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REPORT TO THE POST OFFICE HORIZON IT INQUIRY

PHASE 4

INVESTIGATION, DISCLOSURE AND CRIMINAL PROSECUTION IN ENGLAND AND WALES AND INVESTIGATIONS AND PROSECUTIONS BY THE POST OFFICE 2000-2013

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VOLUME 1

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INTRODUCTION

1. This report is prepared for phase 4 of the Post Office Horizon IT Inquiry, a statutory inquiry under the Inquiries Act 2005, which focuses on "action against Sub-Postmasters and others: policy making, audits and investigations, civil and criminal proceedings, knowledge and responsibility for failures in investigations and disclosure". It is neither necessary nor helpful to set out the full factual background here. In short, so far as is presently relevant, the Inquiry seeks to consider investigations undertaken by and prosecutions brought by the Post Office against Sub-Postmasters, managers and assistants where shortfalls and discrepancies in branch accounts had been identified through the use of the Horizon computer system. That system was originally designed and operated by International Computers Limited, which was partially owned by, and later fully integrated with, Fujitsu.

2. The operation of that system, the issues of shortfalls and discrepancies to which it gave rise and the action taken by the Post Office thereafter are addressed in detail in the judgement (no.3) 'Common Issues'[1] and judgement (no.6) 'Horizon Issues'[2] of the Hon. Mr Justice Fraser, and the decision of the Court of Appeal in *Josephine Hamilton v Post Office*[3]. I am asked to address the following questions in this report:

    1. An explanation of the law and practice of the conduct of investigations and prosecutions by a private investigator/prosecutor between 2000 and 2013 (focusing on the application or non-application (as the case may be) of PACE 1984, CPIA 1996 (and the Code issued under it), the Code for Crown Prosecutors, the Criminal Procedure Rules, the Attorney-General's Guidelines on Disclosure ('AG's Guidelines'), and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases - noting that the non-statutory Code for Private Prosecutors developed by the Private Prosecutors' Association was only issued in July 2019). The focus should be on the obligations and duties of an investigator to pursue reasonable lines of enquiry and the duties of disclosure (including the duty to obtain third party material).

[1] [2019] EWHC 606 (QB)
[2] [2019] EWHC 3408 (QB)
[3] [2021] EWCA Crim 577

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2. In relation to investigation:
    a. Whether any special difficulties arise where the same body is the victim, a witness, the investigator and the prosecutor and, if so, what should be done to ensure independence of decision-making;
    b. The terms, and adequacy, of Post Office Limited ('POL')'s policy documents concerning the conduct of investigations;
    c. The duties of an investigator to pursue a reasonable line of enquiry (generally, and also where a person positively asserts that they believed the problems they had experienced (accounting shortfalls at their Horizon terminals) might lie with the computer system).

3. In relation to prosecution:
    a. Charging decisions:
        i. The test that the prosecutor applied (or ought to have applied) – including an analysis of (i) any general POL prosecutorial guidance/policy (ii) any policy decisions made in relation to prosecutions based on Horizon evidence;
        ii. The evidence that the prosecutor reviewed when making a charging decision (or ought to have reviewed);
        iii. The extent to which the charging decisions appear to be thorough and conscientious;
        iv. The approach said to have been undertaken of charging theft and false accounting as alternatives (note: *R v Eden* (1971) 55 Cr. App. R. 193, in which the practice of the Post Office charging both theft and false accounting received judicial disapproval).
    b. How proceedings were commenced – an application for the issue of a summons in the Magistrates' Court (and the duty of candour when applying for the issue of a summons – see e.g., *R (Kay) v Leeds Magistrates' Court* [2018] EWHC 1233 (Admin)).
    c. Disclosure:
        i. Whether there was a "disclosure officer" (as would exist in a prosecution conducted under the CPIA), or equivalent (and, if not, any difficulties that this created);

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ii. Whether the prosecutor reviewed the adequacy of disclosure;

iii. The extent of the duty of "cross-disclosure" – i.e. where an issue arises in Case A, there is a duty to give disclosure of it in Cases B, C and D etc.

d. Prosecutorial practice:

i. The practice said to have been undertaken of 'plea bargaining' (i.e. offering no evidence on a count of theft in return for a plea on a count of false accounting).

ii. The relevance of the approach taken to reliance on Horizon data to the repeal of s69 of PACE 1984 by the Youth and Criminal Evidence Acy 1999.

3. I will throughout this report refer to the Post Office, so as to encapsulate a number of legal entities that have existed in the period with which I am concerned. The materials that have been provided to me for this purpose are addressed in appendix 3 to this report. It follows on from the required declarations that are set out in appendix 1 and details of my qualifications to write this report, which are set out in appendix 2. I should make clear that I have been greatly assisted in the preparation of this report by Catherine Brown, whose qualifications are also set out in appendix 2. The opinions set out in this report are, however, my own.

4. The approach I have adopted is to consider in this first part of my report the legal framework for prosecution, both by the Post Office and more broadly, and the framework relating to responsibilities of prosecuting authorities, investigations, charging decisions, prosecutions and disclosure. This involves consideration of applicable statutory provisions, codes of practice issued under statute, guidelines and guidance, caselaw and other material from a range of identified sources (many of which were alluded to in my instruction), and then consideration of such policy documents and guidance issued by and to the Post Office as engage those topics.

5. In terms of how this framework of guidance was in fact applied in Post Office prosecutions, by reference to specific cases, this is to be addressed in my second report. I should also note at the outset that in terms of Post Office policies, I have been dependent on that which has been provided to me. I understand that all of the relevant

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disclosure received by the Inquiry has been provided to me in terms of the policies that were in existence through the Inquiry's relevant period. However, it remains possible that there are gaps in what was received by the Inquiry. Indeed there are instances where there is reference in that which I have seen to other policy documents that I have not.

6. Similarly, I have endeavoured, with the assistance of Catherine Brown and the Inquiry Secretariat, to obtain the versions of the statutory provisions, codes of practice issued under statute, guidelines and guidance, caselaw and other relevant material that had application during the period from 2000 and 2013. It has not always been possible to do so with certainty as to completeness. I have made clear that which I have seen. I am not conscious of having been deprived of access to any material necessary for me to reach the conclusions I have set out below. If further material is identified, I am happy to consider it and, if necessary, address it in an addendum to this report.

7. In relation to the Post Office policies that applied to criminal investigations and prosecutions this first report I can, therefore, only address that which I have seen. In the second part I will address both the application of the policies I have seen, and more significantly the application of the wider framework for investigation and prosecution with which the Post Office, like anybody undertaking those functions was expected to comply. I anticipate that it is possible that the analysis of specific cases in my second report may throw further light on the issues addressed in this first report. To the extent that this proves to be the case, I will address this in an addendum to this report.

OVERVIEW OF CONCLUSIONS

8. Throughout the Inquiry's period of focus, 2000-2013, and indeed for a significant period before that, there had been a network of statutory requirements, regulation provided through Codes of Conduct issued under statute, and other forms of directly applicable and mandated guidance in place. This sought to ensure that the procedures employed and decisions taken by investigative and prosecutorial bodies were fair, transparently auditable and accorded with the interests of justice. The structure erected by that network of material was detailed and therefore complicated. It

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required those engaged in the investigation and prosecution of crime to receive training, instruction and guidance for each important stage of their duties.

9. I have reviewed the Post Office policies in relation to investigation, prosecution and related areas, and have concerns as to their adequacy to achieve these objectives. The policies recognise that the Post Office as an investigator and prosecutor was and is subject to the Police and Criminal Evidence Act 1984 ("PACE"), Criminal Procedure and Investigations Act 1996 ("CPIA") and the Codes issued under each Act. However, in particular during the earlier period from 2000, policies referred to that fact without setting out the ways in which this was the case, the specific aspects of those Acts and Codes that applied, and the ramifications of that to those undertaking investigations and prosecutions.

10. In some respects, the policy documents themselves differed from training materials which did seek to address the PACE Codes of Practice, and do identify which parts applied in what context. However, such training materials did not represent a suitable alternative to policy documents which themselves steered the correct path through the application of PACE, or the Codes thereunder. Such training documents would not necessarily ensure the application of up-to-date regulation. I also have not seen comparable training materials relating to the CPIA or the Code thereunder, save in relation to the retention of investigators' notebooks, until 2012.

11. During the course of the Inquiry's relevant period the degree of detail and guidance in these policies did improve, and was thorough, for example, as to the conduct of interviews. Moreover, there was guidance for the disclosure of unused material in place from at least 2001. However, there were other aspects of the structure of statute and regulation that were not addressed in detail, and in some instances not really addressed at all. I would, in this context, identify in particular the following areas:

    (a) First, there was a lack of explicit instruction to investigators to undertake or prosecutors to monitor the CPIA Code requirement that *"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances"*. This duty is of central importance to the securing of a fair trial, not least through the achieving of fair and adequate disclosure.

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(b) Secondly, the AG's Guidelines in relation to disclosure were not addressed. This limited the guidance as to role of prosecutors in overseeing, monitoring and securing proper compliance with the requirements of disclosure. It also meant that there was almost no guidance as to the handling of third party disclosure throughout the Inquiry's relevant period.

12. I consider that the policy landscape for a significant period was not sufficient to ensure consistent and comprehensive compliance with a number of important aspects of the PACE and CPIA regimes, and in particular in relation to independent decisions as to charge, disclosure of material that might undermine the reliability of data systems and third party disclosure. It will readily be appreciated that each of these is an area of importance to the Inquiry's terms of reference.

13. Similarly, in relation to decisions to charge, I do have concerns about the adequacy of policy guidance to achieve a proper division of responsibility so as to achieve independence, transparency, accountability and consistency. Whereas in other areas, for example pursuant to the Prosecution of Offences Act 1985, such a division is instilled and maintained, Post Office policies left it open for the same person, or group of persons, to make key investigation and prosecution decisions. Whilst such prosecution decisions were, by reference to a number of important policies, to be undertaken with the application of the Crown Prosecution Service ('CPS') Code for Crown Prosecutors, there was, in my view, a lack of detailed guidance as to how this was to be done, or how compliance with proper standards was to be achieved or monitored.

14. There was a similar lack of guidance as to proper decisions as to which charges to prefer, and for example little guidance as to the application of the Court of Appeal decision in *Eden* (1971) 55 Cr. App. R. 193 until 2013. There was equally no reference to the AG's Guideline on the Acceptance of Pleas until 2016, and I have not identified any reference to the duty of candour required in applying for a summons to initiate criminal proceedings in any of the policies that I have considered where that might have been expected. These omissions in the policy documentation were consistent with the failure of the training materials that I have seen to address these topics. Finally, I have considered the implications of the repeal of section 69, PACE as to the

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obtaining of confirmation as to the reliability of computer data. The real concern however, is and was as to the appreciation of the need to consider reliability of computer data in reaching charging decisions and to the disclosure of material that undermined that reliability.

THE STATUS OF PROCEEDINGS BROUGHT BY THE POST OFFICE

15. The postal service has undertaken the investigation and prosecution of offences relating to the Post Office for a very considerable time. In 1683, when Richard Swift was appointed Assistant Solicitor to the General Post Office, his duties include "*the detection and carrying on of all prosecutions against persons for robbing the mails and other fraudulent practices*". That duty was addressed by Antony Parkins, then Secretary to the General Post Office in a letter to the then Postmaster General in outlining the duties performed by the Solicitor to the Post Office in January 1793.

16. The responsibility for investigating offences against the Post Office was transferred from the Solicitor's Office to the Secretary's Office in 1816, and the investigative team were called the Missing Letter Branch. That Branch continued to operate even when, following the introduction of the first postage revenue stamp, the penny black, in 1840, an office was created with specific investigatory duties under the Post Office Inspector General in 1848. The Missing Letter Branch was reorganised on a number of occasions thereafter, and the post of Inspector General abolished in 1858. In 1883, the Missing Letter Branch became the Confidential Enquiry Branch in 1883, and then in turn the Investigation Branch in 1908 and the Post Office Investigation Division in 1967. Prosecutions remained the responsibility of the Prosecution Division of the Post Office Solicitor's Office. In the 1990s, the Investigative Division became the Post Office Security and Investigation Services, and the Solicitor's Office became Royal Mail Legal Services.

17. In the course of my researches, I sought to identify the statutory basis, if there was one, for the Post Office's prosecution of offences, and was unable to identify one. I was reassured that this was not a failure on my part by sight of the paper "Post Office Audit, Risk and Compliance Committee Prosecution Policy", by Chris Aujard, dated

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November 2013[4], which observed (at para.2.4) that "*an important and previously little-appreciated finding… is that Post Office does not have any special statutory power to bring prosecutions rather it brings prosecutions in a purely private capacity….In reality, no specific legislation or regulation currently requires Post Office to undertake prosecutions, nor is there any current legislative policy that mandates that prosecutions should be brought*". A further paper for the same committee by Aujard in February 2014[5], at para.2.2, quotes Brian Altman KC's observation that "*Post Office Ltd's prosecution role is perhaps anachronistic*" and that it is "*the only commercial organisation (albeit Government owned) I have been able to identify (apart from RMG that retains a prosecution function) that has a commercial based, sophisticated private prosecution role, supported by experienced and dedicated teams of investigators and lawyers. To that extent it is exceptional if not unique*".

18. That observation was supported, at para.4.6 of the same paper, by the analysis that:

(a) "*most retailers and financial institutions maintain in-house security/investigative functions, which pass evidence of crime (often CCTV footage) over to the police, and then support any actions taken by the external prosecutor (eg CPS). Other than Royal Mail Group, we have not identified any commercial organisations that habitually bring private prosecutions.*"

(b) "*Although Virgin Media recently conducted a high profile, hight value (c.£144 million) private prosecution of a set-top box fraud, this was conducted with the police and appears to have been an exceptional step rather than 'business as usual' activity.*"

(c) "*Quasi-public organisations (egTfL) and charities (eg RSPCA) are also known to bring private prosecutions. However these are typically brought against external persons (eg fare dodgers or animal abusers), and not employees or others involved in the organisations day-to-day operations*".

19. The Post Office does not have a statutory power of arrest and has, therefore, to involve police officers in that aspect of their investigatory process. In terms of search and seizure, beyond the power identified below, the Post Office was similarly dependent on the police exercising their powers under PACE and Codes A and, particularly, B. In this regard:

[4] POL00027501
[5] POL00100193

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(a) The Investigation and Prosecution Policy, dated March 2000[6] identifies the Security and Investigations Services as "*the main Consignia interface with other agencies, eg police, customs, Interpol, DSS etc*". This is to be read together with the Reporting of Criminal offences to Police[7] guidance for that liaison, and the 'Relations with Police Authorities and Other Public Bodies' policy[8];

(b) the Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy[9], in its December 2007 version, states (at para.3.1.3) "*Royal Mail Group Security Investigation Teams are the providers of in-house investigations and will maintain the lead in all dealings with the Police.*" This remained the case in the 2010 revision of this policy.[10]

20. Section 49, Postal Services Act 2000, gave the then Postal Services Commission a power of search and seizure, in relation to those suspected of undertaking unlicensed postal services. It stated as follows:

"(1) Subsection (2) applies where, on an application made by a constable or the Commission, a justice of the peace or, in Scotland, a sheriff is satisfied that there are reasonable grounds for suspecting– (a) that a person has committed an offence under section 6 ("the suspect"), and (b) that articles or documents of a particular description which are required for the purposes of an investigation of the offence are on particular premises.

(2) The justice or sheriff may issue a warrant authorising a person appointed by him ("the appointed person") to enter the premises concerned, search for the articles or documents and, subject to subsection (3), seize and remove any that he may find.

(3) A warrant issued under subsection (2) shall not authorise the seizure and removal of any postal packet, mailbag or document to which section 104(2) applies; but any such warrant may authorise the appointed person to take copies of the cover of any such packet, bag or document that he finds.

(4) The appointed person, in the exercise of his powers under a warrant issued under this section, may if necessary use reasonable force.

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[6] POL00031012. The 2002 revision is in the same terms, POL00031010
[7] POL00104759, revised POL00104793, POL00104807
[8] POL00104757
[9] POL00104812, POL00030787, POL00104812
[10] POL00104912

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(5) The appointed person, in seeking to enter any premises in the exercise of his powers under the warrant, shall, if required by or on behalf of the owner or occupier or person in charge of the premises, produce evidence of his identity, and of the warrant, before entering.
(6) Any articles or documents which have been seized and removed under a warrant issued under this section may be retained until the conclusion of proceedings against the suspect."

21. That section was repealed by Postal Services Act 2011, Sch.12(1), para.4 as at October 1, 2011. Section 49 is not addressed by the Post Office Searching Policy, dated January 2001[11]. That policy addressed powers of search under PACE, sections 16 and searches in the company of police officers under sections 18 and 32, PACE. The training materials that I have seen that address search and seizure[12] correctly focus on relevant provisions of PACE (addressed further below), rather than section 49.

22. It follows from this independent role that the Post Office, as an investigative and prosecutorial agency, has always operated separately from the agencies and mechanisms of mainstream investigation and prosecution of crime. In particular, the police in relation to the first and the CPS to the second. It is, however, entirely appropriate to consider the performance by the Post Office in the undertaking of criminal investigations and the prosecution of criminal offences by reference not only to the statutory regime and guidelines that had direct application to the Post Office in these capacities but also to the statutory regime and guidelines that applied in the same time period to the police and CPS. The relevance of the latter is both that it provides a benchmark against which to assess investigatory and prosecutorial practices by the Post Office between 2000 and 2013, but also because in important respects there was an expectation by Parliament and the judiciary that they would have regard to them.

23. Indeed, a 2010 Royal Mail Group document entitled "Investigations, Prosecutions and Security in the Royal Mail[13]" states "*The investigators in particular are trained to rigorous standards and operate in accordance with all requisite legislation, including the Police & Criminal Evidence Act, the Regulation of Investigatory Powers Act and the Postal Services*

[11] POL00104752, revised POL00104828, POL00104849
[12] POL00094151, POL00094195, POL00094206, POL00095334
[13] LCAS0000124

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Act"... Although bound by the provisions of the Acts detailed above and others, and accorded certain privileges in the use of police facilities and access to criminal records and communication networks, these days Royal Mail investigators have no special powers or rights. Suspects are interviewed and searched on a voluntary basis, and where arrests are required the support of police officers or other statutory law enforcement officers is usually sought. Royal Mail Legal Services, the successor to the Post Office Solicitor's Office continues to be recognised by the Ministry of Justice as a private prosecutor and prosecutes on Royal Mail's account in England and Wales.

24. As I have already acknowledged, I have been provided with a number of Post Office investigatory and prosecutorial policy documents. I will address those where they arise under the various headings in the analysis that follows. In doing so, I shall note what they say, and consider whether in doing so they address the requirements of the statutory and regulatory regime and guidance.

25. I have also now seen a Post Office Security and Investigation Services workbook, entitled 'Investigation Policies and Health and Safety'[14], which is copyright dated 2000. This workbook provides training for access to the Lotus Notes Corporate Security Database. This suggests that the Post Office operated a database on which its investigative policies were accessible, including its Investigative Standards and Criminal Procedures. I have not seen any other document that refers to this database., by whom it was accessible or what was stored on it. Clearly, a database to which reference could be made to obtain any up-to-date policy and the critical statutory and other material that underpinned those policies would be of great value. It is not clear to me whether this database performed that role. Moreover, as the workbook pointed out *"legislation and Post Office Policies are always evolving and as such there are always changes in the law and the way in which investigations are conducted"*. These observations are unquestionably true. As my analysis below illustrates, the Post Office did not always ensure its policies reflected legal changes. What is also not clear is the extent to which the Post Office did ensure that changes to its policies, or the law, were communicated to those charged with investigation and prosecution on its behalf.

[14] POL00095320

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RESPONSIBILITY FOR PROSECUTIONS IN ENGLAND AND WALES

26. In the light of the statement in the 2010 document "Investigations, Prosecutions and Security in the Royal Mail" quoted above, it is helpful to put the role being performed by the Post Office as a prosecutor into context. This involves consideration of the statutory regime that governs the majority of prosecutions, and, to a more limited extent, other agencies that undertake prosecutions and how they are regulated.

27. The CPS was created by the Prosecution of Offences Act 1985 ('POA 1985'). In so doing, the POA 1985 also established the office of the Director of Public Prosecutions ('DPP') as the head of that service. The Director's role therefore derives from the POA 1985, section 1(1) of which, in so far as is relevant, states: "*There shall be a prosecuting service for England and Wales (to be known as the "Crown Prosecution Service") consisting of— (a) the Director of Public Prosecutions, who shall be head of the Service; (b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and (c) the other staff appointed by the Director under this section*".

28. Section 3, POA 1985 sets out the functions of the Director. Section 3(1) states that "*The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.*" This wording replicates that to be found in the Prosecution of Offences Act 1879 by which the role of Director was established and which provided: "*It shall be the duty of the [Director] for Public Prosecutions, under the superintendence of the Attorney General, to institute, undertake, or carry on such criminal proceedings (whether in the Court for Crown Cases Reserved, before sessions of Oyer and Terminer, before magistrates, or otherwise), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of that proceeding, as may he for the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney General.*"

29. The status of the DPP, and the superintendence of the CPS by HM Attorney General is recognised to have significant importance. For example, in *R v Director of Public*

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Prosecutions, Ex p Manning[15], Lord Bingham of Cornhill CJ observed, in the context of a challenge to a decision not to prosecute by way of judicial review, [§23]: "*… as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear.* ***The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else***" (emphasis added). There is no comparable oversight of the investigative and prosecutorial activities of the Post Office.

30. The duties and responsibilities of the DPP and the CPS are in turn identified within the POA 1985. For example, section 3, POA 1985 goes on to list in significant detail the types of cases that the CPS will undertake, and the way in which it will interact with those who investigate criminal offences that can result in CPS prosecution. This amply demonstrates that there is a deliberate statutory distinction between the investigative role of other agencies, such as the police (section 3(2)(a)), the National Crime Agency (section 3(2)(ee)) or by the Revenue and Customs (sections 3(2)(ef)), and the prosecutorial role of the Director. This division of responsibility is further addressed below, as potentially an important difference between prosecutions by the CPS on the one hand and the Post Office on the other.

31. Section 6, POA makes clear that these duties of the DPP do not prevent the undertaking of prosecutions by others. This states:

> "*(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.*
>
> *(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.*"

32. This role for agencies outside the CPS is also demonstrated by the fact that other agencies, including the Post Office, can and do undertake prosecutions. That wider scope is also demonstrated by, and specifically addressed by statute in relation to, the

[15] [2001] QB 330

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role of the Director of the Serious Fraud Office. Her role and powers derive from the Criminal Justice Act 1987. At section 1, in so far as is relevant, this states:

> (2) *The Attorney General shall appoint a person to be the Director of the Serious Fraud Office (referred to in this Part of this Act as "the Director"), and he shall discharge his functions under the superintendence of the Attorney General.*
>
> (3) *The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.*
>
> (4) *The Director may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.*
>
> (5) *The Director may – (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and (b) take over the conduct of any such proceedings at any stage.*
>
> (6) *The Director shall discharge such other functions in relation to fraud as may from time to time be assigned to him by the Attorney General.*

33. It is relevant also to note in passing how the comparable role of the Director of the Serious Fraud Office ('SFO'), who is similarly subject to the superintendence of the Attorney General, was considered by both the Administrative Court and the House of Lords in *R (Corner House Research) v Serious Fraud Office* (DC)[16]. In describing the independent role of the Director of the SFO in the Administrative Court proceedings[17], Moses LJ observed [§49, 69]: "*The power of the Director of the Serious Fraud Office to investigate a suspected offence is conferred by statute: section 1(2) of the Criminal Justice Act 1987.* ***Although he is required to discharge his functions under the superintendence of the Attorney General, any decision he makes as to investigation or prosecution is for him to reach independently****. … Independence is fundamental to the proper exercise of the Director's powers. Those authorities on which the Director relied to establish the width of his discretion support that proposition. One of the very bases for according a prosecutor so wide an ambit of judgment is the recognition of his independence: see the references by Lord Bingham of Cornhill CJ to the independence of the Director of Public Prosecutions, answerable to the Attorney General and to no one else and to the independent judgment of Treasury counsel in*

[16] [2009] 1 AC 756
[17] [2008] EWHC 714 (Admin)

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R v Director of Public Prosecutions, Ex p Manning [2001] QB 330, para 23. The Director of the SFO is answerable to no one. By the 1987 Act, Parliament has conferred on him alone the power to reach an independent, professional judgment, subject only to the superintendence of the Attorney General. ***Whatever superintendence may mean, it does not permit the Attorney General to exert pressure on the Director, let alone make a decision in relation to an investigation which the Director wishes to pursue***" (emphasis added).

34. Prosecutions for offences relating to their areas of responsibility are undertaken by the Department of Work and Pensions ('DWP'), the Health and Safety Executive ('HSE') and the Environment Agency. In each case, such prosecution is undertaken under a statutory regime. In the case of the DWP, for example, by reference to section 116, Social Security Administration Act 1992, and pursuant to its Prosecution Policy. Section 18(1) of the Health and Safety at Work etc Act 1974 imposes a duty upon the HSE to make adequate arrangements for the enforcement of health and safety law[18] and pursuant to the HSE's Enforcement Policy Statement[19]. As the Environment Agency notes in its enforcement policy: "*The Environment Agency is a non-departmental public body. Our power to prosecute is set out in law and is controlled by our board. When we decide to prosecute we are not influenced by a government department or minister or any third party. It is an independent decision.*"

35. The position of these agencies is more akin to that of the Post Office, as being both the investigator and the prosecutor in relation to their cases, without the inbuilt separation recognised as being desirable since 1985 between the CPS and police.

THE ROLE OF THE PROSECUTOR

36. In the analysis set out below, the role of the prosecutor both in relation to the decision to charge an individual, the conduct of the proceedings thereafter and, in particular, ensuring fair and adequate disclosure to them in those proceedings, are all considered in some detail. At that outset, however, it is appropriate to recall that the manner in which the prosecutor should conduct themselves in criminal proceedings and the

[18] Save for sites within the remit of the Office of Road and Rail and the Office for Nuclear Regulation.
[19] I note that I have only had sight of the current policies of the DWP, HSE and Environment Agency, as opposed to the guidance/policies in place in the period 2000-2013.

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duties resting upon them emerge, to an extent, from dicta in Court of Appeal decisions and, more importantly, from the Code of Conduct of the Bar and from the recommendations of the Farquharson Committee on the role of prosecuting counsel, published in *Counsel*, Trinity 1986.

37. In *Puddick*[20], Crompton J said (at p. 499) that prosecution counsel "*are to regard themselves as ministers of justice, and not to struggle for a conviction*". Avory J made observations to very similar effect in *Banks*[21]: "*It is quite true that counsel for the prosecution throughout a case ought not to struggle for the verdict against a prisoner, but that they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice.*" Whilst Avory J was specifically considering the terms in which prosecution counsel had expressed themselves in a closing address[22], the underlying principle that the prosecution is not seeking a conviction at all costs, but to assist and promote the administration of justice so that the just outcome is achieved is far wider, and far more fundamental.

38. Some of the implications this has on the prosecutor's role are identified in the report that was the result of a committee chaired by Farquharson LJ in 1986. The introductory paragraphs of the Farquharson report state: "*There is no doubt that the obligations of prosecution counsel are different from those of counsel instructed for the defence in a criminal case or of counsel instructed in civil matters. His duties are wider both to the court and to the public at large. Furthermore, having regard to his duty to present the case for the prosecution fairly to the jury, he has a greater independence of those instructing him than that enjoyed by other counsel. It is well known to every practitioner that counsel for the prosecution must conduct his case moderately, albeit firmly. He must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits; he must not invite the jury to convict on evidence which in his own judgement no longer sustains the charge laid in the indictment. If the evidence of a witness is undermined or severely blemished in the course of cross-examination, prosecution counsel must not present him to the jury as worthy of a*

[20] (1865) 4 F & F 497

[21] [1916] 2 KB 621 at p. 623

[22] In a similar vein, in *Gonez* [1999] All ER (D) 674, the Court of Appeal endorsed the description of prosecuting counsel as a minister of justice, stating that it was incumbent on him not to be betrayed by personal feelings, not to excite emotions or to inflame the minds of the jury, and not to make comments which could reasonably be construed as racist and bigoted. He was to be clinical and dispassionate.

