commencing proceedings

- **Q10. Re 5.1.1: Do you agree that, at the end of the investigation, a private prosecutor should consider whether there is any merit in referring the case to be brought by way of private prosecution to a public prosecuting authority at that stage?**
  - ( )Yes
  - ( )No

The public prosecutor has no standing at the stage suggested. The power of the DPP (through the CPS) to intervene does not arise until there are proceedings in existence. The CPS has no investigative function. The CPS cannot realistically be asked to sanction or comment on any prospective action. It might be more appropriate to recommend that the prosecutor should consider referring the case to the appropriate investigative agency (which can then seek the advice of the relevant public prosecutor, if required).

Of course, defendants regularly request the DPP to take over and discontinue proceedings. Bearing this in mind, it may be that the end of the investigation and the gathering of evidence is a moment to pause and reflect on whether private Prosecution is appropriate. Say for example most of the evidence was beyond the reach of the private prosecutor for some reason. What harm can it do to suggest this point of reflection? As the courts have observed the private prosecutor is often also the victim. There is no reason why the victim cannot make a criminal complaint to the police or present the evidence they have gathered to them or the CPS. What happens thereafter is out to the private prosecutor's hands. But if the decision is not to proceed with the case, then the option of private Prosecution is still available. But as with many of these questions, it all depends on the target audience, which the Code keeps very broad.

Paragraph 5.1.1 - there is an unnecessary repeat of the word "whether"

- **Q11. Re 5.1.2: Do you agree with the way in which the Draft Code envisages the Full Code Test should be applied in the context of a private prosecution?**
  - **( )Yes**
  - **( )No**

We agree with the suggested approach to whether it should be applied. Paragraph 5.1.2. does not contain any guidance on the way in which it should be applied.

We also think it would be helpful if it was made clearer that paragraphs 5.1.1 and 5.1.2 are separate issues.

- **If not, please set out how you consider it should be applied, giving reasons.**
- **Q12. Re 5.3.1 and 5.5.6: Do you consider there to be any obligation on a private prosecutor to inform the Court at the time of laying the information if either: a. The private prosecutor has not referred the case to a state agency; or b. A state agency has declined to accept the case?**

No: this trespasses on the province of the CPR committee which has just revised rule 7.

- If so, should this be mandated by the Draft Code?
  - ( )Yes
  - **(√)No**

No

- Q13. Please make any additional comments you have on this chapter below.

Paragraph 5.3.3 - is skeleton argument the appropriate phrase for a document in a process which will usually involve only one party?

Paragraph 5.3.6 - this is in the CPR, whereas this reads as if it is a code issue.

Paragraph 5.5.4.b – this is not reasonable as an expectation, if this Code is aimed at private prosecutors as defined

Paragraph 5.5.6 - see above at Q12. One of the reasons for preserving the right to bring a private prosecution is because state actors may make unreasonable decisions.

Paragraph 5.6 - this section (bail) is quite confusing following the laying of the information section, with nothing to explain to the reader that it is addressing a later stage rather than information to be supplied when laying the information.

Paragraph 5.6.2 - private prosecutors should seek to obtain the antecedent history

- **Re Chapter 6: Referral to the Director of Public Prosecutions**

Re Chapter 6: Referral to the Director of Public Prosecutions

- **Q14. This chapter includes information about referrals to the DPP by way of background which does not prescribe specific**

behaviour or conduct. Do you consider this is helpful to understanding the Draft Code, or is it unnecessary?
    - **(√)Helpful to understanding the Draft Code**
    - **( )Unnecessary**
- **Do you think the level of detail is appropriate**
    - **( )Yes**
    - **(√)No**

Not entirely.

If not, what level of detail do you think is appropriate?

Paragraph 6.2.1 should explain that the DPP's power may be exercised by a crown prosecutor

- **Are there any behaviours or conduct which should be prescribed here?**
- **Q15. Please make any additional comments you have on this chapter below.**

Paragraph 6.1.2 – This is inaccurate: the guidance refers specifically to DPP Consent cases, not AG consent cases

Paragraph 6.1.3 is in the wrong place: it should be 6.2.4

Paragraph 6.8 is unclear and probably unreasonable.

- **Re Chapter 7: Abuse of process**

  Re Chapter 7: Abuse of process

- **Q16. This chapter includes information about abuse of process by way of background which does not prescribe specific behaviour or conduct. Do you consider this is helpful to understanding the Draft Code, or is it unnecessary?**
    - **(√)Helpful to understanding the Draft Code**
    - **( )Unnecessary**
- **Do you think the level of detail is appropriate**
    - **(√)Yes**
    - **( )No**
- **If not, what level of detail do you think is appropriate?**
- **Are there any behaviours or conduct which should be prescribed here?**
- **Q17. Please make any additional comments you have on this chapter below.**

Paragraph 7.1.2 refers to the likelihood of greater scrutiny. It might be desirable, somewhere, to introduce a reference to appeals against terminating rulings.