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credibility he no longer enjoys. . .. Great responsibility is placed upon prosecution counsel and although his description as a 'minister of justice' may sound pompous to modern ears it accurately describes the way in which he should discharge his function.

39. As the Farquharson committee stated in the passage quoted above, prosecution counsel is recognised as enjoying greater independence from those instructing him, whether it be the CPS or other prosecuting agency or private prosecutor, than does defence counsel from his solicitor or lay client. The committee helpfully summarised their views in the following propositions:

(a) It is the duty of prosecution counsel to read the instructions delivered to him expeditiously and to advise or confer with those instructing him on all aspects of the case well before its commencement.

(b) A solicitor who has briefed counsel to prosecute may withdraw his instructions before the commencement of the trial up to the point when it becomes impracticable to do so, if he disagrees with the advice given by counsel or for any other proper professional reason.

(c) While he remains instructed it is for counsel to take all necessary decisions in the presentation and general conduct of the prosecution.

(d) Where matters of policy fall to be decided after the point indicated in (b) above (including offering no evidence on the indictment or on a particular count, or the acceptance of pleas to lesser counts), it is the duty of counsel to consult those instructing him, as their views at this stage are of crucial importance.

(e) In the rare case where counsel and his instructing solicitor are unable to agree on a matter of policy, it is (subject to (g) below) for prosecution counsel to make the necessary decisions.

(f) Where counsel has taken a decision on a matter of policy with which his instructing solicitor has not agreed, then it would be appropriate for the A-G to require counsel to submit to him a written report of all the circumstances, including his reasons for disagreeing with those who instructed him.

(g) When counsel has had the opportunity to prepare his brief and to confer with those instructing him, but at the last moment before trial unexpectedly advises that the case should not proceed or that pleas to lesser offences should be accepted, and his instructing solicitor does not accept such advice, counsel

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should apply for an adjournment if instructed so to do.

(h) Subject to the above, it is for prosecution counsel to decide whether to offer no evidence on a particular count or on the indictment as a whole and whether to accept pleas to a lesser count or counts.

40. That these principles, in relation to the duty of fairness and the application of the interests of justice to the prosecution and the prosecutor, equally apply in a private prosecution was demonstrated, for example, in Zinga[23], where Lord Thomas CJ said (at para.61): *"…advocates and solicitors who have conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister of Justice (as described by Farquharson J) in preference to the interests of the client who has instructed them to bring the prosecution. As Judge David QC, a most eminent criminal justice, rightly stated in R v George Maxwell (Developments) Ltd [1980] 2 All ER 99, in respect of a private prosecution: 'traditionally Crown counsel owes a duty to the public and to the court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment…'"*

41. This was also demonstrated in R(Kay) v Leeds Magistrates' Court[24], Sweeney J said (at para.23):

"(1) whilst the Code for Crown Prosecutors does not apply to private prosecutions, a private prosecutor is subject to the same obligations as a Minister for Justice as are the public prosecuting authorities – including the duty to ensure that all relevant material is made available both for the court and the defence; and
(2) advocates and solicitors who have the conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice in preference to the interests of the client who has instructed them to bring the prosecution – owing a duty to the court to ensure that the proceeding is fair."

42. In relation to the role of prosecuting counsel specifically, guidance is also found in the Guidelines that the CPS and the General Council of the Bar issued in 2002 on the

[23] [2014] EWCA Crim 52; [2014] 1 WLR 2228
[24] [2018] EWHC 1233 (Admin)

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application of the Farquharson principles. Where appropriate these were also incorporated in the Written Standards for the Conduct of Professional Work in the Code of Conduct of the Bar. The status of the Code of Conduct of the Bar was explained as follows in *McFadden*[25], by James LJ (at p. 190): "*The Bar Council issues statements from time to time to give guidance to the profession in matters of etiquette and procedure. A barrister who conforms to the Council's rulings knows that he cannot be committing an offence against professional discipline. But such statements, although they have strong persuasive force, do not bind the courts. If therefore a judge requires a barrister to do, or refrain from doing, something in the course of a case, the barrister may protest and may cite any relevant ruling of the Bar Council, but since the judge is the final authority in his own court, if counsel's protest is unavailing, he must either withdraw or comply with the ruling or look for redress in a higher court.*"

43. Paragraph 10 of the Written Standards deals especially with the duties of prosecuting counsel. Paragraph 10.1 describes the general role and approach of prosecuting counsel in terms similar to those used by Avory J in *Banks*[26], and the Farquharson committee. Paragraph 10.6 reflects what is contained in the report of the Farquharson committee.

44. In relation to the motivation of a private prosecutor, the approach of the Court of Appeal in *Asif v Ditta and another*[27]. The decision's primary focus was as to whether the Crown Court judge had been entitled to stay proceedings brought by a private prosecutor as an abuse of process where satisfied that the proceedings were being brought by a proxy for a person with a significant background in fraud, for collateral purposes and for an improper motive. The Court of Appeal declined to interfere with that decision, observing[28] that "*the court has the power to stay proceedings …where it will be impossible to give the accused a fair trial, and…where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case*".

45. However, Sharp P went on to observe (at para.75) that "*it is well established that a private prosecutor can have another motive as well as being motivated by a public interest factor. Mixed*

[25] (1975) 62 Cr App R 187
[26] [1916] 2 KB 621
[27] [2021] EWCA Crim 1091; [2021] 2 Cr. App. R. 21
[28] By reference to the dicta at para.13 of *Maxwell* [2010] UKSC 48

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motives are not of themselves a bar to a private prosecution … the question is where the line is to be drawn between the public interest motivation and the other "oblique" motive." Sharp P cited in support of the latter observation the earlier decision in *R v Bow Street Magistrates Court, ex.p. South Coast Shipping Co. Ltd.*[29]. In that case challenge was unsuccessfully made to the bringing of a private prosecution by the bereaved family of one of those who died in the Marchioness disaster. The fact that the family also wanted a public inquiry did not prevent such a prosecution.

46. That approach was also adopted by the Administrative Court in *R (Smith-Allison) v Westminster Magistrates' Court*[30], in which Eady J observed (at para.48): "*although a prosecution whether public or private, must not be improperly motivated, the courts have recognised that, in any private prosecution, a prosecutor will have a motive other than simply a desire that justice be done and that a criminal offence, if proven, should be punished*". Eady J also, like Sharp P, cited the Court of Appeal's decision in *D Ltd. V A & ors*.[31] in which (at para.59) Davis LJ observed: "… *mixed motives may often be present in many prosecutions. In a public prosecution, the proceedings will be brought in the public interest; but the actual complainant may often be accused of (say) seeking revenge after a relationship has failed, and so on. This may sometimes indeed be the case but the true motive of the complainant may still be to seek justice In a private prosecution, the complainant of course is frequently the prosecutor. But there too it is well established that mixed motives do not of themselves vitiate the prosecution…*"

DISTINCTION OF ROLES

47. It is worthy of note before considering the duties and powers of the police on the one hand and the CPS on the other, and identifying those areas where the Post Office were either subject to, or required to have regard to, those or comparable duties, to bear in mind that in the context of the police and CPS it has long been recognised that their roles are, and are intended to be, distinct.

48. This is demonstrated by the wording of the POA 1985, by which the CPS was created. The duties and responsibilities of the DPP and the CPS are in turn identified within

[29] (1993) 96 Cr. App. R. 405
[30] [2021] EWHC 2361
[31] [2017] EWCA Crim 1172

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the POA 1985. For example, section 3, POA 1985 goes on to list in significant detail the types of cases that the CPS will undertake, and the way in which it will interact with those who investigate criminal offences that can result in CPS prosecution. As section 3 amply demonstrates, there is a deliberate statutory distinction between the investigative role of other agencies, such as the police (section 3(2)(a)), the National Crime Agency (section 3(2)(ee)) or by the Revenue and Customs (sections 3(2)(ef)), and the prosecutorial role of the Director. His role is to take over the conduct of proceedings initiated by those investigative agencies, and to give advice as appropriate to those agencies (section 3(2)(e)), rather than to undertake such criminal investigation or to direct such investigation himself.

49. That this is the correct interpretation of the relationship between the police as criminal investigators on the one hand and the Director as a prosecutor on the other is further demonstrated by a proper reading of the Director's guidance "*Police and CPS Relations*" (updated in December 2018). The guidance identifies at the outset the principles that govern those relations, which state (with emphasis added):

"*The relationship between the CPS and the police is an important one. The police have a key role in the prosecution process:* ***they are responsible for the detection and investigation of criminal offences****. The police also perform many of the tasks integral to the conduct of a prosecution: warning witnesses to attend court, obtaining further witness statements as required, and keeping victims informed as to the progress of the case. It is essential to develop and maintain a constructive working relationship with the police, especially in light of the interaction of Prosecutors and the police within the process of Charging. The CPS will need the cooperation and assistance of the police in many aspects of CPS work. A good communications system between the CPS and the police is vital. Both will benefit from a constructive means of exchanging views and information. In working closely with the police, it is important not to compromise the independence of the CPS.*

The functions of the CPS and the police are different and distinct. In giving advice to the police, the prosecutor must not assume the role of investigator *or direct police operational procedures. However, providing advice to the police in all matters relating to criminal offences is one of the core statutory functions of the CPS.* ***Prosecutors should***

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therefore be alert and open to all appropriate opportunities for giving such advice, where it may contribute to the effectiveness of an investigation and prosecution."

50. Similarly, section 3 of the present edition of the Code for Crown Prosecutors, issued under section 10, POA 1985 (issued in October 2018), addresses decisions whether to prosecute, and again makes clear the distinction between the roles of investigative authorities such as the police in relation to investigations on the one hand and that of the Director and in relation to prosecutions on the other. In particular, it states (again with emphasis added):

> 3.1. *In more serious or complex cases, prosecutors decide whether a person should be charged with a criminal offence and, if so, what that offence should be. Prosecutors may also advise on or authorise out-of-court disposals as an alternative to prosecution. They make their decisions in accordance with this Code, the DPP's Guidance on Charging and any relevant legal guidance or policy. The police apply the same principles in deciding whether to start criminal proceedings against a person in those cases for which they are responsible.*
>
> 3.2. ***The police and other investigators are responsible for conducting inquiries into any alleged crime and for deciding how to deploy their resources. This includes decisions to start or continue an investigation and on the scope of the investigation.*** *Prosecutors should* ***advise*** *the police and other investigators about possible reasonable lines of inquiry, evidential requirements, pre-charge procedures, disclosure management and the overall investigation strategy. This can include decisions to refine or narrow the scope of the criminal conduct and the number of suspects under investigation.* ***Such advice assists the police and other investigators to complete the investigation*** *within a reasonable period of time and to build the most effective prosecution case.*
>
> 3.3. ***Prosecutors cannot direct the police or other investigators****. However, prosecutors must have regard to the impact of any failure to pursue an advised reasonable line of inquiry or to comply with a request for information, when deciding whether the application of the Full Code Test should be deferred or whether the test can be met at all.*

51. The central importance of the independence of prosecutors is also set forth in clear terms at para.2.1 of the Code as the first of the general principles on which it is based,

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as follows: *"The independence of the prosecutor is central to the criminal justice system of a democratic society. Prosecutors are independent from persons or agencies that are not part of the prosecution decision-making process. CPS prosecutors are also independent from the police and other investigators. Prosecutors must be free to carry out their professional duties without political interference and must not be affected by improper or undue pressure or influence from any source."*

52. This distinction of roles between the investigator and prosecutor was considered by the Administrative Court in *R (on the application of DPP) v Sunderland Magistrates' Court*[32]. That case related to decisions by two Crown Prosecutors not to take investigative action in respect of allegations by a member of the public that a number of officials were guilty of criminal misconduct [§14].

53. Holding that the Crown Prosecutors had no power to take such action, Rafferty LJ observed (emphasis added) [§15 and 17]: *"**The Crown Prosecution Service, we should remind ourselves, has no and has never had any investigative powers**. Its functions and its duties are set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions, a public declaration of the principles which drive decisions made by the Crown Prosecution Service and its officers. …. The functions and the duties of Crown Prosecutors are set out in section 2, and section 3 offers guidance on their decisions to prosecute. **It recites that the police and other investigators are responsible for conducting enquiries into an allegation of crime**. Every case a prosecutor receives from the police or others is reviewed. Prosecutors must ensure they have all the information needed before an informed decision about how best to deal with the case is made. This will often involve their providing guidance and advice to the police and others. **However, prosecutors cannot direct the police or other investigators**."* Rafferty LJ further observed [§20]: *"… the role of the Crown Prosecutor is not that of an investigator nor can it ever be … any guidance provided by a Crown Prosecutor is issued only to the police or other investigative agencies and is discretionary".*

54. In respect of prosecutions undertaken by the HSE, I note that the decision to prosecute is undertaken by an "Approval Officer", who, although within the same organisation, is required to be independent of the investigation. The HSE's Enforcement Guide

[32] [2014] EWHC 613 (Admin)

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states that[33], *"Approval Officers must be fair and sufficiently independent of the investigation to review the case objectively. The Code for Crown Prosecutors states that Crown Prosecutors must be fair, independent and objective. Casework decisions taken fairly, impartially and with integrity help to secure justice for victims, witnesses, defendants and the public. Prosecutors must ensure that the law is properly applied, that all relevant evidence is put before the court and that obligations of disclosure are complied with in accordance with the Code."*

55. The Post Office prosecution and investigation policy documents that I have seen address roles and responsibilities, to the extent that they do, as follows:

(a) The Investigation and Prosecution Policy, in its March 2000 version[34], identifies that investigations will be undertaken by the Security and Investigations Services ('SIS') or Business Security and Investigation Unit. Whilst it refers to prosecutorial decisions, which it says will be taken in consultation with by the SIS and Legal Services Criminal Law Division, it does not spell out by whom they are to be taken. It also does not indicate the standards to be applied, or who is to ensure those standards are applied correctly. The Post Office Rules and Standards policy, as issued in October 2000[35], identify that such investigators are to maintain the highest standards of professionalism, without seeking to define them in any detail.

(b) The Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy[36], in its December 2007 version, states (at para.3.1.4): *"The conduct, course and progress of an investigation will be a matter for the investigators as long as it is within the law, rules and priorities of the business. Investigators will ultimately report to the Director of Security with regard to the conduct of a criminal investigation"*. The Investigators are defined, at para.3.1.3, *"Royal Mail Group Security Investigation Teams are the providers of in-house investigations and will maintain the lead in dealing with the Police."* In relation to prosecutions, at para.3.2.9, it states: *"decisions to prosecute in non-CPS cases will be taken by nominated representatives in the business with consideration to the advice provided by the Royal Mail Group Criminal Law Team"*. The policy remained unchanged in each of these respects in its November 2010 iteration.[37]

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[33] Again, I recognise that I have only seen the recent HSE guidance rather than that in 2000-2013
[34] POL00031012, the 2002 revision is in the same terms, POL00031012
[35] POL00104754. I am unclear as to whether the standards of behaviour policy, POL00104806, is relevant in this context.
[36] POL00104812, POL00030787
[37] POL00104912

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(c) The Post Office Ltd. Security Policy – Fraud investigation and prosecution policy, dated April 2010[38], identifies the fraud investigation team as being in house investigators answerable to the Head of Security (paras.3.12-13). In relation to prosecutions, at para.3.15, it states: "*decisions to prosecute will be taken by nominated representatives in the business with consideration to the advice provide by the Royal Mail Group Criminal Law Team and where there is sufficient evidence and it is in the public interest*".

(d) The Royal Mail Group Prosecution Policy, both as dated October 2009[39] and in a later version, dated April 2011[40], at para.5.1, stated "*the decision to prosecute Royal Mail investigations in England and Wales will be reached in agreement between the Human Resources Director for the affected business unit or his or her nominated representative, the nominated representative from the Investigation team and the lawyer advising*". At para.5.5, the document further addresses the process where there is no agreement between these persons as to whether or not to prosecute.

(e) Similarly, the Royal Mail Prosecution Decision Procedure, dated January 2011[41] states (at para.4.4) "*the Regional Human Resources Director, or in Post Office Ltd cases the Senior Security Manager, Security Operations and in Parcelforce Worldwide the Head of HR Operations, will act as the 'decision maker' in authorising prosecutions or not. All decision makers will be familiar with the evidential and the public interest tests of the Code for Crown Prosecutors and make decisions accordingly*".

(f) The Royal Mail Prosecution Decision Procedure, dated January 2011[42] addresses a division of decisions to prosecute, including such a decision maker. It states, at paras 5.1-2: "*A criminal lawyer will advise whether the case papers meet the evidential test for prosecution and provide advice on the most appropriate action to be taken… the PSO will forward the relevant case papers to the appropriate Decision Maker for a decision on whether it is in the public interest to initiate a prosecution*".

(g) The Post Office Ltd. Criminal Enforcement and Prosecution Policy, which I understand can be dated to November 2012[43], states that "*decisions to proceed with a prosecution will be taken by the Head of Security of POL, upon legal advice*". An undated internal document "internal protocol for criminal investigation and

[38] POL00030580
[39] POL00031011
[40] POL00030685
[41] POL00030598
[42] POL00030598
[43] POL00030604

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enforcement"[44] sought to "*ensure that all enforcement decisions arising from criminal investigations are taken in accordance with*" the policy. It sought to do this by requiring all those involved in relevant decision making be familiar with the policy, and that line managers ensured it was followed. A flow chart was attached to address the decision making process[45].

(h) The Post Office Prosecution Policy England and Wales, dated November 2013[46], in contrast to these earlier policies, stated that prosecution decisions should be taken by a qualified lawyer "*independent of any Post Office Ltd. Department having a direct financial or other interest in prosecution*". It added in a footnote that this as designed to mirror the independence of CPS decisions.

(i) In an undated document, Post Office Ltd Security Governance of Investigations[47], roles at various stages of the process whereby an investigation is opened, undertaken, a decision made as to whether to prosecute and actual prosecution are undertaken is set out.

(j) It is also of note in this regard that in a paper Post Office Audit, risk and compliance Committee Prosecution Policy, by Chris Aujard, dated February 2014[48], at para.6.1, there is a recommendation that "*an individual within Post Office Limited be appointed to take responsibility for deciding whether or not an individual case should be prosecuted against that policy (currently this accountability is shared across a number of individuals)*". Similarly, in a new proposed prosecutions policy, dated December 2015[49], it was proposed that "*where an investigation is conducted and there is deemed to be sufficient evidence to support a charge and meet the public interest test, the investigation case papers are referred to Post Office's external lawyers who review the case against the same criteria and provide formal advice/opinion and a recommendation on whether to prosecute or not. The General Counsel is the business decision make on the final decision to prosecute.*"

56. It follows that in the case of the Post Office, throughout the Inquiry's relevant period, there was no such distinction of roles of investigator and prosecutor being undertaken

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[44] POL00104929
[45] I have also seen a further such flowchart, POL00105226, the provenance of which is unclear
[46] POL00030686
[47] POL00105159
[48] POL00100193
[49] POL00030771

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by separate agencies subject to separate oversight, governed by separate Codes of Practice and with an inevitable role the one keeping the other in check. As will be seen, there are aspects of the structure for disclosure under the Code of Practice issued under the CPIA, and the guidelines issued by HM Attorney General that similarly seek to divide responsibility, and create cross-referring superintendence of the disclosure regime, between investigative agency on the one hand and the prosecuting agency on the other. Where those agencies are in fact the same agency, the need to ensure that no blurring of lines of responsibility and review becomes all the more important.

INVESTIGATIONS POWERS: POLICE AND CRIMINAL EVIDENCE ACT 1984

57. In relation to their investigatory powers, the powers of the police relating to arrest, detention, interrogation, entry and search of premises and search of persons, are primarily governed by PACE.

58. PACE is applied with modifications to investigations conducted by a number of other agencies, including the following:

(a) Revenue and Customs officers, by virtue of section 114(2), PACE and Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015[50];

(b) Immigration officers and customs officers acting pursuant to Part 1 of the Borders, Citizenship and Immigration Act 2009, by virtue of section 23 of that act and Police and Criminal Evidence Act 1984 (Application to Immigration officers and designated customs officers in England and Wales) Order 2013[51];

(c) Investigators acting pursuant to the Armed Forces Act 2006, by virtue of section 113(1), PACE and Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009[52];

(d) Members of National Crime Agency ('NCA') staff designated as having the powers of a police constable by the Director of the NCA.

[50] SI 2015 No.1783
[51] SI 2013 No.1542
[52] SI 2009 No.1922

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59. Section 66, PACE, as enacted, stated: "*The Secretary of State shall issue codes of practice in connection with – (a)the exercise by police officers of statutory powers – (i)to search a person without first arresting him; or (ii)to search a vehicle without making an arrest; (b)the detention, treatment, questioning and identification of persons by police officers; (c)searches of premises by police officers; and (d)the seizure of property found by police officers on persons or premises.* Subsection 66(a) was amended by the Serious Organised Crime and Police Act 2005 so as to read "*The Secretary of State shall issue codes of practice in connection with – (a)the exercise by police officers of statutory powers – (i)to search a person without first arresting him; .(ii)to search a vehicle without making an arrest; or (iii)to arrest a person*". The Secretary of State has issued Codes of Practice under section 66 since its enactment. These addressed, in the Inquiry's relevant period:

(a) Code A: Stop and Search
(b) Code B: Search of Premises
(c) Code C: Detention, Treatment and questioning of persons
(d) Code D: Identification
(e) Codes E and F: Audio and Visual recording of interviews of suspects
(f) Code G: Arrests

60. In an approach similar to that intended to be achieved by section 26, CPIA, which is considered in more detail below and which requires others involved in criminal investigations to have regard to the Code issued under the CPIA which sets out the manner in which investigators should "*record, retain and reveal to the prosecutor material obtained in a criminal investigation*", application of these PACE codes to investigators beyond the immediate ambit of PACE is achieved by section 67, PACE. As originally enacted, this stated at subsections (9) to (11):

"*(9) Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a code.*

(10) A failure on the part (a)of a police officer to comply with any provision of such a code; or (b)of any person other than a police officer who is charged with the duty of investigating offences or charging offenders to have regard to any relevant provision of

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such a code in the discharge of that duty, shall not of itself render him liable to any criminal or civil proceedings.

(11) *In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."*

61. The requirement for investigators other than police officers to have regard to the Codes issued under PACE is expressly acknowledged by other agencies. For example, the DWP's Prosecution Policy states at para.3.1: "*Criminal investigations are undertaken by the Department's Fraud Investigation Service (FIS) in accordance with: ♦ the Police and Criminal Evidence Act 1984 (PACE) and its codes of practice ♦ the Criminal Procedures and Investigations Act 1996 (CPIA) and its codes of practice*".

62. The Code under PACE that is of particular relevance here is Code C, the Code for the detention, treatment and questioning of persons by police officers. In terms of general propositions, the following are of particular importance:

(a) Para.1.0: "*the powers and procedures in this Code must be used fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination.*"

(b) *Para.1.1: "All persons in custody must be dealt with expeditiously, and released as soon as the need for detention no longer applies."*

63. The Code addresses the responsibility to maintain, and the necessary content of, a custody record (para.2), and the initial action to be taken in relation to someone taken into custody (para.3). This latter paragraph also addresses the position of those who voluntarily attend a police station, rather than when under arrest, from para.3.21. The Code then addresses a number of a detained person's rights, including their right to legal advice (para.6), and the permissible conditions of their detention (from para.8). The terms of the caution, and the circumstances in which it is to be given, are addressed at para.10. In short, the caution should be given before someone is questioned in relation to whom there are grounds to suspect that they have committed an offence. In terms of such questioning, the rules for the conduct of an interview are set out in general (para.11) and in particular in relation to interviews at police stations (para.12). Para.13 addresses the provision of interpreters for those being detained

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and/or questioned. Para.16 of Code C addresses the charging of detained persons. This is considered in more detail under the heading of charging decisions more generally below.

Post Office policies relating to PACE

64. In the Consignia Investigation Procedure issued in January 2001[53], there are limited references to PACE and the Codes issues thereunder. Under the heading of 'Enquiry Methods':

(a) At para.3.1.1 it states "*the investigator should endeavour to ascertain the facts in an effort to solve the case. There is no compulsion to question anyone involved unless it is considered to be necessary or expedient.*". There is no guidance as to how this is to be decided;

(b) At para.3.1.2 it states "*Investigations. Collection of facts in accordance with the Police and Criminal Evidence Act and the other legislation.*" There was no reference in that document to the application or otherwise of the Codes, for example in relation to arrest, search, seizure or interviews.

(c) The same approach, and the same comment, applies to the Post Office Rules and Standards policy, as issued in October 2000[54], which identifies that investigators are bound by PACE and the Codes thereunder, without saying how.

65. I note in this regard that under the section on "enquiry methods" begins "*these important aspects of investigation are the subject of detailed training given to new entrants to the Security Community and comprehensive training notes are issued. Aspects dealt with in this chapter are, therefore, restricted to procedures which need to be applied*". I have now seen the Security Foundation Programme 'Open learning on PACE Codes of Practice' workbook, which may represent those "comprehensive" notes[55]. The notes address the background to the Codes, the areas addressed by each, and then, in slightly more detail, the relevance to a Post Office investigation of Codes B (Searches), C (detention

[53] POL00030687, revised POL00030687. It is of note that the Security Foundation Programme 'Open learning on PACE Codes of Practice, POL00095325, which is copyright dated 2000 refers to the PACE Codes in a degree of detail, and thus predates this policy, to which it makes no reference.
[54] POL00104754
[55] POL00095325. I have also seen separate Security Foundation Programme workbooks relating to searches, POL00095334, and interviews, POL00095321, which were also copyright 2000. The same caveats as I identify for POL00095325 apply to these.

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and questioning) and E (tape recorded interviews). These are clearly all Codes that did, and do, have application to Post Office investigators.

66. However, I would observe, first, that these training notes do not amount to a "comprehensive" guide to how those Codes should be applied in such an investigation, by whom and to whom. Secondly, I would observe that it would not be adequate to expect those undertaking criminal enquiries to rely on the notes that they were given during training, not least because the statutory and other framework will inevitably alter, and such notes will quickly be rendered out of date. Moreover, it is important that the procedures that are to be applied to criminal investigations are clearly and comprehensively identified in a resource open to all tasked with such investigations and accessible to those who have to audit, assess or apply the fruits of such investigations. Further, it can properly be argued that if it was recognised that particular aspects of these particular PACE Codes were relevant to Post Office investigators, this was all the more reason for those aspects of those Codes to be addressed in clear terms in relevant policy documents, rather than relying on training notes or recourse, without such guidance, to the Codes themselves.

67. The position as to the application or otherwise of the Codes issued under PACE, for example in relation to arrest, search, seizure or interviews was further addressed in the Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy[56], in its December 2007 version and its November 2010 reissue[57], which states the application by the Post Office of PACE 1984 and the Codes issued thereunder in relation to:

(a) *Approach and arrest (para.3.2.5): "suspects will be dealt with in accordance to the Police and Criminal Evidence Act 1984, in particular the 'Code of Practice for the detention, treatment and questioning of persons by police officers"* [this appears to be a reference to Code C, though it will involve elements of Code A][58];

(b) *Interviewing (para.3.2.6): "suspects will be interviewed in accordance to the Police and Criminal Evidence Act 1984 in particular the Code of Practice on tape recording interviews*

[56] POL00104812
[57] POL00104912
[58] I have also seen a Security Foundation Programme 'Open learning Powers of Arrest' workbook, POL00095326, which is copyright 2000 which also addresses this topic (and a further undated workbook on the topic, POL00105437). I have also seen evidence of training on this topic in 2014 (POL00094141)

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with suspects. Suspects who are employees are entitled to the additional rights provide for in the Royal Mail Conduct Code" [this again appears to be a reference to Code C][59];

(c) *Searching (para.3.2.7): "searches will be carried out in accordance to the Police and Criminal Evidence Act 1984, in particular the Code of Practice for searches of premises by police officers and the seizure of property found by police officers on person or premises. Suspects who are employees are entitled to the additional rights provide for in the Royal Mail Conduct Code."* [this appears to be a reference to Code B, but will also involve elements of Code A][60].

68. Arrests are also addressed specifically in the Arrest Procedures policy, dated May 2001[61]. This addresses powers of arrest under section 24, PACE, and in this context (at.p.5) the circumstances in which a Consignia investigator could arrest someone. In March 2012, a Royal Mail Suspect Approach and Arrest Procedure was produced[62]. Approaching a suspect, for the purposes of interview is addressed at para.2, and includes a requirement for the caution to be given and for the suspect to be told that their attendance is voluntary. Arrest, pursuant to section 24A, PACE by someone other than a constable is addressed at para.3, together with the limitations to that power. Circumstances in which such an arrest might be appropriate are then identified (para.4), for example where a suspect either refuses to attend a voluntary interview or seeks to leave before it is completed[63].

69. Interviews are also addressed in a specific Interviewing Policy[64] issued in January 2001. This addresses those interviewed under PACE at para.3.2, along with the note taking processes for such interviews. The Interview Recording policy[65] separately

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[59] There appears to have been a raft of training documents in relation to interviews, including Security Foundation Programme 'Open learning caution and interview' workbook, copyright 2000, POL00095321, an undated 4 page document 'Tape recorded interviews", POL00095337, and a Security Foundation Programme 'Open learning friends, juveniles and Post Office young persons", dealing with the detention and questioning in particular circumstances, which is also copyright 2000. There are also further undated training documents, such as POL00105225, 00094144 and 00094145, and evidence of training on this topic in 2012, POL00094173, and 2014, POL00094140.

[60] Again, there are training materials that address this topic, copyright 2000, POL00095334, and undated, and generic, guidance such as POL00094151 and 00094206

[61] POL00104760

[62] POL00104868

[63] Footnote 58 identifies training materials on this topic, including that copyright 2000 that predated this policy.

[64] POL00104758

[65] POL00104744, revised POL00104765

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addresses tape recording procedures for such interviews, again with reference to PACE and Codes of Practice under PACE (although specific parts of the Codes are not identified). Additionally, Interviews under PACE[66] addressed preparation for interviews, what should be sought and looked out for during an interview (para.3.3), and appropriate actions after an interview (para.3.4). Guidance for "written record of tape recorded interviews"[67] was also issued in June 2011. It is not clear to me why a series of separate policies was required for interviews, and it is of note that none of them seek to mesh in detail in the PACE Codes. It is right to note that some of the training materials that addressed interviews[68] did provide more of an analysis of relevant parts of Code C. That analysis was far from comprehensive, and in any event did not represent a substitute for such analysis appearing in the policy itself.

70. A more detailed version of the policy, Interviewing Suspects was produced in March 2011[69]. This provided greater detail on the facilitation of legal advice, the approach to special warnings under the Criminal Justice Public Order Act 1994, the need to engage and explain to the person being interviewed, the approach to vulnerable suspects and the principles to be applied to questioning. Further appendices to this document addressed "dealing with defence solicitors and complaints by suspects"[70], "juveniles and appropriate adults"[71], the use of interpreters[72] and "interviewing suspects in prison"[73]. A number of these topics were addressed in training material which is undated[74] A quick reference guide for interviews was also produced in May 2011[75]. A Post Office Guide to interviewing was also produced which I understand to be dated October 2013[76].

71. The Post Office Conduct of Criminal Investigations Policy[77], dated August 2013, addresses the conduct of, and preparation for interviews at para.5.11 and gives

[66] POL00104745, revised POL00104774
[67] POL00104875
[68] POL00095325, POL00105225
[69] POL00104867
[70] POL00104893
[71] POL00104894
[72] POL00104869
[73] POL00104870
[74] POL00105225
[75] POL00104859
[76] POL00105225
[77] POL00030670

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guidance for searches at para.5.12. The relevant PACE Codes are referred to in each context. In March 2013, guidance as to the obtaining of fingerprints and handwriting specimens was issued[78], which addressed the police powers in this regard under PACE. The Royal Mail Custody Procedures[79], issued in May 2012, sought to address each of these areas, namely arrest, detention, interview and messages such as fingerprint taking that followed from arrest and detention. It did include some, but not comprehensive, cross-referencing to PACE or the PACE Codes.

72. Searches are also specifically addressed in the Searching policy issued in January 2001[80]. This recognises (at para.3.1) that "*members of the security community have no statutory power of search and it is important that officers should avoid creating any misapprehensions on this point when dealing with suspected offenders or with the police*". It then addresses voluntary searches, which should be undertaken in the presence of the suspect, searches by the police (para.3.2) and pursuant to search warrants issued under PACE (para.3.3)[81].

73. The 2007 Criminal Investigation and Prosecution Policy[82], like the 2001 Investigation Procedure before it and the 2010 version[83] after it, refers to the fact that: "*investigation procedures and standards relating to this policy are included in the induction and ongoing training course and materials provided to investigators. Any changes to the procedures and standards are notified to investigators via investigation circulars and communications*". I have sought to identify in the footnotes relating to arrests, searches and interviews the relevant training materials which were provided, by reference to their copyright date, from the outset of the Inquiry's relevant period. I note also that an undated document, 'Criminal Investigation Training'[84] identified a series of E-books on these and other topics pertinent to criminal investigations. As I observed in relation to the 2001 procedure, however, training materials are no substitute for a necessarily detailed exposition of the rules, procedures and guidance that should govern the actions of investigators. Moreover, as with the CPIA Code and, for example, the guidance the

[78] POL00104871
[79] POL00105230
[80] POL00104752, revised POL00104849
[81] Footnote 60 addresses the training material, including that copyright dated 2000, in this area.
[82] POL00104812, para.4
[83] POL00104912
[84] POL00094149

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CPS has issued in relation to criminal investigations, the policies themselves need to be updated, rather than separate circulars being circulated.

74. The Post Office Ltd. Financial Investigation Policy, in its May 2010 version[85] sought to "*describe the role of the Financial Investigation Unit in mitigating losses and recovering Post Office funds within the functions of the Post Office Ltd Fraud Team*". It made no specific reference to PACE, although it did identify as an aim (para.3.1) adherence to UK and EU legislation. The revision to this policy in February 2011[86] added a procedures and standards section which identified adherence with PACE, without identifying which aspects and in what contexts such adherence was required from whom in the doing of what. In the same way, the Post Office Ltd. Security Policy – Fraud investigation and prosecution policy, dated April 2010[87], identifies PACE as one of the sources of "*procedure and standards*" with which to have "*adherence and compliance*", without identifying which aspects or in what respects.

75. The Post Office Conduct of Criminal Investigations Policy, dated August 2013[88], states (at para.3.1): "*Post Office Security is almost unique in that unlike other commercial organisations we are a non-police prosecuting agency and are therefore subjected to the Codes of Practice and statutory requirements of the Police and Criminal Evidence Act*"[89]. There are, however, only limited references to PACE and the Codes thereunder thereafter in the Policy (for example, Code G of PACE is cited in the context of interviews (para.5.11), and searches are to be undertaken "*in the spirit of PACE*" (para.5.12.1)). In the 2014 version of the policy (or at least by the final draft 2018 revision of the policy)[90] Code C is addressed in more detail. I have seen training materials issued for Post Office training events in 2012[91] and particularly in 2014[92], which addressed a number of the topics addressed by this 2013 policy, for example Code G. Again, this should not be seen as a substitute for detail in policy documentation, for reasons already rehearsed.

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[85] POL00030579, revised POL00104853
[86] POL00026582
[87] POL00030580
[88] POL00030670
[89] This observation also appears in the undated Governance of Investigations document, POL00105159
[90] POL00030902, para.12.1
[91] POL00094173
[92] POL00094140, POL00094141

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RESPONSIBILITIES OF THOSE INVOLVED IN A CRIMINAL INVESTIGATION, PURSUANT TO THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996

76. Beyond the application of the Codes issued under PACE to criminal investigations undertaken by the Post Office, it is important to note the impact also of the CPIA and the code issued thereunder.

77. Section 23(1), CPIA states:

"The Secretary of State shall prepare a code of practice containing provisions designed to secure –

(a) that where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued;

(b) that information which is obtained in the course of a criminal investigation and may be relevant to the investigation is recorded;

(c) that any record of such information is retained;

(d) that any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained;

(e) that information falling within paragraph (b) and material falling within paragraph

(d) is revealed to a person who is involved in the prosecution of criminal proceedings arising out of or relating to the investigation and who is identified in accordance with prescribed provisions;

(f) that where such a person inspects information or other material in pursuance of a requirement that it be revealed to him, and he requests that it be disclosed to the accused, the accused is allowed to inspect it or is given a copy of it;

(g) that where such a person is given a document indicating the nature of information or other material in pursuance of a requirement that it be revealed to him, and he requests that it be disclosed to the accused, the accused is allowed to inspect it or is given a copy of it;

(h) that the person who is to allow the accused to inspect information or other material or to give him a copy of it shall decide which of those (inspecting or giving a copy) is appropriate;

(i) that where the accused is allowed to inspect material as mentioned in paragraph (f) or (g) and he requests a copy, he is given one unless the person

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allowing the inspection is of opinion that it is not practicable or not desirable to give him one;

(j) that a person mentioned in paragraph (e) is given a written statement that prescribed activities which the code requires have been carried out."

78. Section 23, CPIA goes on to address matters that the Code may or may not address. The terms of the section make clear, in so doing, that the Code will only directly apply to the conduct of investigations by the police. In that regard, section 23 states:

"(2) The code may include provision – (a)that a police officer identified in accordance with prescribed provisions must carry out a prescribed activity which the code requires; (b)that a police officer so identified must take steps to secure the carrying out by a person (whether or not a police officer) of a prescribed activity which the code requires; (c)that a duty must be discharged by different people in succession in prescribed circumstances (as where a person dies or retires).

(3) The code may include provision about the form in which information is to be recorded.

(4) The code may include provision about the manner in which and the period for which –

(a) a record of information is to be retained, and

(b) any other material is to be retained; and if a person is charged with an offence the period may extend beyond a conviction or an acquittal.

(5) The code may include provision about the time when, the form in which, the way in which, and the extent to which, information or any other material is to be revealed to the person mentioned in subsection (1)(e)."

79. In other words, the Code is intended both to address specific issues that touch on disclosure, such as rules for the recording and retention of information received during the course of an investigation, but also the more general principles that should apply to the conduct of such an investigation.

80. The application of the Code issued under section 23, CPIA to the police is also made clear by the introduction to the Code itself. Its introduction (paras.1.1-2) states that the Code *"… applies in respect of criminal investigations conducted by police officers which begin on or after the day on which this code comes into effect. Persons other than police officers who are charged with the duty of conducting an investigation as defined in the Act are to have regard to the relevant provisions of the code, and should take these into account in applying*

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their own operating procedures. This code does not apply to persons who are not charged with the duty of conducting an investigation as defined in the Act." This text appeared in the original 1997 version of the Code and has been replicated unaltered in all subsequent iterations.

81. Since that original 1997 version a preamble has been added (for example in the 2015 version) which underlines it primary application to police officers. It states: *"This code of practice is issued under Part II of the Criminal Procedure and Investigations Act 1996 ('the Act'). It sets out the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters."* However, the CPIA does seek to direct others with a duty of investigation similarly to have regard to its terms. This is made clear by section 26, CPIA which states:

> *"(1) A person other than a police officer who is charged with the duty of conducting an investigation with a view to it being ascertained – (a)whether a person should be charged with an offence, or (b)whether a person charged with an offence is guilty of it, shall in discharging that duty have regard to any relevant provision of a code which would apply if the investigation were conducted by police officers.*
>
> *(2) A failure – (a)by a police officer to comply with any provision of a code for the time being in operation by virtue of an order under section 25, or (b)by a person to comply with subsection (1), shall not in itself render him liable to any criminal or civil proceedings.*
>
> *(3) In all criminal and civil proceedings a code in operation at any time by virtue of an order under section 25 shall be admissible in evidence.*
>
> *(4) If it appears to a court or tribunal conducting criminal or civil proceedings that –*
>
> *(a) any provision of a code in operation at any time by virtue of an order under section 25, or*
>
> *(b) any failure mentioned in subsection (2)(a) or (b), is relevant to any question arising in the proceedings, the provision or failure shall be taken into account in deciding the question."*

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Recognition of the CPIA in Post Office policies

82. The Consignia Investigation Procedure issued in January 2001[93], seeks to outline "*the investigation procedures which must be adhered to by all Consignia Security managers undertaking investigations*". In this policy there are limited references to CPIA and the Codes issued thereunder. It refers to the circumstances in which records relating to surveillance equipment should be retained (para.3.2), and the retention of notebooks in compliance with the CPIA retention periods (para.3.3)[94]. The Recording of Evidence Gained on an Investigation policy[95], also issued in January 2001, identifies what an investigator should record in relation to evidentially pertinent observations.

83. Beyond that, in the context of testing (at para.3.4), the Consignia Investigation Procedure issued in January 2001[96] states: "*the rules relating to the disclosure of unused material to the Defence are laid down in the Criminal Procedures* (sic) *and Investigations Act 1996*" and "*Investigators should ensure they are fully conversant with the rules on disclosure as set out in the Criminal Procedure and Investigations Act 1996 and the Post Office Code of Practice under the 1996 Act*". The Post Office Code there referred to has not been provided to me[97].The Investigation Procedure itself does not further address how the CPIA or the Code thereunder is to be applied by investigators. That is with one potential qualification, namely that at para.3.1 of the 2001 Procedure[98], it identified "*factors that influence as to whether certain actions are required [in the context of an investigation] are based upon the following: the potential loss to Consignia business in value, reputation and customer retention; quality and integrity of the information (intelligence) and the level of incident, of probability; timeliness as to whether the incident reported is recent or not; a named suspect.*"

84. The Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy, in its December 2007[99] and its November 2010[100] versions, similarly makes reference at the

[93] POL00030687
[94] Official notebooks are also addressed by the specific policy, dated December 2008, POL00104819
[95] POL00104753
[96] POL00030687
[97] Unless it is POL00104762, in which case this is not made clear in either document
[98] POL00030687
[99] POL00104812
[100] POL00104912

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outset, as factors underlying the policy, to protecting the integrity of the Mail and protecting the business. Moreover, it stated that "*the conduct, course and progress of an investigation will be a matter for the investigators as long as it is within the law, rules and priorities of the business*"[101]. There is a risk that such policy statements in the context of investigation focus on business considerations relating to an identified suspect, rather than an investigation that looks at lines of enquiry leading towards and away from that suspect[102].

85. The Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy, in both its December 2007[103] and November 2010[104] versions, alludes to the CPIA and the Code issued thereunder in a number of contexts:

(a) Conducting Enquiries and Exhibit management (para.3.2.2.)
(b) Casework (para.3.2.8)

86. The Casework Management Policy, dated March 2000[105], similarly makes reference to the CPIA Code at various points. In particular, it addresses the disclosure of the investigation report to the person to be interviewed, and it refers in that context to the Post Office Code of Practice under the CPIA 1996[106]. It further states that "*legal services will decide what information will be disclosed to the defence in compliance with the CPIA 1996*", and states that the "*usual duties of disclosure*" will apply under that Act. The wording appeared unchanged in the 2002 version of the policy.[107]

87. It is of note, against that background, that in more general terms, the Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy[108], in its December 2007 version, and again in its November 2010 version[109], at para.3.1.4, it states: "*the conduct, course*

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[101] POL00104812, para.3.1.4
[102] Similar concerns arise in relation to the Contract Breach document, dated April 2014, POL00005989 which sets out factors relevant to decision making where action should be taken, which are financially and commercially focused.
[103] POL00104812
[104] POL00104912
[105] POL00104747
[106] The contents of investigation reports are addressed in the Offender Reports Policy, POL00104746
[107] POL00104777
[108] POL00104812
[109] POL00104912

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and progress of an investigation will be a matter for the investigators as long as it is within the law, rules and priorities of the business. Investigators will ultimately report to the Director of Security with regard to the conduct of criminal investigations". The law and rules are not further identified. The business priorities, on the face of this policy, would appear to be protecting the integrity of the mail (para.3.1.1) and protecting the business (para.3.1.2). Further, at para.3.2.10 it states: "*Royal Mail Group Security employees perform a vital role on behalf of the public, the Criminal Justice system and Royal Mail Group Ltd customers and employees. These stakeholders must have absolute confidence in the integrity, conduct and professional status of investigators. This means adherence to the laws, regulations and codes along with their respective procedure and standards referred to above".* As indicated above, there is no wider reference to the CPIA or its Code than those references above, so as to identify wider application of the CPIA Code in this context.

88. The Post Office Ltd. Security Policy – Fraud Investigation and Prosecution Policy, dated April 2010[110], identifies the CPIA as one of the sources of "*procedure and standards*" with which to have "*adherence and compliance*", without identifying which aspects or in what respects.

89. The July 2010 Royal Mail Group Security "Disclosure of Unused Material" policy [111] explicitly seeks to implement the April 2005 version of the CPIA Code, which it embeds as a link in the policy. This important policy document is addressed in detail below.

90. The Crime and Investigations Policy, created in September 2008, in both an undated version[112] and in the October 2009[113] and April 2011[114] versions, did not make specific reference to the CPIA, but did state[115] "*Royal Mail Security and its subordinate business unit security teams maintain professional criminal investigation teams, staffed by personnel*

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[110] POL00030580
[111] POL00104848
[112] POL00031003. I have been provided with this policy with a number of different POL references, and both headed 'S2' and 'S3' (for example, POL00030786). There do not appear to be any, or any obvious differences between them.
[113] POL00031003
[114] POL00030786
[115] At para.5.1 of the undated POL00031003, and the 2009 version, POL00031003, and para.4.1 of the 2011 version, POL00030786

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trained to conduct investigations in accordance with the different judicial systems and legislative requirements of England and Wales, Scotland and Northern Ireland".

91. That Policy went on[116] to identify the aims of such criminal investigations as:

"5/4.3.1 maintaining the safety and security of staff and customers
5/4.3.2 identifying, apprehending and, if appropriate, prosecuting suspected offenders
5/4.3.3 recovering Royal Mail Group cash and other assets and, if appropriate cash and other assets belonging to other victims of crime
5/4.3.4 identifying system or other weaknesses, rectifying these and ensuring, wherever possible, that similar crimes do not reoccur
5/4.4 Royal Mail Group will investigate with absolute impartiality all suspected or detected crime against it, either using its own resources or where relevant in partnership with police and other agencies".

92. In comparison to the extent of training materials that addressed PACE and the Codes thereunder, there appears to have been very limited training material that addressed the CPIA or its Code of Practice. The duty to retain investigators notebooks was recognised in training provided in 2014[117], and in a presentation dated February 2015[118], but not in notebook specific training copyright dated 2000[119]. The earliest exposition of the principles of disclosure by reference to the terms of the CPIA appears to have similarly been in November 2012.[120] If it is proper to argue that the limitations of PACE related policies had to be balanced by the extent of PACE related training, which is not an argument with which I agree for reasons developed above, then the same argument cannot be made in relation to the CPIA.

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[116] At para.5.3-4 of the undated POL00031003 and 2009 version, POL00031003, and para.4.3-4 of the 2011 version, POL00030786
[117] POL00094141
[118] POL00094121
[119] POL00095324
[120] POL00094173, in a note 'Principles of Disclosure' which was part of a training day pack. The note was repeated in presentation form in 2015, POL00094117.

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THE CPIA CODE OF PRACTICE

93. Section 25, CPIA to which reference is made in section 26, CPIA addresses the process by which the Secretary of State should consult upon, produce and revise the Code, and such iterations of the Code have been promulgated at intervals since the CPIA came into force. Given that those undertaking criminal investigations for the Post Office were required to have regard to the Code, it is appropriate to consider the versions of the Code that operated during the Inquiry's relevant period.

94. The CPIA Code applies to any criminal investigation, which, in keeping with the CPIA itself[121], it defines (and has always defined) as: "*an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it. This will include:*

a. *investigations into crimes that have been committed;*
b. *investigations whose purpose is to ascertain whether a crime has been committed, with a view to the possible institution of criminal proceedings; and*
c. *investigations which begin in the belief that a crime may be committed, for example when the police keep premises or individuals under observation for a period of time, with a view to the possible institution of criminal proceedings."*

95. The Code recognises that in any such criminal investigation there are a number of important roles to be performed, namely those of the investigator, the officer in charge of the investigation, and the disclosure officer. Each of these roles is defined under the code, as follows:

(a) Investigator: "*any police officer involved in the conduct of a criminal investigation. All investigators have a responsibility for carrying out the duties imposed on them under this code, including in particular recording information, and retaining records of information and other material*";
(b) The officer in charge of an investigation: "*the police officer responsible for directing a criminal investigation. He is also responsible for ensuring that proper procedures are in place for recording information, and retaining records of information and other material,*

[121] Section 1, CPIA

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in the investigation". Further guidance as to this role is set out in the general responsibilities section of the Code. In the 1997 version it stated, at para.3.3: *"The officer in charge of an investigation may delegate tasks to another investigator, to civilians employed by the police force, but he remains responsible for ensuring that these have been carried out and for accounting for any general policies followed in the investigation"*. The wording was subsequently amended so that, at para.3.4, in relation to this role, the Code states: *"The officer in charge of an investigation may delegate tasks to another investigator, to civilians employed by the police force, or to other persons participating in the investigation under arrangements for joint investigations, but he remains responsible for ensuring that these have been carried out and for accounting for any general policies followed in the investigation"*;

(c) The disclosure officer: *"the person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor."*

96. The role of the disclosure officer, and the interaction of those other roles with it, are further considered below. It is right to note at the outset, however, that at para.3.1 the Code, it is emphasised that *"The functions of the investigator, the officer in charge of an investigation and the disclosure officer are separate. Whether they are undertaken by one, two or more persons will depend on the complexity of the case and the administrative arrangements within each police force. Where they are undertaken by more than one person, close consultation between them is essential to the effective performance of the duties imposed by this code."* In this regard, the Code underlines (at 3.3 in the 1997 version and now in para.3.4) that even where the officer in charge delegates tasks to others, *"…it is an essential part of his duties to ensure that all material which may be relevant to an investigation is retained, and either made available to the disclosure officer or (in exceptional circumstances) revealed directly to the prosecutor."*

97. Moreover, whilst the Code recognises that the same person (or less than 3 persons) may undertake the roles of investigator, officer in charge and disclosure officer, those roles remain distinct from that of the prosecutor, who is *"the authority responsible for conduct of criminal proceedings on behalf of the Crown. Particular duties may in practice fall to individuals acting on behalf of the prosecuting authority"*. Where, therefore, the Code

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addresses the role of the prosecutor in relation to disclosure, it is addressing a separate person, and indeed a separate agency, to the investigative one.

98. The Code is explicit as to the bedrock principles that should apply to any criminal investigation at para.3.4 of the 1997 Code: *"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances."* That text, and that core requirement remains at the heart of the Code (at para.3.5), although it now additionally reads: *"It is a matter for the investigator, with the assistance of the prosecutor if required, to decide what constitutes a reasonable line of inquiry in each case."* This requirement is specifically referred to in Code C to PACE at note 11B, in the context of the rules for the undertaking of interviews (addressed further below), which serves both to underline its importance and the circumstances in which it would be drawn to the attention of an investigator, be they police officers or otherwise.

99. During the course of an investigation, the expectation voiced by the Code is that material that may be relevant to the investigation will be recorded and retained. Again the definitions of these terms are important. Importantly, their definition has remained the same since the original 1997 Code.

(a) Material *"is material of any kind, including information and objects, which is obtained or inspected in the course of a criminal investigation and which may be relevant to the investigation…"*;

(b) Material may be relevant to an investigation *"if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case"*.

100. In short, the Code then addresses the requirements in the context of a criminal investigation for the 3 'R's of the CPIA regime, recording, retention and revelation. In other words, the obligation and mechanism for recording information, the process and time limits for its retention, and how that material should be prepared for and then revealed to the prosecutor, so that the prosecutor can then address their own obligations as to disclosure under the CPIA and under the Code.

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101. In terms of the recording of such information, part 4 of the Code states (and has stated since the original 1997 version):

"4.1 If material which may be relevant to the investigation consists of information which is not recorded in any form, the officer in charge of an investigation must ensure that it is recorded in a durable or retrievable form…
4.2 Where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, its contents should be transferred as a true record to a durable and more easily-stored form before that happens.
4.3 Negative information is often relevant to an investigation. If it may be relevant it must be recorded. An example might be a number of people present in a particular place at a particular time who state that they saw nothing unusual.
4.4 Where information which may be relevant is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time. This includes, for example, information obtained in house-to-house enquiries, although the requirement to record information promptly does not require an investigator to take a statement from a potential witness where it would not otherwise be taken."

102. In relation to retention of material, the 1997 Code stated (at para.5.1): "*The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, if the original is perishable; the original was supplied to the investigator rather than generated by him and is to be returned to its owner.*" In later versions, an additional method was added as follows "*… or the retention of a copy rather than the original is reasonable in all the circumstances*".

103. There is also an important additional requirement, which underlines the fluid nature of relevance to an enquiry at para.5.3: "*If the officer in charge of an investigation becomes aware as a result of developments in the case that material previously examined but not retained (because it was not thought to be relevant) may now be relevant to the investigation, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required.*" The Code addresses categories of material in relation to which there is a "particular" duty of retention at para.5.4. This includes, and has since 1997 always included, "*communications between the police and experts such*

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as forensic scientists, reports of work carried out by experts, and schedules of scientific material prepared by the expert for the investigator, for the purposes of criminal proceedings".

104. In terms of the duration of retention, from para.5.6 of the Code, this requires material to be retained until a decision is made to prosecute (para.5.6), and in that event until the end of the proceedings (para.5.7).

105. In terms of revelation to the prosecutor, the Code from para.6.1 addresses the means to be utilised by the disclosure officer to prepare material for review by the prosecutor to determine whether it should be disclosed. This stage of the process, and the prosecutor's disclosure role, is further addressed below.

The application of the CPIA Code by the Post Office

106. It is of note that the Post Office "Disclosure of Unused Material – Criminal Procedure and Investigations Act 1996 Code of Practice" policy, issued in May 2001[122], defines a criminal investigation in line with the CPIA definition. It says, at para.3.1, it is an investigation "*with a view to ascertaining whether a person should be charged with a criminal offence or if charged with an offence is guilty of it*". This same wording appeared in the Royal Mail Group Prosecution Policy, both as dated October 2009[123] and in a later version, dated April 2011[124] at para.4.1, and at paras.3.1 of the 2012[125] and 2013[126] versions of this policy. It also appeared in the July 2010 edition of the Policy on "Disclosure of Unused Material"[127], which is considered in detail below.

107. The "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996 Codes of Practice" policy was issued in May 2001[128]. It addresses the roles of investigator and disclosure officer, without specific cross-reference to the CPIA Code. It is 3 pages long. This policy is addressed further below in the context of how it informed the disclosure regime. The essential points, in terms of roles, are:

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[122] POL00104762
[123] POL00031011
[124] POL00030685
[125] POL00031034
[126] POL00030796
[127] POL00104848
[128] POL00104762

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(a) An investigator (para.3.2) is someone "*involved in the conduct of a criminal investigation involving Consignia*", who has a duty in particular to record and retain information. They share a duty with the disclosure officer to "*be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met*".