Paragraph 7.1.3 reflects a switch to a more coherent approach to the issue of what the Code is designed for.

Paragraph 7.3.1 - we do not understand what is intended in the second bullet point (NB, why hasn't a, b formatting been followed as elsewhere?)

Paragraph 7.4. Is the word media necessary?

Paragraph 7.7.1 – it might be helpful to consider the issue of what happens if the prosecutor changes firm.

Paragraph 7.8.1 – this should refer to previous disposal of which they are aware and have the caveat: so far as possible. How, in practice, is it envisaged this would be achieved? Presumably this should also refer to a previous disposal of the same allegation.

- **Re Chapter 8: Interaction between civil and criminal proceedings**

  Re Chapter 8: Interaction between civil and criminal proceedings

- **Q18. Re 8.3.1 and 8.8.1: The Draft Code refers to the impropriety of bringing, or threatening to bring, private prosecutions solely as a strategic tool to add leverage to a party's position in civil proceedings. This is based on the judgments in R (Dacre) v City of Westminster Magistrates' Court [2009] 1 Cr App Rep and R (G) v S and S [2017] EWCA Crim 2119. However, many practitioners, as well as those acting for defendants have continuing concerns about the extent to which private prosecutions are/can be used for this purpose. Do you think the Draft Code as drafted appropriately/sufficiently addresses this issue?**
  - **( )Yes**
  - **(√)No**

We do not believe that the word "solely" is used in either of the cases referred to. It suggests that as long as there is some other mixed motive this strategy would be acceptable. We do not agree.

- **Q19. Re 8.8.1: The Draft Code is silent as to the appropriateness of discontinuing proceedings if the accused settles related civil proceedings and/or pays compensation/makes reparation to the victim. Do you think that the Draft Code should address this point?**
  - **( )Yes**
  - **( )No**

See below

- **If so, do you think it is or is not appropriate to discontinue proceedings in such circumstances and what is relevant/not relevant to this consideration?**
- **Q20. Please make any additional comments you have on this chapter below.**

We think the two parts of Q19 ask the wrong questions. There should be a reference to the duty to keep the prosecution under review. It is not appropriate to have as a default position either that a case will be dropped if there is a civil settlement or that it will continue regardless: what is needed is a balanced consideration of the public interest in light of the new circumstances.

Paragraph 8.8.1 – "action for abuse of process" wrongly suggests that abuse is a separate claim / cause of action rather than an argument which can be raised in the course of the proceedings.

Paragraph 8.8.1 is another example of the tension referred to.

- **Re Chapter 9: Trial**

  Re Chapter 9: Trial

- **Q21. Re 9.3.1 and 9.3.2: Do you feel this is the appropriate procedure to be adopted in these circumstances?**
  - **(√)Yes**
  - **( )No**

Yes. It might be helpful to add, at the end of paragraph 9.3.1, "and so cannot be consulted".

Under this chapter (although general comments have not been invited) it would also be helpful to suggest that it is best practice for those conducting a private prosecution to have a written agreement of principles whether in the retainer or elsewhere.

- **Re Chapter 10: Sentencing, confiscation and ancillary orders**
- **Q23. This chapter includes general information about sentencing, confiscation and ancillary orders which is not specific to private prosecutions and/or does not prescribe specific behaviour or conduct. Do you consider this is helpful to understanding the Draft Code, or is it unnecessary?**
  - **(√)Helpful to understanding the Draft Code,**
  - **( )Unnecessary**
- **Do you think the level of detail is appropriate**
  - **(√)Yes**
  - **( )No**
- **If not, what level of detail do you think is appropriate?**
- **Are there any behaviours or conduct which should be prescribed here?**

- **Q24. Please make any additional comments you have on this chapter below.**

Paragraph 10.1.2 - the second sentence would be better as part of the next paragraph and needs rewording. It currently reads as "the decision .... Must be prosecuted (etc)".

Paragraph 10.1.4 "must" is not consistent with paragraph 1.1.6.

Paragraph 10.8.1 needs to be amended to say indictable only

- **Re Chapter 11: Costs**

  Re Chapter 11: Costs

- **Q25. Please make any comments you have on this chapter below.**
- **Re Chapter 12: Communications with press and media**

  Re Chapter 12: Communications with press and media

- **Q26. Please make any comments you have on this chapter below.**
- **Consent***