(b) The disclosure officer is the person "*responsible for examining material retained during an investigation, revealing material to Legal Services during the investigation and.. certifying to Legal Services that he has done this.*" In contrast, arguably, to the CPIA Code, the policy proceeds on the basis that the investigator and disclosure officer will "normally" be the same person.

108. The "Rules & Standards" policy, as issued in October 2000[129], requires those performing an investigative role to observe the highest standards of professionalism, which are not defined in any detail. The investigator and disclosure officer roles were again addressed in detail in the July 2010 revision of the "Disclosure of Unused Material" policy[130]. There it is recognised (at para.2.2) that "*in most Royal Mail Group cases the lead investigator and the disclosure officer will be the same person*".

109. The Consignia Investigation Procedure issued in January 2001[131], makes limited references to CPIA and the Codes issued thereunder. It refers to the circumstances in which records relating to surveillance equipment should be retained (para.3.2), and the retention of notebooks in compliance with the CPIA retention periods (para.3.3). It does not seek explicitly to mesh with the "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996 Codes of Practice" policy, referred to above[132]. It is of note that the training materials relating to notebooks that appears to have been in use at this period of time (by reference to its copyright date of 2000)[133] do not refer to the duty of retention, the CPIA, or this 2001 policy document.

110. The Post Office Ltd Financial Investigation Policy, in its May 2010 version[134] made no specific reference to the CPIA or the Code issued thereunder, although it did identify

[129] POL00104754
[130] POL00104848
[131] POL00030687
[132] POL00104762
[133] POL00095324
[134] POL00030579

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as an aim (para.3.1) adherence to UK and EU legislation. The revision to this policy in February 2011[135] added a procedures and standards section which identified adherence with the CPIA. It was silent as to the manner in which this was to be achieved, save for adding that financial investigators should *"ensure that all investigations are recorded correctly and in a timely manner"*. Similarly, the Casework Management policy[136] at para.3.3 enjoined *"team leaders should ensure all avenues of enquiry have been exhausted"*, but it does not spell out that this involves lines of enquiry leading away from the suspect as well as to implicate them.

111. There are some acknowledgements of the 3Rs to be found in the Post Office policies that I have considered, albeit they are limited and far from comprehensive. In the Investigation Procedures dated January 2001[137], it states (at para.3.2) *"local records may be required as evidence or unused material. If so, they must be kept in accordance with the Post Office Code of Practice under the CPIA"* and in relation to notebooks (at para.3.3) *"where used in evidence, notebooks must be retained in compliance with the retention periods set out in the Post Office Code of Practice under the CPIA"*. I have not seen the Code to which this refers[138], but the Post Office Conduct of Criminal Investigations Policy[139], dated August 2013, states in relation to the duty to record noted (at para.5.5.9): *"it is important to document every action, decision and reason for decisions being made during the course of the investigation"*. The policy also noted (at para.5.3.1) that *"all activities undertaken during an investigation should be recorded on the event log"*.

112. That 2013 policy did also address the supervision and conduct of a criminal investigation. Under the former heading[140], it stated *"the decided course of action needs to be proportionate and necessary. It may, if the circumstances warrant be more appropriate to consider other actions that could be done that don't necessarily lead to a criminal investigation…proper consistent supervision is vital to ensure that cases are thoroughly investigated and submitted in a timely manner. Team leaders with the support of the financial*

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[135] POL00026582
[136] POL00104777
[137] POL00030687
[138] Unless it is POL00104762 – if it is, this is not made clear.
[139] POL00030670
[140] POL00030670, para.5.4. This text was retained in the 2014/2018 policy, POL00030902, para.5.1. It also appeared in the Governance of Investigations undated document, POL00105159

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investigators need to quality assure the investigation making sure prior to initial submission that all available evidence has been gathered".

113. Under the heading of investigation[141], the 2013 Policy states: "*it is important to consider the aims, objectives and scope of the investigation". The Security Manager is required to "prepare an investigation plan which will outline the terms of reference in the way the investigation will be conducted".* It also, at para.5.5.7, made reference specifically to the standard of proof to which regard was necessary in criminal investigations including those which involved material from the Horizon system. It stated: "*The security manager has been tasked to prove or dispel the allegation. In criminal cases where the burden of proof is beyond all reasonable doubt, it is necessary to draw on all available evidence which is necessary to draw on all available evidence which is likely to substantiate the allegation. In cases concerning the Horizon system, it is important to establish the level of training the suspect received, when this was received and action the subject took to remedy any identified faults. A key point to cover template has been produced to ensure that security managers establish these facts during the interview process…*" Sources of evidence to be collated were then identified.

114. It follows that in this paragraph:

(a) There was a recognition of the investigation looking at material that led to and away from the suspect, but only in passing and without explanation as to the implications of this. Paragraph 5.5.9 needs to be considered in this regard, however, which I address below, but the focus in paragraph 5.5.7 was on the strengthening of the case against a suspect, rather than identifying whether he might not be correctly suspected;

(b) In relation to Horizon related investigations, there was no reference to consideration of, or either investigation of or disclosure of, anything that might suggest a failure in the operation of the system, as opposed to failure by the subject in its operation. This wording remained in the 2014/2018 revision of the policy[142],

[141] POL00030670, para.5.5. This text was retained in the 2014/2018 policy, POL00030902, para.6.1
[142] POL00030902, para.5.7

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although in that version issues with Horizon was identified as a specific interview topic[143].

115. It is also important to note that para.5.5.9 went on to say "*the security manager must not overlook the fact that a fair investigation is there to establish the truth as well as substantiate the allegation, so it is important that any evidence uncovered that may support the subject's position is also recovered. It is important to document every action, decision and reason for decisions being made during the course of the investigation*". This does reflect para.3.4 of the 1997 CPIA Code, and the need to consider evidence that exonerates as well as implicates. It is of note that it was in what appears to be the 2018 reviewed and amended version[144] of this policy that the need for schedules of unused material was addressed.

116. Similarly, the July 2010 revision of the Royal Mail "Disclosure of Unused Material" policy[145] did expressly state, under the heading of duties of investigators and disclosure officers, at para.3.2:
"*Investigators must pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example where material is held on a computer, it is a matter for the Investigator to decide which material on the computer it is reasonable to enquire into and in what manner*". That policy replicates the definitions of material and relevance set out in the Code (at paras.2.3-4), and then addresses the 3 Rs, the duties of retention, recording and revelation (para.3.3).

117. The Post Office Prosecution Policy England and Wales, dated November 2013[146], similarly addressed disclosure in a more detailed manner more akin to comparable CPS documents. It states (at para.6.2): "*Post Office Ltd will take all reasonable steps to identify and record material which may meet the test for disclosure [making specific reference*

[143] POL00030902, para.12.5. In a Joint Investigation Protocols document issued by Royal Mail Group in July 2015, POL00114559, at para.3, the mechanism for gaining access to Horizon data for prosecution use was set out. No reference to its potential relevance to disclosure was made.
[144] POL00030902 - it may be that the April 2014 version included this, but I have not seen it. This version of this 2014 / 2018 policy does not appear to be the final version. It is unclear what was in the 2014 version and what has been newly added in 2018.
[145] POL00104848
[146] POL00030686

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to section 3, CPIA in a footnote]…in doing so, Post Office Ltd will operate a continuous process designed to identify any material whether the subject of a criminal investigation or not which may relate to the integrity and reliability of Post Office Ltd's IT and data systems". In keeping with this more detailed consideration of disclosure in 2013, there is evidence of training that specifically addressed disclosure in November 2012[147], which included an "introduction" to the "Principles of Disclosure", the role of the disclosure officer, the types of material that fell to be considered and the schedules that were required to address the disclosure exercise. Thereafter, a set of training slides for a Presentation on Principles of Disclosure were prepared in February 2015[148] in similar terms. Neither could be described as comprehensive or sufficient in itself to ensure CPIA-compliance.

DECISIONS AS TO CHARGE

118. Under section 37, PACE, as originally enacted, the custody officer responsible for the detained suspect was vested with determining whether there was sufficient evidence to charge him. In its original form the relevant part of section 37 stated:

> *"(1) Where – (a)a person is arrested for an offence – (i)without a warrant ; or (ii)under a warrant not endorsed for bail, or (b)a person returns to a police station to answer to bail, the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.*
>
> *(2) If the custody officer determines that he does not have such evidence before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence be questioning him.*
>
> *(3) If the custody officer has reasonable grounds for so believing, he may authorise the person arrested to be kept in police detention."*

[147] POL00094173
[148] POL00094117

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119. This is reflected by Code C, issued under PACE, which addresses the charging of a detained person at para.16. Para.16.1 states:

"When the officer in charge of the investigation reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for the offence (see paragraph 11.6), they shall without delay, and subject to the following qualification, inform the custody officer who will be responsible for considering whether the detainee should be charged. See Notes 11B and 16A. When a person is detained in respect of more than one offence it is permissible to delay informing the custody officer until the above conditions are satisfied in respect of all the offences, but see paragraph 11.6. If the detainee is a juvenile or a vulnerable person, any resulting action shall be taken in the presence of the appropriate adult if they are present at the time."

120. The reference to note 11B to the Code is significant. That note, which appears in the context of the rules for undertaking an interview, and the circumstances in which an interview should not be undertaken if "*the officer in charge of the investigation, or in the case of a detained suspect, the custody officer, … reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence*". Note 11B states: "*the Criminal Procedure and Investigations Act 1996 Code of Practice, paragraph 3.5 states 'In conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. What is reasonable will depend on the particular circumstances.' Interviewers should keep this in mind when deciding what questions to ask in an interview.*" As discussed above, the CPIA Code does not have direct application to investigators other than police officers, but it does have indirect application in the same way that the PACE Codes are held to apply to them. It follows that the requirement to pursue reasonable lines of inquiry leading away from as well as towards the suspect is therefore drawn to the attention of non-police investigators through both routes.

121. The July 2010 revision of the Royal Mail "Disclosure of Unused Material" policy[149] did expressly state, under the heading of duties of investigators and disclosure officers, at para.3.2: "*Investigators must pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular*

[149] POL00104848

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circumstances. For example where material is held on a computer, it is a matter for the Investigator to decide which material on the computer it is reasonable to enquire into and in what manner". In the same vein, the Post Office Conduct of Criminal Investigations Policy, dated August 2013[150], which states (at para.5.5.9): "*the security manager must not overlook the fact that a fair investigation is there to establish the truth as well as substantiate the allegation, so it is important that any evidence uncovered that may support the subject's position is also recovered.*"

122. There has, since the enactment of PACE, been a steady shift of the actual decision on charge being made by the police to that decision being taken by the CPS. This is reflected in the wording of section 37 as it has been amended, and the introduction of sections 37A. It is also reflected by the amended Code C, para.16.

123. For example, the Criminal Justice Act 2003 amended section 37, from 29th January 2004, so that section 37(7) read:

> "(7) *Subject to section 41(7) below, if the custody officer determines that he has before him sufficient evidence to charge the person arrested with the offence for which he was arrested, the person arrested – (a)shall be released without charge and on bail for the purpose of enabling the Director of Public Prosecutions to make a decision under section 37B below, (b)shall be released without charge and on bail but not for that purpose, (c)shall be released without charge and without bail, or (d)shall be charged.*
>
> *(7A) The decision as to how a person is to be dealt with under subsection (7) above shall be that of the custody officer.*
>
> *(7B) Where a person is released under subsection (7)(a) above, it shall be the duty of the custody officer to inform him that he is being released to enable the Director of Public Prosecutions to make a decision under section 37B below."*

124. Section 37B, to which the amended section 37(7) refers, states, in so far as is relevant:

> "*(1) Where a person is released on bail under section 37(7)(a) above, an officer involved in the investigation of the offence shall, as soon as is practicable, send to the Director of*

[150] POL00030670

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Public Prosecutions such information as may be specified in guidance under section 37A above.

(2) The Director of Public Prosecutions shall decide whether there is sufficient evidence to charge the person with an offence.

(3) If he decides that there is sufficient evidence to charge the person with an offence, he shall decide –

(a) whether or not the person should be charged and, if so, the offence with which he should be charged, and

(b) whether or not the person should be given a caution and, if so, the offence in respect of which he should be given a caution."

125. More broadly, in terms of the DPP's enlarged role in the charging process, Section 37A, which was inserted into PACE by section 28, Criminal Justice Act 2003, states, in so far as is relevant:

"(1) The Director of Public Prosecutions may issue guidance –

(a) for the purpose of enabling custody officers to decide how persons should be dealt with under section 37(7) above or 37C(2) below, and

(b) as to the information to be sent to the Director of Public Prosecutions under section 37B(1) below.

(2) The Director of Public Prosecutions may from time to time revise guidance issued under this section.

(3) Custody officers are to have regard to guidance under this section in deciding how persons should be dealt with under section 37(7) above or 37C(2) below."

126. Code C, para.16.1A requires the custody officer to have regard to this guidance in reaching a charging decision where it applies. The Code further requires the custody officer to refer an appropriate case to a CPS prosecutor for a charging decision *"as soon as is reasonably practicable"* (para.16.1B). Although note 16AB addresses the power of a custody officer to detain a suspect whilst such a decision is obtained, where it cannot be obtained with sufficient expedition, the suspect is to be released on bail to allow that decision to be reached (para.16.1B).

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127. The Post Office Arrest Procedures policy, dated May 2001[151], does include a requirement, at para.3.12, that advice be sought from legal services "if possible" before a suspect is charged. The investigator is also required to annotate the charge sheet "*to be prosecuted by Consignia PLC*" so as to prevent the police referring the case to the CPS. In May 2012 a "*Police Custody Procedure*"[152] was introduced, addressing arrest and detention in relation to Post Office investigations.

THE DIRECTOR'S GUIDANCE ON CHARGING

128. This Guidance is now in its 6th edition, which came into effect at the end of 2020. The 5th edition, introduced in May 2013, identified in its introduction that the guidance set out:

- *how the police should deal with a person where there is sufficient evidence to charge or where a person has been arrested again having been released on bail awaiting a charging decision by a prosecutor;*
- *the offences that can be charged by the police and those where the decision must be made by prosecutors;*
- *how and when early investigative advice is to be sought from a prosecutor;*
- *the evidence and information needed for a charging decision to be made and for the prosecution of cases at court;*
- *the circumstances when a person may be given a simple caution for an indictable only offence, or a conditional caution.*

129. The Guidance recognises the different roles of police and prosecutor in relation to charging decisions. At para.2, in addressing the responsibility of the police, it identifies these as including "*diverting, charging and referring cases as directed by this Guidance; assessing cases before referral to ensure the Full Code or Threshold Test can be met on the available evidence as appropriate to the circumstances of the case; taking 'no further action' in any case that cannot meet the appropriate evidential standard, without referral to a prosecutor; …completing pre-charge reports and prosecution files…action plans … ensuring that any unused material which undermines the prosecution case or is capable of assisting the defence is*

[151] POL00104760
[152] POL00105230

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revealed to the prosecutor at the time of referral of the case for investigative advice or a charging decision…". Similarly, it identifies the responsibility of the prosecution as including *"making charging decisions and providing advice and guidance in cases specified by this Guidance; deciding whether it is appropriate to apply the Threshold Test in any case where the prosecutor is responsible for making the charging decision; recording decisions on the MG3 and MG3A; ensuring pre-charge action plans only require the gathering of key evidence and contain agreed timescales for the completion of any work…".*

130. The charging guidance then develops what is required for each of those responsibilities. In particular:

(a) Police duty to investigate (para.3): *"The police will undertake effective early investigations to ensure that the key evidence required to make informed decisions in cases is obtained as soon as possible. All reasonable lines of enquiry should be pursued to ensure that any evidence or material likely to undermine the prosecution case or assist the defence is provided to the prosecutor and taken into account during any referral for investigative advice or charging."* This accords with the requirement set out in the CPIA Code that investigators are required to pursue lines of inquiry leading away from as well as towards the suspect.

(b) Police duty to assess evidence (para.4): *"Where a police decision maker considers there may be sufficient evidence to charge they will assess the key evidence to ensure the appropriate Test can be met before proceeding to charge or referring the case to a prosecutor. If the Test is not met and the case cannot be strengthened by further investigation the police will take no further action unless the decision requires the assessment of complex evidence or legal issues".*

(c) Police duty to refer cases to prosecutors (para.5) applies to those cases identified in the Guidance that should be *"referred to a prosecutor to determine whether the suspect is to be charged"* once a *"police decision maker considers there is sufficient evidence to charge a suspect".* The guidance makes clear that the case should be referred save where it relates to summary offences, offences of shoplifting and cases triable either way where a guilty plea is expected, save for particular specified types of offence, and which are expected to be resolved in the magistrates' court (para.15). A plea may be expected (para.17) where unambiguous admissions have been made or no indication was made that the

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allegation would be contested. Cases likely to be resolved in the magistrates' court (para.18) are determined by reference to their seriousness.

(d) Prosecutor's duty to assess the evidence (para.6): "*In making charging decisions and providing early advice, prosecutors will assess the evidential material provided in accordance with this Guidance. Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation or where the public interest clearly does not require a prosecution.*" In addition, pursuant to para.21, the prosecutor is required to review charging decisions taken by the police before its first appearance, and "*Where it appears that the police have charged a case not permitted by this Guidance, the reviewing prosecutor must consider whether the evidence and material available at that time fully meets the Threshold Test or Full Code Test relevant to the circumstances of the case.*"

(e) Compliance with the full code test (para.8): This test is set out in the Code for Crown Prosecutors, which is addressed in detail below. In short, it involves a determination that there is a realistic prospect of conviction and that it is in the public interest to prosecute. This guidance urges "*Police decision makers have an important role in identifying and stopping cases where the Full Code Test (set out in the Code for Crown Prosecutors) cannot be met. Cases should not be charged by the police or referred to prosecutors unless this standard can be met or unless the making of a charging decision in accordance with the Threshold Test is justified. This means the case must be capable, through the gathering of further evidence of meeting the Full Code Test realistic prospect of conviction evidential standard.*"

(f) Action where that test is not met (para.12) involves the prosecutor referring the case back to the custody officer to determine whether to release the suspect. Similarly, where the material that is needed by a prosecutor is not yet available for a charging decision, the suspect should be bailed (para.31) until it is. The Guidance also addresses what material needs to be provided to the prosecutor by the police in order to enable either a charging decision, or for investigative advice to be provided(para.26).

(g) The alternative threshold test (para.11) is again addressed by the Code for Crown Prosecutors as, effectively, a holding charging position where a decision cannot await further investigation. In that context this guidance states: "*Prosecutors will apply the Full Code Test unless the suspect presents a substantial*

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bail risk if released and not all the evidence is available at the time when he or she must be released from custody unless charged. The Threshold Test may be used to charge a suspect who may justifiably be detained in custody to allow evidence to be gathered to meet the Full Code Test realistic prospect of conviction evidential standard." It is made clear at para.14 that the threshold test should not be used in relation to triable either way offences where the police are permitted to make the charging decision, namely those where a guilty plea is anticipated and resolution will be in the magistrates' court, or in relation to summary offences carrying imprisonment.

(h) Review of decisions under the threshold test (para.13): *"A decision to charge under the Threshold Test must be kept under review. The evidence must be regularly assessed to ensure that the charge is still appropriate and that the continued objection to bail is justified. The Full Code Test must be applied as soon as is reasonably practical and in any event before any contested hearing and at the very latest before the expiry of any applicable custody time limit or extended custody time limit. Cases must not proceed to trial unless both stages of the Full Code Test are met. In any case charged in accordance with the Threshold Test, a prosecutor will undertake a Full Code Test review prior to any trial hearing and before the expiry of any custody time limit."*

131. The guidance further addresses the consequences where there is a disagreement between the investigator and the prosecutor about whether a suspect should be charged. In short (para.23) the matter will be escalated on each side to a management level. Otherwise (para.24) the investigator must comply with the prosecutor's decision.

132. In summary, therefore, in cases involving the police and CPS as the investigator and prosecutor, the structure of responsibility is clear. That is that in all but the least complex or serious of cases, the decision to charge is a decision independent of the investigator, and by reference to a clearly defined two stage test taken by reference to clearly defined material. The structure also makes clear where the final decision lies.

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THE CODE FOR CROWN PROSECUTORS

133. An important facet of the role of the DPP is his duty to provide and maintain the Code for Crown Prosecutors.

134. The creation of such a Code is provided for in Section 10, POA 1985, which states, in so far as is relevant (with emphasis added):

> *"(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them –*
>
> *(a) in determining, in any case –*
>
> *(i) **whether proceedings** for an offence **should be instituted** or, where proceedings have been instituted, whether they should be **discontinued**; or*
>
> *(ii) what charges should be preferred; and*
>
> *(b) in considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case.*
>
> *(2) The Director may from time to time make alterations in the Code…."*

135. The Code does not apply to those undertaking prosecution outwith the CPS. It is not, however, of no relevance to them. This is recognised in the Code itself, which observes (at para.1.3): *"The Code gives guidance to prosecutors on the general principles to be applied when making decisions about prosecutions. The Code is issued primarily for prosecutors in the CPS but other prosecutors follow the Code, either through convention or because they are required to do so by law."*

136. This is expressly recognised in the guidance relating to charging decisions to be taken by other agencies. For example:

(a) The DWP's Prosecution Policy states at 4.4.3: *"The Department's Prosecution Division is bound by the Code for Crown Prosecutors".*

(b) The Environment Agency Enforcement and Sanctions policy states, at 7.4: *"If the Environment Agency decides to prosecute it will exercise prosecutorial independence and ensure any case put forward for prosecution meets the test in the Code for Crown Prosecutors".*

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(c) Similarly, the Health and Safety Executive has an Enforcement Policy Statement ('EPS') which sets out the principles inspectors should apply when determining what enforcement action to take in response to breaches of health and safety legislation[153]. The EPS states, at 14.1, *"We use discretion when making this decision and we take account of the evidential stage and the relevant public interest factors set down by the Director of Public Prosecutions in the Code for Crown Prosecutors. No prosecution will go ahead unless we find there is sufficient evidence to provide a realistic prospect of conviction and that prosecution is in the public interest".*

137. This was also demonstrated in *R(Kay) v Leeds Magistrates' Court*[154], Sweeney J said (at para.23):

"(1) whilst the Code for Crown Prosecutors does not apply to private prosecutions, a private prosecutor is subject to the same obligations as a Minister for Justice as are the public prosecuting authorities – including the duty to ensure that all relevant material is made available both for the court and the defence; and

(2) advocates and solicitors who have the conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice in preference to the interests of the client who has instructed them to bring the prosecution – owing a duty to the court to ensure that the proceeding is fair."

138. Similarly, in *R (Hollway) v Harrow Crown Court*[155] Mailes J said (at paras.19-20):

"19. Two points relevant to the position of private prosecutors deserve emphasis. First, in their role as 'ministers of justice' prosecutors have a duty to undertake an independent and objective analysis of the evidence before commencing proceedings to determine whether there is a realistic prospect of a conviction. This requires an assessment not only of what evidence exists, but also of whether it is reliable and credible, and whether there is other evidence which might affect the position. As the Code for Crown Prosecutors states:

[153] Local Authorities also enforce health and safety law in workplaces allocated to them. Their inspectors are also required to follow the EPS when taking enforcement action, see EPS para 1.7.
[154] [2018] EWHC 1233 (Admin)
[155] [2019] EWHC 1731 (Admin)

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'When deciding whether there is enough evidence to charge, Crown Prosecutors must consider whether evidence can be used in court and is reliable and credible, and there is no other material that might affect the sufficiency of evidence. Crown Prosecutors must be satisfied there is enough evidence to provide a 'realistic prospect of conviction' against each defendant.'

20. It was common ground before us that a private prosecutor is under the same duty, or at any rate is more likely to be treated as having committed an improper act or omission if he fails to carry out such an analysis. That leads on to the second point, which was not common ground. Because a private prosecutor will often have a private interest in the proceedings, he may lack the objectivity required to undertake such an analysis. Indeed, the objective private prosecutor will recognise the danger of his own lack of objectivity. It will often be prudent, therefore, to bring a proposed prosecution to the attention of the police or prosecution authorities and to take legal advice. While this is not a legal precondition to bringing a private prosecution, and a failure to do so is not in itself 'improper', it may give rise to an inference that a private prosecutor was determined to go ahead regardless of the prospects of success or, more mundanely, may simply indicate that no proper analysis of evidential sufficiency has been carried out. Haigh at [39] shows that a failure to bring the matter to the attention of the relevant authorities may be a factor in demonstrating that the commencement of a private prosecution falls short of the standards required of a minister of justice."

139. In fact, the Post Office has at least purported to apply the Code for Crown Prosecutors, and this is further addressed below.

140. The General principles to be applied by prosecutors are set out in the Code (part 2) as follows:

*"**2.1** The independence of the prosecutor is central to the criminal justice system of a democratic society. Prosecutors are independent from persons or agencies that are not part of the prosecution decision-making process. CPS prosecutors are also independent from the police and other investigators. Prosecutors must be free to carry out their professional duties without political interference and must not be affected by improper or undue pressure or influence from any source.*

***2.2** It is not the function of the CPS to decide whether a person is guilty of a criminal offence, but to make assessments about whether it is appropriate to present charges for the criminal*

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court to consider. The CPS assessment of any case is not in any sense a finding of, or implication of, any guilt or criminal conduct. A finding of guilt can only be made by a court.

2.3 *Similarly, a decision not to bring criminal charges does not necessarily mean that an individual has not been a victim of crime. It is not the role of the CPS to make such determinations.*

2.4 *The decision to prosecute or to recommend an out-of-court disposal is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care.*

2.5 *It is the duty of prosecutors to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible. Casework decisions taken fairly, impartially and with integrity help to secure justice for victims, witnesses, suspects, defendants and the public. Prosecutors must ensure that the law is properly applied, that relevant evidence is put before the court and that obligations of disclosure are complied with.*

2.6 *Although each case must be considered on its own facts and on its own merits, there are general principles that apply in every case.*

2.7 *When making decisions, prosecutors must be fair and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity of the suspect, defendant, victim or any witness influence their decisions. Neither must they be motivated by political considerations. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.*

2.8 *Prosecutors must be even-handed in their approach to every case, and have a duty to protect the rights of suspects and defendants, while providing the best possible service to victims.*

2.9 *The CPS is a public authority for the purposes of current, relevant equality legislation. Prosecutors are bound by the duties set out in this legislation.*

2.10 *Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case. They must comply with any guidelines issued by the Attorney General and with the policies and guidance of the CPS issued on behalf of the DPP, unless it is determined that there are exceptional circumstances. CPS guidance contains further evidential and public interest factors for specific offences and offenders and is available for the public to view on the CPS website. Prosecutors must also comply with the Criminal Procedure Rules and Criminal Practice Directions, and have regard to the Sentencing Council Guidelines and the obligations arising from international conventions.*

2.11 *The CPS prosecutes on behalf of some other Government departments. In such cases, prosecutors should have regard to any relevant enforcement policies of those departments.*

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2.12 *Some offences may be prosecuted by either the CPS or by other prosecutors in England and Wales. When making decisions in these cases, CPS prosecutors may, where they think it appropriate, have regard to any relevant enforcement or prosecution policy or code of the other prosecutor.*

2.13 *Where the law differs in England and Wales prosecutors must apply the Code and have regard to any relevant policy, guidance or charging standard."*

141. The Code identifies two tests that, in different circumstances, are to be applied in determining whether to prosecute, namely the Full Code Test and the Threshold Test. As their names suggest, the first is a more robust test than the latter. The Full Code test should be applied (para.4.3): "*when all outstanding reasonable lines of inquiry have been pursued; or prior to the investigation being completed, if the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the Full Code Test, whether in favour of or against a prosecution.*"

142. In contrast (pursuant to para.5.1), the threshold test is to be applied "*in limited circumstances, where the Full Code Test is not met, the Threshold Test may be applied to charge a suspect. The seriousness or circumstances of the case must justify the making of an immediate charging decision, and there must be substantial grounds to object to bail.*"

143. Factually, it is the Full Code test that is relevance here, and will therefore be the focus of this analysis. As to the timing of the application of the test, it is relevant to note:

(a) At para.3.4: "*Prosecutors should identify and, where possible, seek to rectify evidential weaknesses but, subject to the Threshold Test (see section 5), they should quickly stop cases which do not meet the evidential stage of the Full Code Test (see section 4) and which cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution (see section 4). Although prosecutors primarily consider the evidence and information supplied by the police and other investigators, the suspect or those acting on their behalf may also submit evidence or information to the prosecutor, before or after charge, to help inform the prosecutor's decision. In appropriate cases, the prosecutor may invite the suspect or their representative to do so.*"

(b) At para.4.5: "*Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information*

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to take such a decision, the investigation should continue and a decision taken later in accordance with the Full Code Test set out in this section."

144. The Full Code Test involves 2 stages, first an evidential stage and then a consideration of whether prosecution is in the public interest. Ordinarily, the stages are to be approached in that order, although para.4.4 observes: "*In most cases prosecutors should only consider whether a prosecution is in the public interest after considering whether there is sufficient evidence to prosecute. However, there will be cases where it is clear, prior to reviewing all the evidence, that the public interest does not require a prosecution. In these instances, prosecutors may decide that the case should not proceed further.*

145. At the evidential stage the prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. Consideration must be given to what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be[156]. There is a realistic prospect of conviction if "*an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged*"[157]. The questions that a prosecutor should consider in answering this question are identified as:

(a) Can the evidence be used in court?

(b) Is the evidence reliable?

(c) Is the evidence credible?

(d) Is there any other material that might affect the sufficiency of evidence?

146. It follows that the reliability of the evidence is identified as being a central consideration to the decision whether there is a realistic prospect of a conviction, together with the question of "*whether there is any material that may affect the assessment of the sufficiency of evidence, including examined and unexamined material in the possession of the police, and material that may be obtained through further reasonable lines of inquiry.*" (para.4.8).

[156] See Code for Crown Prosecutors paragraph 4.4
[157] See Code for Crown Prosecutors paragraph 4.5

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147. Additionally, at para.3.5 *"Prosecutors should not start or continue a prosecution where their view is that it is highly likely that a court will rule that a prosecution is an abuse of its process, and stay the proceedings."*

148. If the evidential stage is satisfied, the prosecutor must consider whether the prosecution is in the public interest. As the Code observes (para.4.10): *"It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution."*

149. The prosecutor is required to consider factors identified at para.4.14[158]:

a) The seriousness of the offence.

b) The level of culpability of the suspect. In this regard, the Code lists relevant factors including *"the suspect's level of involvement; the extent to which the offending was premeditated and/or planned; the extent to which the suspect has benefitted from criminal conduct; whether the suspect has previous criminal convictions and/or out-of-court disposals and any offending whilst on bail or whilst subject to a court order; whether the offending was or is likely to be continued, repeated or escalated; the suspect's age and maturity".*

c) The circumstances of, and the harm caused to the victim.

d) Whether the suspect was under the age of 18 at the time of the offence.

e) The impact on the community.

f) Whether prosecution is a proportionate response.

g) Whether sources of information require protecting.

150. The Code in this context then observes (para.4.13): *"It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed."*

[158] See Code for Crown Prosecutors paragraph 4.12 (a) to (g)

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151. Importantly, the determination reached under the test just described is not a one off assessment. At para.3.6, the Code states: "*Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops. This includes what becomes known of the defence case, any further reasonable lines of inquiry that should be pursued, and receipt of any unused material that may undermine the prosecution case or assist the defence case, to the extent that charges should be altered or discontinued or the prosecution should not proceed.*"

152. The Code then addresses the alternative test to be applied in particular circumstances, namely the Threshold Test, which arises (as para.5.1 observes) where: "*The seriousness or circumstances of the case must justify the making of an immediate charging decision, and there must be substantial grounds to object to bail.*" The Code sets out 5 conditions that must be met for this Threshold test to be applied. If any is absent, the test is not met. The 5 conditions are:

(a) **There are reasonable grounds to suspect that the person to be charged has committed the offence.** The Code observes (at para.5.3) "*Prosecutors must be satisfied, on an objective assessment of the evidence, that there are reasonable grounds to suspect that the person to be charged has committed the offence. The assessment must consider the impact of any defence or information that the suspect has put forward or on which they might rely.*" In reaching this determination, consideration needs to be had to "*all of the material or information available, whether in evidential format or otherwise*" and consideration of its reliability, credibility and the likelihood that it can be adduced evidentially;

(b) **Further evidence can be obtained to provide a realistic prospect of conviction.** The Code (at 5.5) explains: "*Prosecutors must be satisfied that there are reasonable grounds to believe that the continuing investigation will provide further evidence, within a reasonable period of time, so that when all the evidence is considered together, including material which may point away from as well as towards a particular suspect, it is capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.*" At para.5.7 it is made clear that this involves consideration of: "*the nature, extent and admissibility of any likely further evidence and the impact it will have on the case; the charges that all the evidence will support; the reasons why the evidence is not already available; the time required to obtain the further evidence, including whether it could be*

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obtained within any available detention period; whether the delay in applying the Full Code Test is reasonable in all the circumstances."

(c) **The seriousness or the circumstances of the case justifies the making of an immediate charging decision.**

(d) **There are continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and in all the circumstances of the case it is proper to do so.** It is made clear, at para.5.9, that *"this determination must be based on a proper risk assessment, which reveals that the suspect is not suitable to be bailed, even with substantial conditions. For example, a dangerous suspect who poses a serious risk of harm to a particular person or the public, or a suspect who poses a serious risk of absconding or interfering with witnesses. Prosecutors should not accept, without careful enquiry, any unjustified or unsupported assertions about risk if release on bail were to take place."*

(e) **It is in the public interest to charge the suspect.**

153. As with the Full Code test, but with greater emphasis given the nature of the test, the Code makes clear that the use of the Threshold Test is not a one off event. Para.5.11 states: *"A decision to charge under the Threshold Test must be kept under review. The prosecutor should be proactive to secure from the police the identified outstanding evidence or other material in accordance with an agreed timetable. The evidence must be regularly assessed to ensure that the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as the anticipated further evidence or material is received and, in any event, in Crown Court cases, usually before the formal service of the prosecution case."*

154. The Code also addresses the determination of what offences to charge where the full code test has been applied and prosecution has been determined upon. At para.6.1, it is stated that the charges should *"reflect the seriousness and extent of the offending; give the court adequate powers to sentence and impose appropriate post-conviction orders; allow a confiscation order to be made in appropriate cases, where a defendant has benefitted from criminal conduct; and enable the case to be presented in a clear and simple way."* It follows from this analysis that the interests of justice do not always require the charging of the most serious potential charge (para.6.2). The prosecutor should never seek to pressure a defendant into pleading guilty through the charges chosen (para.6.3) and should keep the charge under review (para.6.5).

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The Post Office recognition of the Code for Crown Prosecutors

155. The Post Office has at least purported to apply the Code for Crown Prosecutors. That is demonstrated by the following:

(a) The Royal Mail Group Criminal Investigation and Prosecution Policy, dated 1 December 2007[159] states (at para.3.2.9): "*suspect offenders will be prosecuted where there is sufficient evidence and it is in the public interest in accordance with the Code for Crown Prosecutors*". This wording also appears in the 2010 version of this policy.[160]

(b) The Post Office Ltd. Security Policy – Fraud Investigation and Prosecution Policy, dated April 2010[161], makes limited reference to the Full Code Test, at para.3.15, it states: "*decisions to prosecute will be taken by nominated representatives in the business with consideration to the advice provide by the Royal Mail Group Criminal Law Team and where there is sufficient evidence and it is in the public interest*";

(c) This was supplemented by the Royal Mail Prosecution Decision Procedure, dated January 2011[162], at para.4 which required adherence to both parts of the Full Code Test laid down by the Code for Crown Prosecutors and observes that "*compliance with the Code.. will ensure that inappropriate prosecutions are not pursued*". It identifies the decision makers as the director of human resources or security managers.

(d) Also in 2011, the Royal Mail Group Prosecution Policy, dated April 2011[163], spelt out, at para.6.1, that "*the decision to prosecute will be reached by applying the general principles and guidance offered by the Code…*" The same wording had appeared in the earlier 2009 version of this policy[164], and in the 2012[165] and 2013[166] revisions of it. In these revisions, the Full Code test is addressed.

(e) The Post Office Ltd. Criminal enforcement and Prosecution Policy, which I understand can be dated to November 2012[167], states that the Code for Crown Prosecutors has been adopted for POL cases. Under the heading of Criminal

[159] POL00104812
[160] POL00104912
[161] POL00030580
[162] POL00030598
[163] POL00030685
[164] POL00031011
[165] POL00031034
[166] POL00030796
[167] POL00030604.

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Enforcement this addresses factors relevant to the application of the Code, which are addressed below.

156. The Crime and Investigations Policy, created in September 2008, in both an undated version[168] and in the October 2009[169] and April 2011[170] versions, addresses factors relevant to prosecutorial decisions under the heading of "consequences". It states[171]: "*where a business leader, manager or employee is the subject of a criminal investigation and grounds are established to suspect them of having committed a criminal offence, breached Royal Mail Group's code of business standards or subverted business systems, controls or policies, they may enter one or both of the following processes: the relevant national Criminal Justice System and the relevant business unit Code of Conduct.*" It is right to note that the policy goes on[172] to say that "*once committed to the relevant Criminal Justice System it is the accountability of the Royal Mail, its investigators, criminal lawyers and prosecuting agents to ensure that the case is presented impartiality but with all possible evidential support and preparation. It is the function of the relevant court to decide upon guilt…*" However, the policy identifies no more than suspicion as a precursor for a case entering the criminal justice system, and includes none of the guidance for prosecutorial decisions to be found in the Code for Crown Prosecutors.

157. The Post Office Ltd. "Criminal Enforcement and Prosecution Policy", which I understand can be dated to November 2012[173], under the heading of Criminal Enforcement, addresses factors relevant to the application of the Code. In so far as the evidential test is concerned, it simply refers to "*evidence of guilt sufficient to give a realistic prospect of success in criminal proceedings*". In relation to the public interest a list of factors to be taken into account is set out, which are then summarised as follows: "*the seriousness and effect of the offence, the deterrent effect of a prosecution on the offender and others, any mitigating factors*".

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168 POL00031003
169 POL00031003
170 POL00030786
171 At para.8.1 of the undated and 2009 POL00031003 and in para.7.1 of the 2011 POL00030786
172 At par.8.3 of the undated and 2009 POL00031003 and in para.7.3 of the 2011 POL00030786
173 POL00030604

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158. In the November 2013 revision of the Post Office Prosecution Policy[174], in contrast to these earlier documents, there was a detailed exposition of the decision to prosecute (from para.4.1). It is clear that this is intended to operate alongside the Code for Crown Prosecutors, and to identify Post Office-centric factors of relevance. This policy identified the decision as one to be taken by a qualified lawyer and independent of the department with a direct financial or other interest in prosecution (para.3.3). At para.4.4 of the 2013 Policy, the evidential stage of the test involves consideration of "*the reliability and credibility of witnesses and their evidence. Consideration will be given to issues of disclosure from an early stage in the decision-making process. Particular emphasis will be given to the reliability, credibility and integrity of electronic and data-based evidence*".

159. Similarly, in relation to the public interest test (para.4.5), reference is made to the quantum of loss or shortage, with specific matters that fall to be considered in that regard, the degree of sophistication of the offending, the extent and duration of the offending, others effected by the offending, the circumstances of the suspect and cost. This list was further developed in the 2016 revision to this Policy.[175] The 2013 Policy recognises the need to consider potential abuse of process arguments (para.4.7). It is also observed, at para.4.6, that no single factor will determine the decision, and goes on to state: "*the decision to prosecute will be taken in an open and transparent manner and should be readily-justifiable on both the facts of a case and in terms of those matters set out in the Policy*".

160. In the context of being provided with a number of training documents, I have seen an extract from the Code included in a document that begins with the contact details for the Criminal Law Team[176]. I do not understand the provenance or purpose of this undated document. I should add that whilst I have been provided with and considered a series of training workbooks relating to PACE and the Codes thereunder, and a range of investigation techniques and issues, I have not seen any training materials that address the proper approach to the Code for Crown Prosecutors, or its application by Post Office decision makers.

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[174] POL00030686
[175] POL00030811, if this is the final version
[176] POL00114557

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POST OFFICE CHARGING DECISIONS

161. Having identified that which is said in the various prosecution policies issued by the Post Office with which I have been provided, it is appropriate to note that none of them specifically refers to, or replicates, the Director's Guidelines on charging. I have also seen a paper by Andrew Wilson in December 1997[177], which acknowledged that there was "*no single statement of current policy*" as to the prosecution by the Post Office of its own employees and agents beyond a policy "*normally to prosecute all breaches of the criminal law by employees which affect the Post Office and which involves dishonesty*".

162. Wilson observed[178] that there had been "*little formal evaluation or review*" of this approach. He also identified that the "*principles underlying prosecution have been identified as to act as a deterrent [and] to serve the public interest.*" As he recognises, neither of these can be "*accurately evaluated*", and as is clear from the analysis of the Director's Guidance on charging and the Code for Crown Prosecutors they fall far short of the nuanced and detailed grounds of analysis those sources of guidance identify for the making of a charging decision. The evaluation of the evidence, and of material that might undermine that evidence, is not here identified. Indeed Wilson identifies the main reasons not to prosecute as "*costs, adverse publicity [and] adverse IR consequences*"[179].

163. Wilson ultimately formulates the prosecution policy as: "*The Post Office's policy is normally to prosecute those of its employees or agents who commit acts of dishonesty against the Post Office for the purpose of illegally acquiring Post Office property or assets, or the property or assets of Post Office customers and clients while in Post Office custody, where this is deemed to serve the public interest. Other wrongdoings will normally be dealt with via the discipline code*". I recognise that this is only a proposal, rather than a definition of the policy. However, it again fails to identify the range of factors that the Code for Crown Prosecutors, for example, recognises as intrinsic to the making a prosecution decision. Moreover, it fails to address the proper charges which ought to be brought for such

[177] POL00030659
[178] POL00030659, para.3
[179] POL00030659, para.4

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conduct. That omission is of note because it involved a failure to consider Court of Appeal guidance that was directed to the Post Office.

164. In *Eden*[180], the Court of Appeal considered the approach adopted by the Post Office to the prosecution of sub-postmasters to financial irregularities. I am asked to consider this case and what it reveals as to the approach to charging decisions made by the Post Office. It should be noted that the decision predates the Inquiry's period of focus by some decades.

165. In short, the facts were that the Appellant, acting as a sub-postmaster, was responsible for the submission to the Post Office of sets of weekly accounts together with vouchers accounting for receipts and payments of pensions and allowances. Over a period of 10 weeks a discrepancy had been identified with the number of payments out shown as larger than the number of vouchers submitted. The Appellant was charged with 5 sample counts of theft, contrary to section 1, Theft Act 1968, and 5 "twin" counts of false accounting, contrary to section 17, Theft Act 1968. At trial the prosecution invited the jury to convict of theft only where also satisfied that the Appellant was guilty of false accounting, and the jury was directed to adopt that approach. However, they convicted the Appellant only of the false accounting offences, making clear, when unusually asked to clarify their verdict by the Judge, that they had found that the accounts had been deliberately falsified to cover up "a muddle" rather than a theft.

166. Sachs LJ, in considering the law, observed (at p.197): "*It is as well to state that it is certainly not the law in case of the type which are brought by the Post Office for theft and false accounting, that simply because the accused is not guilty of theft it follow that he is not guilty of false accounting. It could be perfectly proper for a jury, if properly directed, to find that an accused person who has deliberately made false entries with regard to the number of vouchers he has received for pensions and allowances in order to cover up a muddle guilty under section 17, whether or not at that time he committed a theft. The question for the jury would be whether he had dishonestly falsified the accounts for 'gain' within the meaning of that word as interpreted by section 34: that could obviously include temporary gains of many types. Such a gain could be constituted by putting off the evil day of having to sort out the muddle and pay up what may been in error kept within the sub-post office when it ought to have been sent to*

[180] (1971) 55 Cr. App. R. 193

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head office. There may well be other forms of temporary gain which could result in a verdict of guilty on a charge under section 17. Indeed it is not easy to think of a deliberate falsification of accounts done dishonestly that is not, in fact, aimed at some sort of gain and indeed some sort of monetary gain." Given that the jury had made clear, in answer to the Judge's question, that their convictions had been based on an absence of dishonesty, the convictions were quashed.

167. Sachs LJ did make the following additional comments (at p.198) as the approach that the Post Office had adopted. He said: "*It seems to this Court to be rather off that two counts, theft and false accounting, should be put in parallel setting, if it is the object of the prosecution to secure a conviction on the first only if the second is proved, or on the second only if the first is proved. There would seem in those circumstances but little point in putting in two separate counts. It would be better in future that the prosecution should make up its mind as to whether or not it really wants a conviction on a count of false accounting only if theft is proved: if so, reliance should be placed on one count only. On the other hand, there may be cases when it is wise to have a count of false counting: where, for instance, a temporary gain could be the object of the dishonest act. No such object was put before the jury in the present case*".

168. Although these observations were made in 1971, it does not appear that the practice of charging both theft and false accounting was altered for almost the whole of the Inquiry's period of concern. In a paper "Post Office Audit, risk and compliance Committee Prosecution Policy", by Chris Aujard, dated February 2014[181] (at para.3.1) it was noted that the Post Office "*typically*" prosecuted sub-postmasters "*for false accounting combined with theft and/or fraud*". The paper went on to say that "*the choice of charge is largely dependent on whether we have obtained an admission of guilt, or other compelling evidence that the Defendant has taken money directly from us, or have only secured evidence that the Defendant covered up losses by falsely recording the branch's financial position…typically Defendants plead guilty to a charge of false accounting, with the charge of theft then being dropped*".

169. The Post Office produced a "criminal offences points to prove" document in December 2008[182] which on its face sought to help investigators and interviewers to understand

[181] POL00100193
[182] POL00104823

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the elements of pertinent offences, rather than to assist with charging decisions. There was an updated version of this document issued in August 2011[183], together with a similar guidance document entitled "criminal investigation trigger points", issued in June 2012[184]. None of these addressed the *Eden* considerations as to charges. Similarly, whilst training materials were produced that addressed the elements of offences of dishonesty[185], they did not address charging decisions or the *Eden* considerations.

170. The choice of charges was not addressed in the various prosecution policies that I have seen until 2013, nor were the implications of *Eden* addressed. It was in the Post Office Prosecution Policy England and Wales, dated November 2013[186] that *Eden* was addressed (at para.5.2), when it was stated that *"where a suspect is charged with offences of theft and false accounting arising out of the same basic facts, those charges will always be alternative charges. This approach is not to be regarded as an invitation to plead guilty to any particular charge(s)"*. I am asked, in the context of *Eden*, the lack of specific Post Office guidance relating to it and, no doubt, the observations in the paper just quoted to consider the practice of 'plea bargaining' in this context.

Plea bargaining

171. As is acknowledged, for example, in Blackstone's Criminal Practice (para.12.62): "*It is common practice for the prosecution and defence to agree through counsel prior to arraignment that, in the event of the accused pleading guilty to parts of the indictment, the Crown will not seek to prove him guilty as charged. Such an arrangement may take the form of accepting a plea of guilty to a lesser offence, or of offering no evidence on counts to which the accused pleads not guilty, or of asking the judge to allow some counts to remain on the file marked not to be proceeded with.*" In *Goodyear*[187], the Court of Appeal set out the correct approach to judicial indications of sentence, identifying the proper roles within this process for the court, and those responsible for prosecuting and defending. I do not understand my instructions to require consideration of that procedure (although I should note that the Post Office policies I have seen do not refer to it). Rather, the issue that falls to be

[183] POL00104901
[184] POL00104884. There is a further such document at POL00105221
[185] POL00095329
[186] POL00030686
[187] [2005] 1 WLR 2532

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considered is whether it was appropriate for the Post Office to charge both theft and false accounting in order to encourage a plea to the latter, if that was what was in fact occurring.

172. The report of the Farquharson committee on the role of prosecuting counsel (May 1986), considered counsel's control over the acceptance of pleas. The committee discussed the authorities, and also made the point that, in the reverse situation of the judge thinking that the evidence on the depositions does not warrant a conviction or that further proceedings would be unfair, he has no power to prevent the prosecution calling their evidence save in the very exceptional case of the proceedings amounting to an abuse of the process of the court.

173. The principles set out by the Farquharson committee were in any event since endorsed and developed by the CPS and the General Council of the Bar in a set of Guidelines jointly issued in 2002. In general, it was recognised that prosecuting counsel is entitled to make this decision. There were, however, three qualifications to this:

(a) If prosecuting counsel expressly asks for the court's approval of his proposed acceptance of certain pleas, he must abide by the court's decision[188].

(b) In a case where the court's approval is not sought beforehand, it is nonetheless usual for counsel to explain in open court his reasons for accepting the plea. It is then open to the judge to express his views. If the judge, on the information available to him is "of the opinion that the course proposed by counsel would lead to serious injustice, he may decline to proceed with the case until satisfied that proper consultation has been undertaken". However, the judge has no power to prevent counsel taking the course he thinks fit – "any attempt by him to do so would give the impression that he was stepping into the arena and pressing the prosecution case".

(c) Should the decision to accept proposed pleas fall to be taken during the course of the trial, prosecuting counsel's position remains as in (b) above until the close of his case. Once, however, he has called his evidence and the judge has either found there is a case to answer or no submission to the contrary has been made, the position is different.

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[188] *Broad* (1978) 68 Cr App R 281

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174. As to the circumstances in which it is appropriate to accept a plea to a lesser offence, Lord Goddard in Soanes[189], declined to lay down a '*hard and fast rule*' but expressed the view that, "*where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment*".

175. In Soanes, Lord Goddard CJ also said, "*. . . it must always be in the discretion of the judge whether he will allow* [a plea of guilty to a lesser offence] *to be accepted*". However, it is doubtful whether, in an adversarial system of justice, the court can or should insist on one of the parties calling evidence. Moreover, in the analogous situation of the accused pleading to some counts on the indictment in exchange for the prosecution offering no evidence on others, the rule seems to be that the prosecution is bound by the judge's views of the bargain if, and only if, they have expressly asked him to approve it in advance. If they choose not to seek his prior approval, they may accept the pleas even though the judge indicates in court that they ought to proceed on all counts[190].

176. The Attorney General first issued Guidelines on the Acceptance of Pleas in December 2000. These stressed that justice should be conducted in public, save in the most exceptional circumstances, and that this includes the acceptance of pleas by the prosecution. The process by which this is done should be transparent. Prosecutors are directed to the guidance contained in the Code for Crown Prosecutors by the Guideline, which states (at B2): "*The Code for Crown Prosecutors governs the prosecutor's decision-making prior to the commencement of the trial hearing and sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted.*" Prosecutors are also told that they should be prepared to explain in open court the reasons for accepting pleas to a reduced number of charges or less serious charges. The Guidelines were amended in 2005 and 2009. The guidance included, at B4:

"*The appropriate disposal of a criminal case after conviction is as much a part of the criminal justice process as the trial of guilt or innocence. The prosecution advocate represents the public interest, and should be ready to assist the court to reach its decision as to the appropriate*

[189] (1948) 32 Cr App R 136
[190] see Coward (1979) 70 Cr App R 70 and Broad (1978) 68 Cr App R 281

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sentence. This will include drawing the court's attention to: any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim; where appropriate, to any evidence of the impact of the offending on a community; any statutory provisions relevant to the offender and the offences under consideration; any relevant sentencing guidelines and guideline cases; and the aggravating and mitigating factors of the offence under consideration".

177. The Guidelines also address the importance of agreeing a basis of plea, or the use of the procedure set out in Newton[191], and the procedure to be employed where an indication is sought by an accused as to sentence.

Decision making

178. In January 2011, the Royal Mail Prosecution Decision Procedure was produced to "*describe the process for making a decision on whether to prosecute Royal Mail and agency employees who have been subject to criminal investigation by Royal Mail Group Ltd Investigators*". It refers to aspects of the Criminal Investigation and Prosecution Policy, addressed above, as to the rationale and test for prosecution. Reference is also made to the Code for Crown Prosecutors, both on the basis that "*compliance…will ensure that inappropriate prosecutions are not pursued*" (para.4.1), and by reference to both the evidential and public interest tests (para.4.3).

179. Against that background, the procedure is briefly set out at para.5[192]. The decision making is split into two:

(a) Para.5.1: "*the prosecution support officer* ['PSO']*… will forward the criminal investigation case papers to the Criminal Law Team. A criminal lawyer will advise whether the case papers meet the evidential test for prosecution and provide advice on the most appropriate action to be taken*";

(b) Para.5.2: "*the PSO will forward the relevant case papers to the appropriate Decision Maker for a decision on whether it is in the public interest to initiate a prosecution*".

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[191] (1983) 77 Cr. App. R. 13

[192] Similar comments would apply to the Post Office Security Operations Casework Review, POL00105223

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180. In terms of case papers, these were addressed in the June 2011 Royal Mail guidance "casefile construction"[193]. The review of such a case file by a Casework Manager ('CWM') is addressed in the "Casework Management" policy issued at the same time[194]. At para.5.1 it states that *"having reviewed and assessed an investigation file, the CWM will decide whether or not the information contained within the file and the evidence obtained at that stage of the investigation are sufficient to consider pursuing a prosecution against the suspect. If it is not considered that the prosecution of the suspect is clearly in the public interest, or there is insufficient evidence to support any prosecution the case file will be closed …"* The CWM is also required to quality assess the file *"in terms of quality, technique, method/process and standards"* (para.4.1). The policy does not provide detail of the considerations required either for the determination of evidential sufficiency, public interest or case quality[195].

181. The Royal Mail guidance "Preparation of the Executive Summary", issued in June 2011[196], addresses the document to be provided to the Head of Investigations, Business Unit Decision Maker and, in relevant circumstances others, where someone has been interviewed for a criminal offence and has been bailed. It is intended, in short, to set out the background to the investigation, enquiries undertaken, the result of interviews or searches and consequential actions. A number of templates accompanied this policy[197]. A similar guidance relating to Suspect Offender Reports[198] was issued at the same time, with similar content, save that it is intended to include suggested charges. Again, a number of templates accompanied this policy[199].

182. The Post Office Prosecution Policy England and Wales, dated November 2013[200], which specifically addressed the import of the decision in *Eden* also specifically addressed the acceptance of guilty pleas (at para.7). It was made clear that decisions as to the acceptability of pleas will be made on legal advice. The 2016 revision of this

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[193] POL00104877
[194] POL00104888
[195] Similar comments would apply to the Post Office Security Operations Casework Review, POL00105223
[196] POL00104886
[197] POL00104874, POL00104874
[198] POL00104881
[199] POL00104879, POL00104890
[200] POL00030686

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Policy[201] makes specific reference to the Attorney General's guidelines on the acceptance of pleas (para.5.4), and to the need to approach enforcement decisions by reference to "*general principles of fairness, consistency and proportionality*". This is the first specific reference to this AG's guidance, albeit that the AG first introduced this in 2000.

183. The "Summons and Cautioning" policy, in 2001[202] addressed the circumstances in which a suspect should be cautioned rather than prosecuted. It refers to the Home Office Circular 18/94, which, it acknowledges, does not apply to Consignia, and by reference to its criteria invites consideration of whether there is evidence of the suspect's guilt, admission by the suspect to the offence and consent to the caution. The revised Home Office Circular 30/2005 was addressed by the November 2005 revision of this policy[203]. The issuing of a caution was also addressed in the June 2011 "Casework Management and PSO Products and Services" policy[204], but this was in terms of mechanics rather than rationale[205].

INTIATING PROCEEDINGS

184. Where proceedings are not initiated through the arrest by the police of the suspect and the charging of the suspect with an offence, the usual means by which proceedings will be initiated against someone is by the laying of an information resulting in that person being summonsed to court. Section 1(1)(a) of the Magistrates' Courts Act 1980, *"On an information being laid before a Justice of the Peace that a person has, or is suspected of having, committed an offence, the justice may issue- (a) a summons directed to that person requiring him to appear before a magistrates' court to answer the information, … ."*

185. Other provisions authorise the issue of such summonses by a district judge (magistrates' courts), or a justices' clerk. These rules were revised during the Inquiries operative period following the introduction of the Criminal Procedure Rules in 2005.

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[201] POL00030811
[202] POL00104763
[203] POL00104810
[204] POL00104888, at para.10
[205] Similarly, the mechanics of a formal caution were addressed in an undated training document concerning Non-Police Prosecuting Agencies Documentation, POL00095332

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Until then, in particular, Rule 4 of the Magistrates' Courts Rules 1981[206], as amended, provides that:

"(1) An information may be laid … by the prosecutor … in person or by his counsel or solicitor or other person authorised in that behalf.

(2) Subject to any provision of the Act of 1980 and any other enactment, an information … need not be in writing or on oath.

(3) It shall not be necessary in an information … to specify or negative an exception, exemption, proviso, excuse or qualification whether or not it accompanies the description of the offence … contained in the enactment creating the offence … ."

186. These rules were replaced (albeit in substantially similar form, and acknowledging their heritage) by part 7 of the Criminal Procedure Rules 2005, which provided that:

*"**7.1.** – (1) An information may be laid or complaint made by the prosecutor or complainant in person or by his counsel or solicitor or other person authorised in that behalf.*

(2) Subject to any provision of the Magistrates' Courts Act 1980 and any other enactment, an information or complaint need not be in writing or on oath

***7.2** (1) Every information laid in, or summons, warrant or other document issued or made by, a magistrates' court shall be sufficient if it – (a)describes the offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms; and (b)gives such particulars as may be necessary to provide reasonable information about the nature of the charge.*

(2) It shall not be necessary for any of those documents to – (a)state all the elements of the offence; or (b)negative any matter upon which the accused may rely.

(3) If the offence charged is one created by or under any Act, the description of the offence shall contain a reference to the section of the Act, or, as the case may be, the rule, order, regulation, bylaw or other instrument creating the offence."

187. The rules were altered when the Criminal Procedure Rules were amended in 2010. Both in this version and in the Criminal Procedure Rules 2015, part 7 provided that:

"7.1(1) This part applies in a magistrates' court where – (a) a prosecutor wants the court to issue a summons … under section 1 of the Magistrates' Courts Act 1980 …

[206] SI 1981/552

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7.2 (1) A prosecutor who wants the court to issue a summons must – (a) serve an information in writing on the court officer; or(b) unless other legislation prohibits this, present an information orally to the court, with a written record of the allegation that it contains … (6) Where an offence can be tried in the Crown Court then – (a) a prosecutor must serve an information on the court officer or present it to the court …within any time limit that applies to that offence

7.3 (1) an allegation of an offence in an information … must contain – (a) a statement of the offence that – (i) describes the offence in ordinary language, and (ii) identifies any legislation that creates it; and (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.…

7.4 (1) The court may issue or withdraw a summons … – (a) without giving the parties an opportunity to make representations; and (b) without a hearing, or at a hearing in public or in private.… ."

188. Part 46 of the Criminal Procedure Rules 2015, as in force at the material time, provided that: "*46.1(1) Under these Rules, anything that a party may or must do may be done – (a) by a legal representative on that party's behalf …*"

189. In *R(Kay) v Leeds Magistrates' Court*[207],the Divisional Court considered what was required of a private prosecutor in relation to the making of an application to the Magistrates' Court for the issuing of a summons to initiate a private prosecution. Sweeney J summarised what the Court was required to consider in issuing a summons as follows (at para.22):

"(1) the magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time-barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute;

(2) if so, generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so – most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper;

[207] [2018] EWHC 1233 (Admin)

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(3) hence the magistrate should consider the whole of the relevant circumstances to enable him to satisfy himself that it is a proper case to issue the summons and, even if there is evidence of the offence, should consider whether the application is vexatious, an abuse of process, or otherwise improper;

(4) whether the applicant has previously approached the police may be a relevant circumstance;

(5) there is no obligation on the magistrate to make enquiries, but he may do so if he thinks it necessary; and

(6) a proposed defendant has no right to be heard, but the magistrate has a discretion to:

(a) require the proposed defendant to be notified of the application; and

(b) hear the proposed defendant if he thinks it necessary for the purpose of making a decision."

190. Having identified that framework, Sweeney J then identified the duties of a private prosecutor in relation to the making of such an application so as to ensure that the Court was able properly to approach those considerations. He observed that any applicant for a summons owed a duty of candour. Having reviewed the relevant authorities, he expressed that duty (at para.25) as: *"…one of "full and frank disclosure" which "necessarily includes a duty not to mislead the judge in any material way" and which requires the disclosure to the court of "any material which is potentially adverse to the application" or "might militate against the grant" or which "may be relevant to the judge's decision, including any matters which indicate that the issue … might be inappropriate". As Hughes LJ (as he then was) memorably put it in In re Stanford International Bank Limited (above) at [191]:"… In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge … ."*

191. Sweeney J then considered how that duty of candour operated. There had been material non-disclosure to the Court in the application for the summons, which had been necessary (para.37): *"in order to enable the court to properly carry out its duty to consider whether the application was vexatious, an abuse of process or otherwise improper; to consider whether to make further enquiries; to require the claimants to be notified of the application; and to hear the claimants"* and the summons that had been issued was quashed. He observed (at para.38): *"As this case demonstrates, the grant of summonses, typically conducted ex parte, can have far reaching consequences. Compliance with the duty of*

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candour is the foundation stone upon which such decisions are taken. In my view, its importance cannot be overstated."

Guidance for the initiation of proceedings by the Post Office

192. Post Office Conduct of Criminal Investigations Policy[208], dated August 2013, addressed the obtaining of a summons as the mechanism for initiating proceedings at para.5.20. There is no reference in this context to the duty of candour addressed above. The "Summons and Cautioning" policy, dated October 2001[209], also addressed the obtaining of a summons to initiate criminal proceedings. That did not address the duty of candour either. This remained the case in the November 2005 revision[210] of the policy. Similarly, the Royal Mail "Magistrates and Crown Court Procedures" policy, issued in May 2013[211], and the "Casework Management" policy, issued in June 2011[212], each describe the procedure for obtaining a summons, and the circumstances in which this is appropriate, but does not refer to the duty of candour[213]. The same observation can be made of the limited training materials that I have identified in relation to the initiating of proceedings. The mechanics, and time limits, were addressed in training in 2014[214], but the duty of candour was not.

SECTION 69, PACE

193. Section 69, PACE until 14th April 2000, sought to regulate *"evidence from computer records"*. More particularly, it sought to govern the admissibility of statements in documents produced by computers where the purpose of adducing those statements was to prove their truth (as opposed, for example, to cases where a computer was simply used to collate results or as a calculating machine[215]). It stated:

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[208] POL00030670, POL00030670
[209] POL00104763
[210] POL00104810
[211] POL00104872
[212] POL00104888, at para.11
[213] Similar comments would apply to the Post Office Security Operations Casework Review, POL00105223
[214] POL00094141
[215] *Sophocleous v Ringer* [1988] RTR 52

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> *"(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown –*
>
> *(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;*
>
> *(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and*
>
> *(c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.*
>
> *(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required."*

194. Section 69 was supplemented by Part II, Schedule 3 to PACE, which included, at para.8, further guidance as to what a certificate under section 69 was required to contain (subject to a court requiring oral evidence on the point, as permitted by para.9). Para.8 stated:

> *"In any proceedings where it is desired to give a statement in evidence in accordance with section 69 above, a certificate – (a)identifying the document containing the statement and describing the manner in which it was produced; (b)giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; (c)dealing with any of the matters mentioned in subsection (1) of section 69 above; and (d)purporting to be signed by a person occupying a responsible position in relation to the operation of the computer, shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."*

195. It was made clear in para.10 that it was a criminal offence for a person to provide a certificate that they did not believe to be true. As originally enacted, section 69 operated in conjunction with section 68, PACE which stated, in so far as is relevant, that: *"…a statement in a document shall be admissible in any proceedings as evidence of any fact stated therein … if… the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who*

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had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information". Section 68 also required that the person compiling the record was dead, unfit or it was otherwise not practicable to secure their attendance. That section was repealed by the Criminal Justice Act 1988 ('CJA 1988'), which included at section 24 a new admissibility gateway for records created in the course of business.

196. The operation of section 69, PACE with both section 68, PACE and section 24, CJA 1988 was considered by the Court of Appeal in *Minors; Harper*[216]. At the outset of the Court's judgement (p.103), Steyn J identified the rationale of sections 68 and 69 PACE, as follows: *"The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility power and frequency of use of computers will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have 'bugs'. Unauthorised alteration of information stored on a computer is possible. The phenomenon of a 'virus' attacking computer systems is also well established. Realistically, therefore, computers must be regarded as imperfect devices."*

197. Steyn J observed (at p.107) that with the advent of section 24, CJA 1988 and the repeal of section 68, PACE, the former provision would need to be complied with in conjunction with section 69, instead of the latter. He further assessed the need for oral evidence to meet the requirements for whichever of these two sections was in force, and then observed in relation to section 69 itself: *"The requirements of section 69 speak for themselves. The only comment we would make is that the failure of a computer, or a software programme, may occasionally result in a total failure to supply the required information, or in the supply of unintelligible or obviously wrong information. It will be a comparatively rare case where the computer supplies wrong and intelligible information, which pertinently answers the questions posed. Nevertheless, such cases could occur. In the light of these considerations trial judges, who are called upon to decide whether the foundation requirements of section 69 have been fulfilled ought perhaps to examine critically a suggestion that any prior malfunction*

[216] (1989) 89 Cr. App. R. 102

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of the computer, or software, has any relevance to the reliability of the particular computer record tendered in evidence."

198. It follows that until the repeal of section 69 by section 60, Youth Justice and Criminal Evidence Act 1999, which had effect so as to repeal the section from 14th April 2000, the Post Office in any prosecution would have been required to certify in relation to any statement in a computer record relied on against an accused that the computer which produced that record was operating properly and/or that the production of the record relied on was not undermined by any facet of the operation of the computer system. This was a matter about which a trial within a trial could have been held if there was issue about it, in accordance with the approach adopted in *Minors*, to resolve compliance with either section 68, PACE or section 24, CJA 1988, depending on which was in force as to the production of the computer record relied upon.

199. The correct operating of the Horizon system, which did more than just calculate or collate information, would have fallen within these requirements, and a certificate from a person "occupying a responsible position in relation to the operation of the computer" would have been required to attest that it was operating properly. This requirement was summarised by the Law Commission[217]: *"When a certificate is relied upon, it must show on its face that it is signed by a person who, from his or her job description, can confidently be expected to be in a position to give reliable evidence about the operation of the computer"*. Where such a person was aware that this was not so, no such certificate could have been issued and the evidence from the Horizon system would have been rendered inadmissible.

200. The repeal of section 69, PACE came about as the result of the Law Commission's Consultation Paper No.138 "Evidence in criminal proceedings: hearsay and related topics" in May 1995. The Law Commission identified a number of problems with the operation of section 69. In summary, these were of two types:

(a) First, as drafted section 69 led to the exclusion of evidence where it was shown that the computer was not operating properly even where it could be shown

[217] Consultation Paper No.138, para.14.7

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that any malfunction of that operation had no effect on the accuracy of the record relied on (as had been held in *McKeown v DPP* [1995] Crim LR 69).

(b) Secondly, it was increasingly difficult to comply with section 69 as computers themselves evolved. The Law Commission observed (at para.14.17): "*We believe that a major problem with computer evidence also arises where incorrect data have been fed into the computer, as opposed to there being a defect in the software.*"

201. It was further observed (at para.14.20): "*The complexity of modern systems makes it relatively easy to establish a 'reasonable doubt in a juror's mind as to whether the computer was operating properly. Bearing in mind the very technical nature of computers, the chances of this happening with greater frequency in future are fairly high. We are concerned about smoke-screens being raised by cross-examination which focuses in general terms on the fallibility of computers rather than on the reliability of the particular evidence. The absence of a presumption that the computer is working means that it is relatively easy to raise such a smoke-screen.*"

202. The Law Commission (para.14.21) therefore repeated the view it had expressed in its earlier report on hearsay[218] that it was "*not possible to legislate protectively*" in relation to computer evidence, and agreed with the observations of M Hirst[219] that "*the only effective course is to weigh evidence according to its reliability, and to rely upon specific challenges to the cogency or accuracy of computer evidence in cases where misuse, system failure or operator error is suspect*". The Law Commission therefore proposed that section 69, which it considered "fails to serve any useful purpose" should be repealed and not replaced. The Commission considered that the common law presumption of regularity would instead operate, namely[220]: "*In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time.*"

203. In other words, as the Commission expressed it (para.14.28): "*The prosecution would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been-in which case the prosecution would have to prove beyond reasonable doubt that it was.*"

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[218] The Hearsay Rule in Civil Proceedings (1993) Law Com. No.216, para.4.43

[219] 'Computer Statements in English Civil Proceedings' (1994) 3(1) Law, Computers & Artificial Intelligence 3,13

[220] Phipson, 5th edition (1979) p.47, as quoted by the Law Commission at para.14.28

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204. They did consider where this would leave the defence, who might not be aware of whether or not the computer system that produced a record relied on by the prosecution was operating correctly, but they observed (at para.4.31): *"Where the defence claims that it would be unfairly disadvantaged by a particular item of evidence because it is not in possession of information that might enable it to discredit that evidence, it can apply for an order that such information be disclosed. Where the prosecution is not in possession of the necessary information either, the evidence can ultimately be excluded if it would be unfair to admit it."*

205. There were a number of responses to the consultation that supported the Law Commission's proposal that section 69 be repealed and not replaced. These included the Post Office. It first responded on 31st July 1995, through the then Head of Criminal Law Division[221]. It was submitted at that stage as follows: *"In practice, the operation of section 69 of the 1984 Act is somewhat onerous from a prosecution perspective. I consider that computer evidence is, in principal, no different from any other sort of evidence and it should, in general terms, be admissible, so that any argument in Court would relate to its weight rather than its admissibility. I therefore consider that there should be a presumption that the machine is in working order etc and if the defence wish to argue otherwise, then clearly, they should be able to do so."*

206. On 26th October 1995, there was a further submission, the authorship of which is redacted[222]. In relation to section 69, this further letter said: *"…a large number of Sub-Postmasters now complete their cash accounts and other accounting records by suing a computer. The Sub-Postmaster is often the only person working in the Sub-Post Office or the only person who uses the computer. In the event of the Sub-Postmaster being prosecuted for theft or false accounting, the Post Office may need to rely upon the computerised accounting records. The Sub-Postmaster is frequently the only person who can give the evidence required by Section 69…In the absence of admissions or other direct evidence the Post Office may not be able to prove the case solely on the ground of being unable to satisfy the technical requirements of section 69…Computers are now being used within Branch Post Offices, Parcelforce Depots and Royal Mail Sorting Offices."*

[221] HOCO0000001, page 1
[222] HOCO0000001, pages 2 to 3

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207. The latter submission is of note because it was predicated on the basis that the person best placed to attest to the operation of the Horizon system was the sub-postmaster, rather than the operators of the system at any higher level either within the Post Office or at Fujitsu. This is therefore itself predicated on the basis that there was no more comprehensive issue with the operation of the system that had to be addressed than any specific error spotted by a postmaster. There was no express reference to the need to disclose any issues with the operation of the system as disclosure to the defence in this response.

208. It is right to note that the Post Office was far from unique amongst those with a prosecution responsibility who supported the repeal of section 69, PACE. Others included:

(a) The CPS, whose Policy Division communicated its submissions on 1st November 1995, indicated that they too believed that section 69 should be repealed[223]. At para.14.1-2 the CPS submitted that "*the main problem with computer evidence is probably incorrect entry of data. Experience shows, though, that the other problems of software faults, hardware faults and unauthorised tampering with computer systems are not without significance. S.69…is frankly a source of difficulty to us. We are all too familiar with problems in complying with it, which are increasing as computer systems develop. We note with interest that the Internet is not mentioned in the Consultation Paper.*" The CPS conclusion (para.16.7) was that neither section 69 nor Schedule 3, PACE served any useful purpose. Like the Post Office, there was no reference to the need to disclose material that might identify any fault in the operation of a computer system.

(b) British Telecom in a letter dated 27th October 1995 "strongly" supported the proposed repeal of section 69[224]. They said "*quite apart from the prosecutions which BT undertakes itself for telecommunications fraud, this company is frequently required to assist the police and CPS in prosecutions for malicious telephone calls and to provide evidence of making of calls I connection with other matters. The entire telecommunications system in this country and, indeed, over much of the globe, is dependent on the operation of computer networks, which connect calls and store records. These systems interact with each other, for the most part without human*

[223] RLIT0000035
[224] RLIT0000034

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intervention, and there is a high degree of redundancy and automatic backup in the event of any breakdown. To prove in every case that every computer which feeds information into the system is working correctly is an extremely difficult matter, as a moment's thought will show, and the certification provisions in the Act do not provide an escape from the problem."

(c) On 9th November 1995, the Department of Trade and Industry responded with written submissions which, at the final page "strongly" supported the repeal of section 69, PACE[225].

(d) The Inland Revenue responded on 16th October 1995, and indicated that they were "*wholeheartedly in agreement with the proposal to abolish section 69 PACE. The requirements of this section consume a considerable amount of our time without, as far as we can see, achieving anything useful*"[226].

209. The Law Commission's report as a result of this consultation process addressed computer evidence at part XIII. The Commission observed (at para.13.18): "*Even where the presumption applies, it ceases to have any effect once evidence of malfunction has been adduced. The question is, what sort of evidence must the defence adduce, and how realistic is it to suppose that the defence will be able to adduce it without any knowledge of the working of the machine? On the one hand the concept of the evidential burden is a flexible one: a party cannot be required to produce more by way of evidence than one in his or her position could be expected to produce. It could therefore take very little for the presumption to be rebutted, if the party against whom the evidence was adduced could not be expected to produce more. For example, in Cracknell v Willis*[227] *the House of Lords held that a defendant is entitled to challenge an Intoximeter reading, in the absence of any signs of malfunctioning in the machine itself, by testifying (or calling others to testify) about the amount of alcohol that he or she had drunk.*"

210. It follows that the Law Commission envisaged that it was for a defendant, in a case where computer records were relied on, to raise the issue of faults in the operation of the relevant computer system, and for the prosecution then to respond to that issue Where no such issue was raised, the system would be presumed to have operated

[225] RLIT0000036
[226] RLIT0000037
[227] [1988] AC 450

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properly. The extent or nature of the evidence necessary to demonstrate such correct operation once the issue was raised was not addressed by the Law Commission. Similarly, they did not address the role of disclosure to the defence in putting them in a position to raise the issue or test any rebutting evidence.

211. In this context, I have seen the Post Office "Community Information Security Policy for Horizon and Horizon Online"[228]. This addresses the means by which the operation and records relating to Horizon might be protected. The only reference to the interaction of the Horizon system and data recorded by it with the criminal process appears to be at para.13.2.3, which requires evidence from the system to "*comply with any published standard or code of practice for the production of admissible evidence*", and the need for a "*strong evidence trail*" to "*achieve quality and completeness of the evidence*". There is no reference in this context to the disclosure of anything that might undermine the reliability of such evidence.

212. The same observation can be made about the "security investigations data handling process" relating to Fujitsu Horizon data requests and dated September 2013[229]. This addresses the mechanism by which Horizon data can be obtained from Fujitsu for investigations but does not refer to the disclosure of such material, or material derived from Fujitsu that might undermine the reliability of such data. Similarly, the Royal Mail Group Joint Investigation Protocols[230], dated July 2015, includes a section on obtaining Horizon and Credence Data. This addresses the mechanics of securing such data for criminal proceedings, but not the need for material that addresses the reliability of such data, or the need for disclosure of such material.

DISCLOSURE

213. The prosecution's obligations as to the disclosure of unused material to the defence is governed through the combination of the CPIA, the Code issued under the CPIA and the AG's Guidelines.

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[228] POL00105234
[229] POL00105222
[230] POL00114559

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214. The starting point for consideration of how this present position was arrived at is the decision of the Court of Appeal in Judith Ward[231]. At that time, decisions on disclosure were made by the prosecution through application of the AG's Guidelines of the time. Cases such as that of *Judith Ward*, where material non-disclosure led to injustice demonstrated the risks where, as Glidewell LJ put it "*the prosecution acted as judge in their own cause*". Glidewell LJ emphasised the importance of there being a test the prosecution should apply to determine whether material was helpful to the defence case.

215. In that regard, Glidewell LJ said (at p.674): "*An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial*".

216. In R v H, R v C[232]. Lord Bingham considered the responsibility of the court to ensure fairness of proceedings in the context of disclosure. He said:

> "*10. As the House declared in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 68, and recently repeated in Attorney General's Reference (No 2 of 2001) [2003] UKHL 68, [2004] 2 WLR 1, para. 13, it is 'axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all'. Article 6 of the European Convention requires that the trial process, viewed as a whole, must be fair. Any answer given to the questions raised by these appeals must be governed by that cardinal and overriding requirement….*"
>
> "*12. While the focus of article 6 of the Convention is on the right of a criminal defendant to a fair trial, it is a right to be exercised within the framework of the administration of the criminal law: as Lord Steyn pointed out in Attorney-General's Reference (No 3 of 1999) [2001] 2 AC 91, 118,*

[231] [1993] 1 WLR 619
[232] [2004] UKHL 3

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'The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public'."

217. Lord Bingham went on to consider the principles underlying the relationship between the need for a fair trial and disclosure when he stated:

"14. Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

15. This is a field in which domestic practice has developed markedly, although not always consistently, over the last 20 years. Until December 1981, the prosecution duty was to make available, to the defence, witnesses whom the prosecution did not intend to call, and earlier inconsistent statements of witnesses whom the prosecution were to call: see Archbold, Pleading, Evidence and Practice in Criminal Cases, 41st ed (1982), paras 4-178-4-179. Guidelines issued by the Attorney General in December 1981 ([1982] 1 All ER 734) extended the prosecution's duty of disclosure somewhat, but laid down no test other than one of relevance ('has some bearing on the offence(s) charged and the surrounding circumstances of the case') and left the decision on disclosure to the judgment of the prosecution and prosecuting counsel.

16. In R v Ward [1993] 1 WLR 619, 674 this limited approach to disclosure was held to be inadequate:

'An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial'.

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The rule was stated with reference to scientific evidence, because that is what the case concerned, but the authority was understood to be laying down a general test based on relevance: see R v Keane [1994] 1 WLR 746, 752.

17. The Criminal Procedure and Investigations Act 1996 gave statutory force to the prosecution duty of disclosure, but changed the test. Primary disclosure must be made under section 3(1)(a) of any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. Secondary disclosure under section 7(2)(a) is to be made, following delivery of a defence statement, of previously undisclosed material which might be reasonably expected to assist the accused's defence. Section 32 of the Criminal Justice Act 2003, yet to take effect, has amended section 3(1)(a) of the 1996 Act so as to require primary disclosure of any previously undisclosed material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused'. Whether in its amended or unamended form, section 3 does not require disclosure of material which is either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence. This rule was not criticised by the appellants' counsel, unsurprisingly since a defendant cannot complain that the defence (and the judge and jury) are not alerted to the existence of material which, if revealed, would lessen his chance of acquittal."

218. As Lord Bingham there made clear, the starting point is the CPIA in terms of the duties and powers of investigators and prosecutors.

219. The Act is deliberately of wide application, so that it applies to any criminal investigation, which is defined at section 1(4) as: "*an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained – (a)whether a person should be charged with an offence, or (b)whether a person charged with an offence is guilty of it.*" Similarly, it applies to any prosecutor, defining a prosecutor (at section 2(3)) in the following terms: "*References to the prosecutor are to any person acting as prosecutor, whether an individual or a body..*" The CPIA has been amended on a number of occasions, and in considering the period relevant to the Inquiry (2000-2013), a number of iterations of the relevant provisions are relevant.

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220. Section 3 defines the initial duty of the prosecution to disclose. As originally enacted (on receiving royal assent on 4th July 1996), the duty was defined by section 3(1) in the following terms: *"The prosecutor must – (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused, or (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)."*

221. This version of the duty applied in 2000, and continued to apply until 4th April 2005. At that time, the wording was amended by section 32, Criminal Justice Act 2003, so that the duty under section 3(1) now read *"The prosecutor must – (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused…"*

222. This remained the foundation for the disclosure regime throughout the remainder of the Inquiry's relevant period (and indeed to the present). It is important to recognise, therefore, that this was the "*golden rule*" as it was described by Lord Goldsmith in the forward to his 2005 revision of the AG's Guidelines, namely "*…that fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence.*"

223. Prosecution material is defined by section 3(2) (and has been so defined since the enactment of the CPIA) as material "*which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused*". The same definition was employed in the CPIA as originally enacted (section 7), and as amended (section 7A) for subsequent disclosure.

224. It follows, however, that the prosecutor's duty arises from material in his or her possession, rather than material in the possession of a third party. The prosecutor's obligation to disclose material in the hands of third parties thus only arises if and when that material has come into the possession of the prosecutor and, at this early stage, when, in the opinion of the prosecutor, it might undermine the prosecution's case. That is the clear import of section 3. The procedure for obtaining or seeking to obtain

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material from third parties is governed not by the CPIA itself but, as will be seen, by the AG's Guidelines. These are considered below. The Act does not, therefore, identify the test to be applied when consideration is given to whether such third party material should be obtained.

225. Section 3(3) states (and has, since enactment, stated) *"Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section- (a) by securing that a copy is made of it and that the copy is given to the accused, or (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so; and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.*

226. As originally enacted, section 7, CPIA provided for secondary disclosure in response to the service of a defence statement on behalf of the defendant pursuant to section 5. Section 7(2) stated: *"The prosecutor must – (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)."* This provision applied until 4th April 2005, but was then repealed by the Criminal Justice Act 2003. In its place, pursuant to section 37, Criminal Justice Act 2003, section 7A, CPIA:

> *"(2) The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which –*
>
> *(a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and*
>
> *(b) has not been disclosed to the accused.*
>
> *(3) If at any time there is any such material as is mentioned in subsection (2) the prosecutor must disclose it to the accused as soon as is reasonably practicable (or within the period mentioned in subsection (5)(a), where that applies).*

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(4) *In applying subsection (2) by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account.*

(5) *Where the accused gives a defence statement under section 5, 6 or 6B – (a)if as a result of that statement the prosecutor is required by this section to make any disclosure, or further disclosure, he must do so during the period which, by virtue of section 12, is the relevant period for this section; (b)if the prosecutor considers that he is not so required, he must during that period give to the accused a written statement to that effect."*

227. The requirements of section 7A, CPIA were originally to be found in largely identical terms in section 9, CPIA as originally enacted. It follows that the continuing duties of the prosecution as to disclosure were operative in one form or another throughout the Inquiry's relevant period.

228. In the Criminal Procedure Rules 2005, no rules were laid down in relation to disclosure. That section of the rules merely noted that "*There are currently no rules in this Part. As to the duty of the prosecution to make initial disclosure see sections 3 and 4 of the Criminal Procedure and Investigations Act 1996. As to the continuing duty of disclosure see section 7A of the same Act.*" The Criminal Procedure Rules 2010 did address disclosure, in relation to claims for public interest immunity, and defence applications for further disclosure pursuant to section 8, CPIA. This remained the position in the Criminal Procedure Rules 2015. Now[233], the Rules replicate the disclosure duties set out in section 3, CPIA.

229. As already considered in the context of the duties of criminal investigators, section 23, CPIA invites the Secretary of State to provide a Code, which addresses not just the conduct of an investigation but disclosure under the CPIA. That is borne out by the fact that one of the important roles that is defined by the Code is that of the disclosure officer: "*the person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal*

[233] Part 15, Criminal Procedure Rules 2020, and rule 15.2

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proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor."

230. It follows that the Code imposes duties on the investigation officer and the disclosure officer, both in relation to the obtaining of material, the recording of material, its retention and the provision of that material to the prosecutor and, where the test to do so is met, to the defence. The retention and recording of information have already been addressed in the context of the investigatory requirements of the CPIA Code of Practice. In brief:

(a) Para.4.1 of the Code requires that *"material which may be relevant to the investigation"* but which *"consists of information which is not recorded in any form"* must be put into a durable or retrievable form. Para.4.2 adds that a durable and easily stored format needs to be found *"where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed"*. Again, the Code-wide definition of "relevant to the investigation" applies, namely material that "*…has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case*". It can include negative information (as para.4.3 underlines);

(b) Para.4.4, in relation to the recording of information, adds *"Where information which may be relevant is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time. This includes, for example, information obtained in house-to-house enquiries, although the requirement to record information promptly does not require an investigator to take a statement from a potential witness where it would not otherwise be taken."*

(c) Para.5 of the Code addresses the need to retain material obtained during the investigation, including in particular those categories of material that are spelt out in para.5.4, until the decision is taken as to whether to prosecute (para.5.6). Where there is a prosecution, the duty to retain is extended to the time of verdict, and if there is a conviction until the accused is released (para.5.7-8).

(d) Material relevant to the investigation that has been retained needs to be included on a schedule. Where that material is not sensitive (which means material that it is not in the public interest to disclose) needs to included in the schedule of non-sensitive material (also commonly referred to as an MG6C), and material that is

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sensitive included in a sensitive material schedule (an MG6D) (para.6.2-4). In relation to sensitive material, the Code requires *"Any material which is believed to be sensitive either must be listed on a schedule of sensitive material or, in exceptional circumstances where its existence is so sensitive that it cannot be listed, it should be revealed to the prosecutor separately."* (para.6.14, 2015 Code; para.6.13, 1997 version). The Code identifies (at para.6.12) reasons why material may properly be assessed as sensitive.

(e) The circumstances in which such a schedule should be prepared (para.6.6) include where the accused is charged and contested. This requirement has been amended over time, but so far as Crown Court proceedings are concerned this remained the case through the Inquiry's operative period. The way in which the material is to be scheduled is also spelt out (at para.6.9): *"The disclosure officer should ensure that each item of material is listed separately on the schedule, and is numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed."* Where the volume of material requires block listing, that which might meet the disclosure test still needs to be identified (para.6.10-11).

231. It should be noted that save where specifically identified to the contrary, these requirements have applied since the first iteration of the Code of Practice in 1997.

232. The Code then addresses the interaction between the investigation and the prosecution, and between those responsible for each aspect. The first area is in relation to the obtaining of advice. Para.6.1, in this regard, states *"The officer in charge of the investigation, the disclosure officer or an investigator may seek advice from the prosecutor about whether any particular item of material may be relevant to the investigation."* The second area is once a schedule of material has been produced. The disclosure officer is required (para.7.1) to provide that schedule to the prosecutor when submitting the case to them, and to draw to the prosecutor's attention *"any material an investigator has retained (whether or not listed on a schedule) which may satisfy the test for prosecution disclosure in the Act, and should explain why he has come to that view."*

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233. Additionally, the disclosure officer is required to provide any of the following not otherwise included in the above submission: *"information provided by an accused person which indicates an explanation for the offence with which he has been charged; any material casting doubt on the reliability of a confession; any material casting doubt on the reliability of a prosecution witness; any other material which the investigator believes may satisfy the test for prosecution disclosure in the Act."* This is an important requirement, because it envisages that material that undermines the investigation in important respects, such as undermining the reliability of a key aspect of the case against an accused, will be volunteered to the prosecutor at the outset, and flagged up as such.

234. However, as the Code makes clear, it is not enough that the fact of such material is identified, the actual material needs to be made available for the prosecutor to review. In that regard, at para.7.4, the Code states: *"If the prosecutor asks to inspect material which has not already been copied to him, the disclosure officer must allow him to inspect it. If the prosecutor asks for a copy of material which has not already been copied to him, the disclosure officer must give him a copy. However, this does not apply where the disclosure officer believes, having consulted the officer in charge of the investigation, that the material is too sensitive to be copied and can only be inspected."* Moreover, the process is not a one off event. As the Code recognises, the relevance of material may alter once the prosecutor has advised, and as the defence engage in the disclosure process, for example through the provision of a defence statement, and thus the Code requires the disclosure officer to revisit the schedules and determinations to which they relate thereafter (para.8).

235. The third area of interaction of the disclosure officer and prosecutor is in relation to the certification of the completion of the second. Para.9.1, in its 1997 version, stated: *"The disclosure officer must certify to the prosecutor that, to the best of his knowledge and belief, all relevant material which has been retained and made available to him has been revealed to the prosecutor in accordance with this code. He must sign and date the certificate. It will be necessary to certify not only at the time when the schedule and accompanying material is submitted to the prosecutor, and also when relevant material which has been retained is reconsidered after the accused has given a defence statement"*. An additional requirement was later added that certification also occur *"whenever a schedule is otherwise given or material is otherwise revealed to the prosecutor."*

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236. A particular area of disclosure that may have relevance here is the disclosure of material from a third party. That is a topic addressed further below. Whilst considering disclosure more generally, however, it is relevant to consider other sources of guidance and instruction in relation to disclosure.

Post Office disclosure policies

237. The Post Office Casework Management Policy, dated March 2000[234], makes reference to the CPIA Code at a number of points, the majority of which are addressed above. It is of note that at para.3.3 it specifically refers to the retention periods for evidential material in that context. Both this 2000 iteration and the February 2002 version of this policy[235] required full details of any "*failures in security or operational procedures are identified which may or may not be directly connected to the offence*" to be included in the investigation report. Although it does add "*the issue of dealing with information concerning procedural failures is a difficult one. Some major procedural weaknesses, if they become public knowledge, may have an adverse effect on our business. They may assist others to commit offence against our business, undermine a prosecution case, bring our business into disrepute, or harm relations with major customers. Unless the offender states that he is aware that accounting weaknesses exist and that he took advantage of them, it is important not to volunteer the option to the offender during interview. The usual duties of disclosure under the CPA 1996 still apply.*"

238. More specifically, the "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996 Code of Practice" policy was issued in May 2001[236]. It is 3 pages long. It addresses the roles of investigator and disclosure officer, without specific cross-reference to the CPIA Code. The essential points are:

(c) An investigator (para.3.2) is someone "*involved in the conduct of a criminal investigation involving Consignia*", who has a duty in particular to record and retain information. They share a duty with the disclosure officer to "*be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met*".

[234] POL00104747
[235] POL00104777
[236] POL00104762

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(d) The disclosure officer is the person "*responsible for examining material retained during an investigation, revealing material to Legal Services during the investigation and.. certifying to Legal Services that he has done this.*" In contrast, arguably, to the CPIA Code, the policy proceeds on the basis that the investigator and disclosure officer will "normally" be the same person.

(e) The disclosure officer should inspect, view or listen to all material retained, save where a large amount has been seized. In those circumstances, the existence of such material should be identified to the defence.

(f) The disclosure officer should ensure the description of unused material is sufficient for the prosecutor to review it, and should draw the prosecutor's attention to any material about which they are in doubt.

239. The policy also addresses the role of the prosecutor (p.3), which includes that they should "*do all they can to facilitate proper disclosure*", provide advice to this end to the disclosure officer, review schedules and review material where not satisfied with their sufficiency or assessment. In line with the CPIA Code, the policy states that "*the prosecutor should inform the investigator if in their view reasonable and relevant lines of enquiry further exist*" and "*any doubts about what should be disclosed should be resolved in favour of disclosure.*" There is finally an expectation on prosecution counsel to "*in future take a far more robust approach to disclosure*".

240. I have had sight of a range of training workbooks copyright in 2000, along with an undated document entitled 'Criminal Investigation'[237], which addresses 9 E-Books which "represent the theoretical learning from the Investigation Foundation Course". In combination, this shows that there was no specific training in that package that related to the CPIA, or to disclosure. There was a workbook relating to investigators' notebooks[238], but it did not refer to the duty of retention, the CPIA, or this 2001 policy document.

241. A significantly revised version of the "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996" policy was published in July 2010[239]. This

[237] POL00094149
[238] POL00095324
[239] POL00104848

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explicitly sought to apply the April 2005 revision of the CPIA Code. Taking that as the intention, the comparison of this policy to the Code is as follows:

(a) The roles of investigator and disclosure officer (para.2) are again addressed in much the same terms as in 2001. Additionally, (at para.3.1): *"the investigator must inform the prosecutor (normally the Criminal Law Team) as soon as practicable if they have any material which weakens the case against the accused. The Act envisages that some disclosure may have been made before the statutory duty to disclose arises".*

(b) The CPIA Code definitions of material and relevance are replicated (para.2.3-4). It is made clear that material includes that generated by the investigation as well as that obtained by it. It is made clear (at para.3.5) that *"if there is any doubt about the relevance of material investigations should err on the side of retaining, recording and revealing"*, and that (at para.3.6) *"negative information is often relevant to an investigation and as such must be retained recorded and revealed".*

(c) At para.3.8 the revelation of material not relied on evidence is addressed by reference to the disclosure test. It adds: *"investigators should note that all relevant material must be revealed to the prosecutor, however not all relevant material will meet the disclosure test, which ultimately is decided upon the prosecutor".*

242. Importantly, at para.3.9 the policy addressed how the assessment of whether material met the disclosure test or not was to be approached by reference to the following "guide":

"1. What has the defendant said by way of a defence in interview, or by way of prepared statement or latterly in a defence statement.

2. Could use be made of the material in cross-examination.

3. Has it the capacity to support submissions that could lead to: a. the exclusion of evidence, or b. a stay of proceedings; or

4. Does it suggest an explanation or partial explanation of the accused's actions."

243. The role of the prosecutor is also addressed in very similar terms to the 2001 version of the policy (from para.4). An addition to the 2001 version is (at para.6.3) a list of the material that a prosecutor would expect to see on an unused schedule. In terms of training, there was a document relating to the 'Principles of Disclosure' included in a

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Post Office Training Day in December 2012[240], which addressed to in overview the CPIA and its Code. However, this was in very high-level terms, and did not, for example, include material from the Code itself in the way that relevant parts of PACE Code C were included in a document about the revision to that Code in the same training pack. The 'Principles' document also appeared as a slide presentation in 2015[241], along with a presentation of investigator's notebooks[242] which now did address the duty of retention and review for disclosure of such notebooks.

THE JUDICIAL PROTOCOL

244. Other sources of relevant guidance include the Judicial Protocol on the Disclosure of Unused Material. The 2013 edition of this Protocol states in its introduction; *"This protocol is intended to provide a central source of guidance for the judiciary, although that produced by the Attorney General also requires attention. In summary, this judicial protocol sets out the principles to be applied to, and the importance of, disclosure; the expectations of the court and its role in disclosure, in particular in relation to case management; and the consequences if there is a failure by the prosecution or defence to comply with their obligations."*

245. The Protocol underlined (from para.1) the importance of disclosure. This section began: *"Disclosure remains one of the most important – as well as one of the most misunderstood and abused – of the procedures relating to criminal trials. Lord Justice Gross' review has re-emphasised the need for all those involved to understand the statutory requirements and to undertake their roles with rigour, in a timely manner."* The Protocol, in a restatement of basic principle, stated (at paras.4-6):

"The overarching principle is that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations. The test for disclosure will depend on the date the criminal investigation in question commenced, as this will determine whether the common law disclosure regime applies, or either of the two disclosure regimes under the CPIA 1996. The test for disclosure under section 3 of the CPIA 1996 as amended will be applicable in nearly

[240] POL00094173
[241] POL00094117
[242] POL00094121. This duty to retain was also addressed in a training event guide in 2014, POL00094141.

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every case and all those involved in the process will need to be familiar with it. Material fulfils the test if – but only if – it 'might reasonably be considered capable of undermining the case for the prosecution … or of assisting the case for the accused.' The disclosure process must be led by the prosecution so as to trigger comprehensive defence engagement, supported by robust judicial case management."

246. The Protocol identified the roles of the court, the prosecution and the defence in relation to the disclosure process, with engagement by both parties under the supervision of the court. In relation to that, the Protocol observed:

(a) Para.7: "*The court should keep the timetable for prosecution and defence disclosure under review from the first hearing. Judges should as a matter of course ask the parties to identify the issues in the case, and invite the parties to indicate whether further disclosure is sought, and on what topics.*"

(b) Para.9: "*If there is a preliminary hearing the judge should seize the opportunity to impose an early timetable for disclosure and to identify any likely problems including as regards third party material*".

(c) Para.13: "*Judges should not allow the prosecution to avoid their statutory responsibility for reviewing the unused material by the expedient of permitting the defence to have access to (or providing the defence with copies of) the material listed in the schedules of non-sensitive unused prosecution material irrespective of whether it satisfies, wholly or in part, the relevant test for disclosure. Additionally, it is for the prosecutor to decide on the manner of disclosure, and it does not have to mirror the form in which the information was originally recorded.*"

(d) Para.16: "*A constructive approach to disclosure is a necessary part of professional best practice, for the defence and prosecution. This does not undermine the defendant's legitimate interests, it accords with his or her obligations under the Rules and it ensures that all the relevant material is provided. Delays and failures by the prosecution and the defence are equally damaging to a timely, fair and efficient trial, and judges should be vigilant in preventing and addressing abuses. Accordingly, whenever there are potential failings by either the defence or the prosecution, judges, in exercising appropriate oversight of disclosure, should carefully investigate the suggested default and give timely directions.*"

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247. The Protocol addresses (from para.44) third party disclosure. Third party disclosure is addressed further below. In that context by reference to the Post Office, it is relevant to note that the "security investigations data handling process" relating to Fujitsu Horizon data requests and dated September 2013[243] addresses the procedure for obtaining data from the Horizon system from Fujitsu. It does not address in that context the provision of material relevant to faults in that data or to the reliability of the system.

248. I have not identified explicit reference to the Judicial Protocol in the Post Office policies I have reviewed. I should say that as this Protocol is aimed at the role the court is to undertake this is less serious an omission than others I have identified, which are addressed elsewhere.

THE ATTORNEY GENERAL GUIDELINES

249. HM Attorney General has issued Guidelines on Disclosure since 2000, with a view to guiding police, prosecutors, defenders and judges through the process that is intended to ensure a fair trial for all those accused of crime. As was made clear by the then Attorney General Lord Williams of Mostyn, the first iteration, issued in November 2000, following research into the operation of the CPIA regime and consultation, with a view to "*improving the operation of the arrangements*" and addressing "*the role of participants in the disclosure process*". The 2000 Guidelines made clear (at para.45) that it was to be adopted "*in relation to all cases submitted in future to the prosecuting authorities in receipt of these Guidelines*". There is nothing explicitly or impliedly to exclude the Post Office, as a prosecutor, from the ambit of these Guidelines.

250. The Attorney General has continued to issue Guidelines on Disclosure which have been revisited and revised on a number of occasions to reflect the development of the CPIA framework. For example, in 2005, the then Attorney General, Lord Goldsmith QC, issued revised Guidelines on Disclosure to reflect the amendments to the CPIA wrought by the Criminal Justice Act 2003, which abolished the concept of "primary" and "secondary" disclosure, and introduced an amalgamated test for disclosure of

[243] POL00105222

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material that "*might reasonably be considered capable of undermining the prosecution case or assisting the case for accused*".

251. The introduction to the 2020 version of the AG's Guidelines states: "*The Guidelines outline the high level principles which should be followed when the disclosure regime is applied throughout England and Wales. They are not designed to be an unequivocal statement of the law at any one time, nor are they a substitute for a thorough understanding of the relevant legislation, codes of practice, case law and procedure*". This recognises that there are various sources of law which regulate the disclosure process, and that the interrelation between those sources needs properly to be understood. From its first version, however, the AG's Guidelines have recognised (as expressed at para.4 of the 2000 version) "*these guidelines build upon the existing law to help to ensure that the legislation is operated more effectively. In some areas guidance is given which goes beyond the requirements of the legislation, where experience has suggested that such guidance is desirable*".

252. The importance placed on the AG's Guidelines in that regime of sources of direction as to the proper operation of the disclosure process is underlined by the Criminal Practice Direction. The Practice Direction, issued by the Lord Chief Justice in October 2015, addresses Disclosure at CPD IV.15A, and includes the following: "*Disclosure is a vital part of the preparation for trial, both in the magistrates' courts and in the Crown Court. All parties must be familiar with their obligations, in particular under the Criminal Procedure and Investigations Act 1996 as amended and the Code issued under that Act, and must comply with the relevant judicial protocol and guidelines from the Attorney-General.*"

253. Similarly, the approach of the Court of Appeal has consistently been to interpret the prosecution as being required to apply the AG's Guidelines on Disclosure. This is clear, for example, from the approach:

(a) In *Alibhai*[244], Longmore LJ applied the AG's Guidelines along with the Code of Practice in identifying the prosecution's disclosure obligations (at paras.35-36); and, more recently,

[244] [2004] EWCA Crim 681

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(b) In *Bater-James*[245], Fulford LJ described the AG's Guidelines as the correct "statement of approach" to disclosure (at paras. 71-72) and the AG's Guidelines were identified as a source of "direct relevance" to the understanding of the regulation of disclosure (para.66).

2000 AG's Guidelines

254. The 2000 version of the AG's Guidelines addressed the original CPIA disclosure structure of primary and secondary disclosure (that is the structure pre-Criminal Justice Act 2003). In doing so (at para.34), it reminded prosecutors that they "*must always be alive to the need, in the interests of justice and fairness in the particular circumstances of any case, to make disclosure of material after the commencement of proceedings but before the prosecutor's duty arises under the Act*".

255. The Guidelines then sought to make clear the broad ambit of primary disclosure, as required by section 3, CPIA. At paras.36-37, the Guidelines stated:

"Generally, material can be consider to potentially undermine the prosecution case if it has an adverse effect on the strength of the prosecution case. This will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution. Material can have an adverse effect on the strength of the prosecution case (a) by the use made of it in cross-examination; and (b) by its capacity to suggest any potential submissions that could lead to (i) the exclusion of evidence; (ii) a stay of proceedings…

In deciding what material might undermine the prosecution case, the prosecution should pay particular attention to material which has potential to weaken the prosecution case or is inconsistent with it. Examples are (i) any material casting doubt upon the accuracy of any prosecution evidence …(iv) any material that might go to the credibility of a prosecution witness, (v) any material that might support a defence that is either raised by the defence or apparent from the prosecute papers…(vi) any material which may have a bearing on the admissibility of prosecution evidence."

[245] [2020] EWCA Crim 790

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256. In relation to secondary disclosure, the Guidelines (at para.39) stated: "*Prosecutors should be open, alert and promptly responsive to requests for disclosure of material supported by the comprehensive defence statement. Conversely, if no defence statement has been served or if the prosecutor considers that the defence statement is lacking specific and/or clarity, a letter should be sent to the defence indicating that secondary disclosure will not take place or will be limited…*" In relation to non-disclosure of material where the public interest weighs against revelation, the Guidelines makes clear (at para.41) that the prosecutor should first "*aim to disclose as much of the material as he properly can (by giving the defence redacted or edited copies or summaries*".

257. In the commentary attached to the Guidelines, it was indicated that it had been decided not to include a list of "*the kind of material that should automatically or usually disclosed*". The concern was that such a list might lead to a "*confusing hierarchy for material which might potentially be disclosed, and might lead to an over-mechanistic approach*". It is of note, in passing, that the approach in this regard has now changed. In the 2020 AG's Guidelines, which followed a further consultation exercise, at para.87, a list was included of material which is likely to meet the test for disclosure. These new Guidelines, as foreshadowed in the consultation that led to it, inserted a rebuttable presumption of disclosure of certain types of material. The consultation stated (at para.12) "*This presumption is intended to provide assistance to investigators and prosecutors, by 'nudging' them to consider this list of material. It is important to note, however, that this proposal is not intended to encourage 'automatic' disclosure: investigators and prosecutors should always apply the disclosure test, and consider each item of material carefully in the context of the case in question.*" The 2000 Guidelines solution, in contrast, was to identify, at para.40, material that "*might reasonably be expected to be disclosed to the defence where it relates to the defence being put forward*", including scientific findings that have not previously been disclosed which are linked to a point is issue and/or material that touches on the reliability of prosecution witnesses (such as earlier conversations or promise of reward).

258. The 2000 version of the AG's Guidelines, in addressing the roles of the participants in the disclosure process, focused to a significant extent on the role of the prosecutor. In relation to the investigator and disclosure officer, the Guidelines emphasised the importance of their undertaking the role spelt out in the Code of Practice, rather than

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adding any new responsibilities. It is of note, in passing, that at para.7 the Guidelines stated "*an individual must not be appointed as disclosure officer, or continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged crime which is the subject of criminal proceedings…*" The Commentary included with the Guidelines made clear that this explicit requirement had been added as a result of concerned expressed by the Judiciary.

259. The Guidelines also sought to address the position where the volume of material seized during an investigation was substantial and therefore the demands of review of that material for disclosure onerous. The approach to this challenge has varied over time. The 2000 approach was to let the defence have access to the material to review it for themselves. Para.9 stated: "*in some cases, out of an abundance of caution, investigators seize large volumes of material which may not, because of its source, general nature or other reasons, seem likely ever to be relevant. In such circumstances, the investigator may consider that it is not an appropriate use of resources to examine such large volumes of material seized on a precautionary basis. If such material is not examined by the investigator or disclosure officer, and it is not intended to examine it, but the material is nevertheless retained, its existence should be made known to the accused in general terms at the primary stage and permission granted for its inspection by him or his legal advisors…*" In the commentary attached to the Guidelines, it was indicated that the detailed review of voluminous material until there was a case to do so was "disproportionate", and it was better to ensure open access by the defence to the material.

260. In relation to the prosecutor, the 2000 Guidelines imposed a clear responsibility on them to ensure the disclosure process was both effective and fair. In the commentary attached to the Guidelines, it was indicated that the Guidelines were deliberately seeking to increase the prosecutorial supervision of the process. In particular:

(a) At para.13: "*Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice. Prosecutors must be alert to the need to provide advice to disclosure officers on disclosure issues and to advise on disclosure procedure generally.*" In keeping with this duty, the Prosecutor "*should resolve any doubts they may have in favour of disclosure*" (para.20) and discontinue the case if "*satisfied that a fair trial cannot take place because of a failure of disclosure which cannot be remedied*" (para.21);

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(b) At para.14: "*Prosecutors must review schedules prepared by disclosure officers thoroughly and must be alert to the possibility that material may exist which has not been revealed to them. If no schedules have been provided, or there are apparent omissions from the schedules, or documents or other items are insufficiently described or are unclear, the prosecutor must at once take action to obtain properly completed schedules….*" In the commentary attached to the Guidelines, it was emphasised that "*accurate and complete schedules are essential for the successful operation of disclosure*". It was considered, however, that para.14 better ensured this than requiring certification by the prosecutor or wider mandated checking by the prosecutor of the material that underpinned the schedule.

(c) Allied to the para.14 requirements, the prosecutor is required to raise any failure by the disclosure officer in the undertaking of their obligations (para.15), to review material which they consider might fall to be disclosed as undermining of the prosecution case even where that has not been drawn to their attention (para.16). In the commentary attached to the Guidelines, it was indicated that the word "must" had been included in these requirements to emphasise their importance. The commentary also explained that the requirement that the prosecutor should "*inform the investigator if, in their view, reasonable and relevant lines of further inquiry exist*" (para.17), was inserted to "*buttress the existing requirement in the Code for investigators to pursue reasonable and relevant lines of further inquiry*".

(d) Paras.20-21 of the Guidelines make clear that the prosecutor should "*resolve any doubt that they may have in favour of disclosure*", and should not continue with a case where they are "*satisfied that a fair trial cannot take place because of a failure to disclose*".

261. The Guidelines also specifically addressed the responsibilities of prosecution counsel in relation to disclosure. In short:

(a) They are required to provide a further review of the disclosure process by placing themselves "*in a fully informed position to enable them to make decisions on disclosure*" so as to "*use their best endeavours to ensure that all material that ought properly to be made available is either presented by the prosecution or disclosed to the defence.*" (para.22).

(b) They are required to consider disclosure "*as a priority*", which means considering whether they have all relevant documentation, so as to review disclosure decisions that have been taken, and advising on "*the aspects that need clarification or action*"

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(para.23). This should involve both the prosecutor and the disclosure officer before trial, and, where needed, during trial (para.25).

(c) Para.24 makes clear that this is not just a one time review of disclosure but an ongoing process in that "*the prosecution advocate must continue to keep under review until the conclusion of the trial decisions regarding disclosure*", and require access to further material where necessary to meet this duty. The Guidelines, as the commentary makes clear, rejected specification as to how this was to be done, for example through certification of the process, as it was considered sufficient to spell out what needed to be achieved and leave it to the advocate as to how.

262. The Guidelines also provided important guidance for the disclosure of third party material, which is further addressed below.

263. In the Post Office Casework Management policy[246], dated March 2000, reference is made to urgency of processing of those being prosecuted "*In the interests of justice and in compliance with the Attorney General's guidelines*". There is no further explanation of which Guidelines this refers to, or what if any further compliance with them there should be. I do not read it as a reference to these disclosure guidelines. The same wording appears in the 2002 version of the policy.[247]

264. The disclosure guidelines are referred to in the "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996 Code of Practice" policy issued in May 2001[248]. However, there is no detail as to how, which aspects and which obligations are contemplated in this brief reference (para.3.1). For example, it states that the Guidelines "*clarify the responsibilities of investigators, disclosure offices, prosecutors and defence practitioners*", without addressing the rationale for doing so, or which aspects of the Guidelines are relevant, and the document does not address defence practitioners thereafter at all. There is no reference to the Guidelines in training materials copyright 2000.[249]

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[246] POL00104747
[247] POL00104777
[248] POL00104762
[249] These training materials are listed in the Criminal Investigation training document POL00094149.

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The 2005 AG's Guidelines

265. The AG's Guidelines were revised to reflect both the changes to the CPIA regime introduced by the Criminal Justice Act 2003, and a review of the operation of the 2000 version. In terms of their application, at para.61 it stated: *"Although the relevant obligations in relation to unused material and disclosure imposed on the prosecutor and the accused are determined by the date on which the investigation began, these Guidelines should be adopted with immediate effect in relation to all cases submitted to the prosecuting authorities in receipt of these Guidelines save where they specifically refer to the statutory or Code provisions of the Criminal Justice Act 2003 that do not yet apply to the particular case."*

266. Primary disclosure is now defined as follows (at para.8): *"Disclosure refers to providing the defence with copies of, or access to, any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed."* This disclosure process is addressed at para.10-11 in almost the same terms as in the 2000 Guidelines paras.36-37.

267. The new ongoing duty of disclosure was further addressed (at para.17) as follows: *"Section 7A of the Act imposes a continuing duty upon the prosecutor to keep under review at all times the question of whether there is any unused material which might reasonably be considered capable of undermining the prosecution case against the accused or assisting the case for the accused and which has not previously been disclosed. This duty arises after the prosecutor has complied with the duty of initial disclosure or purported to comply with it and before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case. If such material is identified, then the prosecutor must disclose it to the accused as soon as is reasonably practicable."* The list of material that might fall to be disclosed as secondary disclosure (para.40, 2000 version) has been removed.

268. In terms of general approach, the 2005 Guidelines recognised that the defence had a role to play in the proper operation of the disclosure process. In his forward to the revised Guidelines, the then Attorney General, Lord Goldsmith, said *"It is vital that everybody in the criminal justice system operates these procedures properly and fairly to ensure we protect the integrity of the criminal justice system whilst at the same time ensuring that a just and fair disclosure process is not abused so that it becomes unwieldy, bureaucratic and*

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effectively unworkable. This means that all those involved must play their role. Investigators must provide detailed and proper schedules. Prosecutors must not abrogate their duties under the CPIA by making wholesale disclosure in order to avoid carrying out the disclosure exercise themselves. Likewise, defence practitioners should avoid fishing expeditions and where disclosure is not provided using this as an excuse for an abuse of process application."

269. In the same vein, the Guidelines observed (at para.5): "*Disclosure must not be an open ended trawl of unused material. A critical element to fair and proper disclosure is that the defence play their role to ensure that the prosecution are directed to material which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. This process is key to ensuring prosecutors make informed determinations about disclosure of unused material.*" In keeping with this, the Guidelines spell out (at para.6) that the disclosure process "*should also ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustified delay and is wasteful of resources*". Moreover, both in general and in relation to consideration of sensitive material in particular (para.20), focus is required on material relevant to the issues. At para.2, in this context, the 2005 Guidelines stated: "*A fair trial should not require consideration of irrelevant material and should not involve spurious applications or arguments which serve to divert the trial process from examining the real issues before the court.*"

270. In the same vein, the Guidelines now addressed the importance and use of answers in police interview and in a defence statement in more detail than before. So that:

(a) Para.9: "*Prosecutors will only be expected to anticipate what material might weaken their case or strengthen the defence in the light of information available at the time of the disclosure decision, and this may include information revealed during questioning.*"

(b) Para.15: "*A defence statement must comply with the requirements of section 6A of the Act. A comprehensive defence statement assists the participants in the trial to ensure that it is fair. The trial process is not well served if the defence make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. The more detail a defence statement contains the more likely it is that the prosecutor will make an informed decision about whether any remaining undisclosed material might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused, or whether to advise the investigator to undertake further*

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enquiries. It also helps in the management of the trial by narrowing down and focussing on the issues in dispute. It may result in the prosecution discontinuing the case. Defence practitioners should be aware of these considerations when advising their clients. "

271. In general, the 2005 version replicated the guidance contained in the 2000 version as to the roles of investigator and disclosure officer. A key change was in relation to the position where a substantial volume of material had been obtained that was unlikely to meet the disclosure test. Rather than advocating as a solution identification of the existence of such material to the defence for them to deal with, as at para.9 of the 2000 version, the 2005 Guidelines state (at paras.26-27): *"…Disclosure officers, or their deputies, must inspect, view or listen to all relevant material that has been retained by the investigator, and the disclosure officer must provide a personal declaration to the effect that this task has been undertaken. …Generally this will mean that such material must be examined in detail by the disclosure officer or the deputy, but exceptionally the extent and manner of inspecting, viewing or listening will depend on the nature of material and its form. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip sampling. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The extent and manner of its examination must also be described together with justification for such action."*

272. Similarly, the 2005 Guidelines largely replicate the 2000 version in its consideration of the roles of the prosecutor and prosecution counsel. It therefore remained a requirement for the prosecutor to supervise the disclosure process undertaken by the investigator (paras.32 and 34), to ensure that schedules were complete and clear (para.33), and to ensure that fair and adequate disclosure was effected (para.35). The key alterations, to reflect the changes to the CPIA and the enhanced importance of the defence statement as a means of judging relevance, are contained in:

(a) Para.36-37: *"Prosecutors should copy the defence statement to the disclosure officer and investigator as soon as reasonably practicable and prosecutors should advise the investigator if, in their view, reasonable and relevant lines of further enquiry should be pursued. …. Prosecutors should examine the defence statement to see whether it points to other lines of enquiry. If the defence statement does point to other reasonable lines of inquiry*

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further investigation is required and evidence obtained as a result of these enquiries may be used as part of the prosecution case or to rebut the defence."

(b) Para.38: "*Once initial disclosure is completed and a defence statement has been served requests for disclosure should ordinarily only be answered if the request is in accordance with and relevant to the defence statement. If it is not, then a further or amended defence statement should be sought and obtained before considering the request for further disclosure.*"

(c) Para.40: "*If the material does not fulfil the disclosure test there is no requirement to disclose it. For this purpose, the parties' respective cases should not be restrictively analysed but must be carefully analysed to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. Neutral material or material damaging to the defendant need not be disclosed and must not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.*"

273. The Guidelines, once again, provided important guidance for the disclosure of third party material, which is further addressed below.

274. Although the Post Office "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996 Code of Practice" policy which was issued in May 2001[250] did allude to the original version of the AG's Guidelines, I have not seen any amended version of that policy following the 2005 AG Guidelines, until the 2010 revision[251]. That 2010 document referred to the 2005 CPIA Code of Practice, but not the AG's Guidelines issued alongside it. No training materials, that I have seen, were produced to address this important revision to the Guidelines.

Supplementary Guidelines on digitally stored material

275. The AG's Guidelines were not amended again until December 2013, and therefore strictly after the end of the Inquiry's period of focus. However, in July 2011 a supplement to the 2005 Guidelines was issued to address, in the context of the disclosure officer's duties where there was a substantial volume of material (para.27

[250] POL00104762
[251] POL00104848

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of the 2005 Guidelines), the approach to digitally stored material. The objective was "*to set out how material satisfying the tests for disclosure can best be identified and disclosed to the defence without imposing unrealistic or disproportionate demands on the investigator and prosecutor*" (para.2). The Guidelines address two forms of digital material (by reference to para.6), namely that "*created natively within an electronic environment*" and that "*digitised from an analogue form*".

276. The headline approach set out, against that background, was the following (para.3):

"*The approach set out in these Guidelines is in line with existing best practice, in that:*

(i) Investigating and prosecuting agencies, especially in large and complex cases, will apply their respective case management and disclosure strategies and policies and be transparent with the defence and the courts about how the prosecution has approached complying with its disclosure obligations in the context of the individual case; and,

(ii) The defence will be expected to play their part in defining the real issues in the case. In this context, the defence will be invited to participate in defining the scope of the reasonable searches that may be made of digitally stored material by the investigator to identify material that might reasonably be expected to undermine the prosecution case or assist the defence."

277. The Guidelines go on to address the general principles to be applied by an investigator "in handling and examining digital material" as follows (para.8):

(i) No action taken by investigators or their agents should change data held on a computer or storage media which may subsequently be relied upon in court;

(ii) In circumstances where a person finds it necessary to access original data held on computer or storage media, that person must be competent to do so and be able to give evidence explaining the relevance and implications of their actions;

(iii) An audit trail or other record of all processes applied to computer-based electronic evidence should be created and preserved. An independent third party should be able to examine those processes (see further the section headed Record keeping and scheduling below); and,

(iv) The person in charge of the investigation has overall responsibility for ensuring that the law and these principles are followed.

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These general principles are identified as being adapted from the Good Practice Guide issued for Computer Based Evidence by the Association of Chief Police Officers.

278. It then considers, by reference to these general principles, the proper approach to the seizure and retention of such material. The Guidelines address the powers of seizure available to investigators, (for example at paras.16 and 19), and the means by which a hard drive, or parts of a hard drive might be obtained (para.13-14). More generally, as to seizure, the important guidance (at para.12) is that "*Before searching a suspect's premises where digital evidence is likely to be found, consideration must be given to what sort of evidence is likely to be found and in what volume, whether it is likely to be possible to view and copy, if relevant, the material at the location - it is not uncommon with the advent of cloud computing for digital material to be hosted by a third party - and to what should be seized. Business and commercial premises will often have very substantial amounts of digital material stored on computers and other media. Investigators will need to consider the practicalities of seizing computer hard drives and other media, the effect this may have on the business and, where it is not feasible to obtain an image of digital material, the likely timescale for returning seized items.*"

279. In relation to retention, again the Guidelines seek to lay down principles to be applied. So that (at paras.24-25): "*Retention is limited to evidence and relevant material (as defined in the Code of Practice issued under the CPIA 1996). Where either evidence or relevant material is inextricably linked to non-relevant material which is not reasonably practicable to separate, that material can also be retained. Inextricably linked material is material that is not reasonably practicable to separate from other linked material without prejudicing the use of that other material in any investigation or proceedings. …However, inextricably linked material must not be examined, imaged, copied or used for any purpose other than for providing the source of or the integrity of the linked material.*"

280. The Guidelines then identified 4 categories of material to be retained (at para.26):

(i) *Material that is evidence or potential evidence in the case. Where material is retained for evidential purposes there will be a strong argument that the whole thing (or an authenticated image or copy) should be retained for the purpose of proving provenance and continuity;*

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(ii) *Where evidential material has been retained, inextricably linked non-relevant material which is not reasonably practicable to separate can also be retained (PACE Code B paragraph 7);*

(iii) *An investigator should retain material that is relevant to the investigation and required to be scheduled as unused material. This is broader than but includes the duty to retain material which may satisfy the test for prosecution disclosure. The general duty to retain relevant material is set out in the CPIA Code at paragraph 5; or,*

(iv) *Material which is inextricably linked to relevant unused material which of itself may not be relevant material. Such material should be retained (PACE Code B paragraph 7).*

281. The supplementary guidelines then address how digital material should be examined and what record should be made of that process. In relation to the first of these, the Guidelines states (at paras.40-41): *"Where digital material is examined, the extent and manner of inspecting, viewing or listening will depend on the nature of the material and its form. … It is important for investigators and prosecutors to remember that the duty under the 1996 Act Code of Practice is to 'pursue all reasonable lines of enquiry including those that point away from the suspect'. Lines of enquiry, of whatever kind, should be pursued only if they are reasonable in the context of the individual case. It is not the duty of the prosecution to comb through all the material in its possession - e.g. every word or byte of computer material - on the look out for anything which might conceivably or speculatively assist the defence. The duty of the prosecution is to disclose material which might reasonably be considered capable of undermining its case or assisting the case for the accused which they become aware of, or to which their attention is drawn."*

282. The manner in which this sift is undertaken will depend on the volume of material.

(a) Where it is limited (para.42), a manual sift of the digital material will be undertaken to identify anything meeting the disclosure test.

(b) Where this is not feasible (para.43), because *"there is an enormous volume of material it is perfectly proper for the investigator/disclosure officer to search it by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers."*

(c) Where there are *"very large quantities of data, the person in charge of the investigation will develop a strategy setting out how the material should be analysed or searched to*

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identify categories of data." In this last category, the search terms to be used will be provided to the defence to allow them to suggest additional search terms which will also be used where they are likely to be productive (para.44). The strategy employed and searches undertaken must be recorded (para.47).

(d) In this eventuality, as is noted at para.45: *"It may be necessary to carry out sampling and searches on more than one occasion, especially as there is a duty on the prosecutor to keep duties of disclosure under review. To comply with this duty it may be appropriate (and should be considered) where further evidence or unused material is obtained in the course of the investigation; the defence statement is served on the prosecutor; the defendant makes an application under section 8 of the CPIA for disclosure; or the defendant requests that further sampling or searches be carried out (provided it is a reasonable line of enquiry)."*

283. In terms of record keeping, digital material seized, imaged and retained must also be logged (para.46), and "*any searching or analytical processing of digital material, as well as the data identified by that process*" also needs properly to be recorded. The limitations of this requirement are spelt out at para.49: *"It should be sufficient for the prosecution to explain how the disclosure exercise has been approached and to give the accused or suspect's legal representative an opportunity to participate in defining the reasonable searches to be made …"* However, in principle, the following needs to be included in any such record (para.48):

"(i) A record of all searches carried out, including the date of each search and the person(s) who conducted it;

(ii) A record of all search words or terms used on each search. However where it is impracticable to record each word or terms (such as where Boolean searches or search strings or conceptual searches are used) it will usually be sufficient to record each broad category of search;

(iii) A log of the key judgements made while refining the search strategy in the light of what is found, or deciding not to carry out further searches; and,

(iv) Where material relating to a 'hit' is not examined, the decision not to examine should be explained in the record of examination or in a statement. For instance, a large number of 'hits' may be obtained in relation to a particular search word or term, but material relating to the "hits" is not examined because they do not appear to be relevant to the investigation. Any subsequent refinement of the search terms and further hits should also be noted and explained as above."

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284. Digital material seized, imaged and retained also needs to be included in the unused schedules (para.50), with a description making clear "the nature" of the item with sufficient clarity that decisions as to review of its content can be made. Where material is listed generically or in blocks, "*the search terms used and any items of material which might satisfy the disclosure test are to be listed and described separately*" (para.51).

The 2013 Guidelines

285. In 2011, Lord Justice Gross published a review of disclosure in criminal proceedings, and both he and Lord Justice Treacy produced a further review of such disclosure in 2012. In response to these reviews, Dominic Grieve QC MP, then Attorney General, produced a further revision of the AG's Guidelines in December 2013. Its aim was to consolidate the 2005 AG's Guidelines and the 2011 Supplement to those Guidelines in relation to digital material into once more concise document. In general terms the 2013 Guidelines were exactly that, the merging of the two earlier documents into one sequentially numbered document.

286. The key additions or alterations from the earlier documents were as follows:

(a) In the exposition of general principles, a paragraph (para.10) was added which sought to import the observations of the Court of Appeal in *Olu, Wilson and Brooks* [2010] EWCA Crim 2975. It stated: "*Disclosure should be conducted in a thinking manner and never be reduced to a box-ticking exercise; at all stages of the process, there should be consideration of* ***why*** *the CPIA disclosure regime requires a particular course of action and what should be done to achieve that aim.*"

(b) In relation to the role of the investigator, this same theme was further explored (at paras.16-17): "*Whether a case is a summary only matter or a long and complex trial on indictment, it is important that investigators and disclosure officers should approach their duties in a 'thinking manner' and not as a box ticking exercise. Where necessary, the reviewing lawyer should be consulted. It is important that investigators and disclosure officers are deployed on cases which are commensurate with their training, skills and experience. The conduct of an investigation provides the foundation for the entire case, and may even impact the conduct of linked cases. It is vital that there is always consideration*

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of disclosure matters at the outset of an investigation, regardless of its size. … A fair investigation involves the pursuit of material following all reasonable lines of enquiry, whether they point towards or away from the suspect. What is 'reasonable' will depend on the context of the case. A fair investigation does not mean an endless investigation: investigators and disclosure officers must give thought to defining, and thereby limiting, the scope of their investigations, seeking the guidance of the prosecutor where appropriate".

(c) Also, in relation to the role of the investigator and disclosure officer, the 2013 Guidelines added (at para.25): *"It may become apparent to an investigator that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was inextricably linked to material that was relevant, is, in fact, incapable of impact. It is not necessary to retain such material, although the investigator should err on the side of caution in reaching that conclusion and should be particularly mindful of the fact that some investigations continue over some time and that what is incapable of impact may change over time. The advice of the prosecutor should be sought where appropriate."*

(d) In substantive terms the roles of the prosecutor and prosecution counsel remained as per the 2005 Guidelines.

287. In relation to recording of material retained and disclosure decisions made in relation to it, a key addition in the 2013 Guidelines related to the Disclosure Management Document ('DMD'), in which the approach to disclosure was to be set out, together with identification of the general approach to disclosure and the understanding of the defence and prosecution cases on which it was premised. It was emphasised (at para.52) that the DMD *"…are living documents and should be amended in light of developments in the case; they should be kept up to date as the case progresses. Their use will assist the court in its own case management and will enable the defence to engage from an early stage with the prosecution's proposed approach to disclosure".*

288. Another key amplification in the 2013 AG's Guidelines related to the role of the defence, which included (at paras.39 and 42): *"Defence engagement must be early and meaningful for the CPIA regime to function as intended. Defence statements are an integral part of this and are intended to help focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify exculpatory unused material. Defence statements should be drafted in accordance with the relevant provisions of the CPIA. …The*

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prosecution's continuing duty to keep disclosure under review is crucial, and particular attention must be paid to understanding the significance of developments in the case on the unused material and earlier disclosure decisions. Meaningful defence engagement will help the prosecution to keep disclosure under review. The continuing duty of review for prosecutors is less likely to require the disclosure of further material to the defence if the defence have clarified and articulated their case, as required by the CPIA."

289. The Supplementary Guideline on digitally stored material remains an annex to the Guidelines but became part of the same document. It paragraphs were renumbered A1-A56. The content remained as per the 2011 version with one exception, relating to material held overseas, which is considered below. Both the Guidelines, and the Annex, addressed third party disclosure.

290. The AG's Guidelines were named amongst the sources in the training material, 'Principles of Disclosure' included in training in 2012[252], but not the re-issue of that document as a slide presentation in 2015[253]. The 2012 document did not quote from or analyse the Guideline.

CPS DISCLOSURE MANUAL

291. It is pertinent, having reviewed the various sources of law as to disclosure, to note that the CPS has for some time produced a Disclosure Manual. I have been able to trace a number of versions of this document, and it indicates at its head "*This manual applies to all investigations commenced on or after 4 April 2005*", which gives some indication as to how long such a manual has been produced.

292. The purpose of the Manual is set out in chapter 1 as follows: "*These instructions explain how investigators and the Crown Prosecution Service (collectively, 'the prosecution team') have agreed to fulfil their duties to disclose unused material to the defence. These duties arise under statute and at common law. It is important that the prosecution team adopt consistent practices across England and Wales. This manual contains practical as well as legal guidance relating to disclosure. This is designed to ensure that the statutory duties are carried out*

[252] POL00094173
[253] POL00094117

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promptly, efficiently, and effectively. The templates for letters and documents referred to can be found elsewhere on the police and CPS case management systems."

293. Thereafter, the Manual addresses the disclosure obligations of both criminal investigations and criminal prosecutions, that is the obligations set out in the earlier parts of this report. It also addresses the various areas of disclosure, and circumstances in which disclosure may be required. The virtue of such a manual is to provide detailed assistance to the CPS as to how any particular disclosure issue should be addressed, what their duties are and what steps need to be taken.

THIRD PARTY DISCLOSURE

294. An important aspect of the disclosure regime which has evolved over the time period with which the Inquiry is concerned is in relation to the seizure, review and disclosure of material from third parties. This is an important topic, which warrants separate consideration from the disclosure of material already obtained by the investigation.

295. The CPIA Code alludes to, but do not seek to regulate, the obtaining of such third party material. Of particular relevance, at para.3.5 of the 1997 version of the Code, and para.3.6 of later iterations, it states:

"If the officer in charge of an investigation believes that other persons may be in possession of material that may be relevant to the investigation, and if this has not been obtained under paragraph 3.5 above, they should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain the material in case they receive a request for its disclosure. The disclosure officer should inform the prosecutor that they may have such material. However, the officer in charge of an investigation is not required to make speculative enquiries of other persons; there must be some reason to believe that they may have relevant material. That reason may come from information provided to the police by the accused or from other inquiries made or from some other source."

296. It follows that the Code, laid down by statute, requires the investigator, in consultation with the prosecutor, to take steps to investigate whether a third party has material that may be relevant. The Code does not limit this consideration of whether an enquiry

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should be made to material that it is believed will pass the disclosure test. The touchstone is relevance. Relevance is itself defined by the CPIA Code (para.2) as material which: *"…appears to an investigator,… that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case"*.

297. The Judicial Protocol on the Disclosure of Unused Material, in relation to third party material, at para.44, states: *"Where material is held by a third party such as a local authority, a social services department, hospital or business, the investigators and the prosecution may need to make enquiries of the third party, with a view to inspecting the material and assessing whether the relevant test for disclosure is met and determining whether any or all of the material should be retained, recorded and, in due course, disclosed to the accused. If access by the prosecution is granted, the investigators and the prosecution will need to establish whether the custodian of the material intends to raise PII issues, as a result of which the material may have to be placed before the court for a decision. This does not obviate the need for the defence to conduct its own enquiries as appropriate. Speculative enquiries without any proper basis in relation to third party material – whether by the prosecution or the defence – are to be discouraged, and, in appropriate cases, the court will consider making an order for costs where an application is clearly unmeritorious and misconceived."*

298. However, since the first iteration in 2000, it has been the AG's Guidelines on Disclosure that have been the primary source for the duty on investigators to obtain and prosecutors to disclose material obtained from out with the investigation that is relevant to it.

299. The 2000 version of the AG's Guidelines, which it is important to note was the version in force at the time that the Court of Appeal issued its important guidance as to the proper approach to third party material in *Alibhai*[254], said the following (at paras.30 and 32):

"There may be cases where the investigator, disclosure officer or prosecutor suspects that a non-government agency or other third party (for example, a local authority, a social services department, a hospital, a doctor, a school, providers of forensic services) has material or

[254] [2004] EWCA Crim 681

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information which might be disclosable if it were in the possession of the prosecution. In such cases consideration should be given as to whether it is appropriate to seek access to the material or information and if so, steps should be taken by the prosecution to obtain such material or information. It will be important to do so if the material or information is likely to undermine the prosecution case, or assist a known defence.

Information which might be disclosable if it were in the possession of the prosecution which comes to the knowledge of investigators or prosecutors as a result of liaison with third parties should be recorded by the investigator or prosecutor in a durable or retrievable form …"

300. In *Alibhai*[255] the Court of Appeal was concerned with an appeal against a conviction for criminal conspiracy to deal in counterfeit Microsoft Software. The prosecution had relied in part on the evidence of a co-conspirator who had been acting as an informant for the FBI. The appellant appealed on the basis that vital documentation held in particular by the FBI and Microsoft had not been disclosed or had been disclosed so late that his trial could not be considered to be fair or his conviction safe. The appellant suggested that the failure to reach consensual agreement for disclosure of relevant third party material in accordance with the Guidelines meant that he should not have stood trial or that the prosecution should not have been entitled to rely on some of its evidence.

301. The Court of Appeal held that under the CPIA, the prosecutor was only under a duty to disclose material in the hands of third parties if that material had come into the prosecutor's hands and the prosecutor was of the opinion that such material undermined his case. The AG's Guidelines went further by requiring a prosecutor to take steps pursuing third party disclosure if there was a suspicion that documents would be detrimental to the prosecution or of assistance to the defence. However, in such circumstances, the prosecutor enjoyed a margin of consideration as to what steps were appropriate. It was held that the disclosure steps taken in this case had not led to unfairness to the defendant. In this regard, Longmore LJ, who gave the Court's judgement, stated (at paras.62-64):

[255] [2004] EWCA Crim 681

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"The trigger for the provisions of paragraph 30-33 of the Attorney General's Guidelines is suspicion on the part of the investigator, disclosure officer or prosecutor that a third party has material or information that might be disclosable if in the possession of the prosecution. Material in the possession of a prosecutor is not disclosable simply because it is or might be relevant to an issue in a case. As Lord Bingham said in R v H, [2004] UKHL 3 at para. 35:-

> *'If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted… Neutral material or material damaging to the defendant need not be disclosed.'*

Thus before it can be said that there has been a breach of an obligation under these provisions of the Guidelines, it must be shown that there was a suspicion that the FBI, Microsoft or McGrath, as the case might be, not only had potentially relevant material but that the material was not neutral or damaging to the defendants but damaging to the prosecution or of assistance to the defendants.

63. Secondly, even if there is the suspicion that triggers these provisions, the prosecutor is not under an obligation to secure the disclosure of the material or information. He enjoys what might be describes as a 'margin of consideration' as to what steps he regards as appropriate in the particular case. If criticism is to be made of a failure to secure third party disclosure, it would have to be shown that the prosecutor did not act within the permissible limits afforded by the Guidelines.

64. In saying this, we are not ruling out the possibility that in an extreme case it might be so unfair for a prosecution to proceed in the absence of material which a third party declines to produce that it would be proper to stay it, regardless of whether the prosecutor is in breach of the Guidelines…".

302. The 2005 revision of the AG's Guidelines, which were issued the year after *Alibhai*, addressed third party material in much the same way as the 2000 version. At para.51 it stated: *"There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a*

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doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused prosecutors should take what steps they regard as appropriate in the particular case to obtain it."

303. It follows that under both the 2000 and 2005 versions of the AG's Guidelines, which were the versions of direct application during the Inquiry period of focus, consideration had to be given to making enquiries of a third party where the investigator/prosecutor believed the third party had material which might be relevant to the prosecution case and if the material might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused then steps should be taken to obtain it.

304. This approach, however, could be read in two ways. First, that the prosecutor had to have grounds to consider the material would pass the disclosure test as well as being relevant before making any enquiries of the third party about it. Second, that the disclosure test was relevant to whether material should be obtained even if the third party was reluctant to provide it, rather than to whether enquiries should be made of a third party to ascertain if they held any material relevant to the case. It is clear, in my view, that the latter interpretation was, and is, the correct one.

305. That latter interpretation would be consistent with the requirements of the Criminal Procedure (Attendance of Witnesses) Act 1965, section 2 of which is the route by which a court can order a third party to produce material in its possession. However, under section 2 a witness summons can be obtained for a person to produce "any document or thing likely to be material evidence". In other words, as was made clear in *Alibhai* (at para.34) *"…a witness summons will not be issued for documents which will not themselves constitute evidence in the case but merely give rise to a line of enquiry which might result in evidence being obtained, still less for documents merely capable of use in cross-examination as to credit".*

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306. That interpretation is also consistent with the approach of the House of Lords in *R v H and C*[256], when Lord Bingham observed (at para.35): "*If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. […]*"

307. That paragraph was considered by the Court of Appeal in *Bater-James*[257], and Fulford LJ observed (at para.71): "*It is clear, therefore, that investigators should not request such material and applications to the court should not be granted if they come within the category of a 'fishing expedition'.*" The Court went on to rely on the Annex to the 2013 iteration of the AG's Guidelines as further support for this proposition. The Annex, which dealt with digitally stored material, replicated that which was introduced as the supplement to the AG's Guidelines in 2011. The supplementary guidelines identified as best practice:

[2011 Para.3a; 2013 Para.A3.a] *Investigating and prosecuting agencies, especially in large and complex cases, will apply their respective case management and disclosure strategies and policies and be transparent with the defence and the courts about how the prosecution has approached complying with its disclosure obligations in the context of the individual case; and,* [2011Para.3b; 2013 Para.A3.b] *The defence will be expected to play their part in defining the real issues in the case. In this context, the defence will be invited to participate in defining the scope of the reasonable searches that may be made of digitally stored material by the investigator to identify material that might reasonably be expected to undermine the prosecution case or assist the defence.*

[256] [2004] UKHL 3
[257] [2020] EWCA Crim 790

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308. More specifically, at paras.55-57 of the 2011 Supplement (paras.A54-56, 2013 Annex), the guidance for third party material held by "a person, organisation, or government department other than the investigator and prosecutor" located within the UK:

"The CPIA Code and the AG's Guidelines makes clear the obligation on the prosecution to pursue all reasonable lines of enquiry in relation to material held by third parties within the UK. …If as a result of the duty to pursue all reasonable lines of enquiry, the investigator or prosecutor obtains or receives the material from the third party, then it must be dealt with in accordance with the CPIA 1996 i.e. the prosecutor must disclose material if it meets the disclosure tests, subject to any public interest immunity claim. The person who has an interest in the material (the third party) may make representations to the court concerning public interest immunity (see section 16 of the CPIA 1996). …Material not in the possession of an investigator or prosecutor falls outside the CPIA 1996. In such cases the Attorney General Guidelines on Disclosure prescribe the approach to be taken to disclosure of material held by third parties (paragraphs 51-54) as does the judicial disclosure protocol (paragraphs 52-62)."

309. Paras.51-54 of the 2005 Guidelines addressed material held by third parties other than other government departments. In so far as is relevant, they stated:

"There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused prosecutors should take what steps they regard as appropriate in the particular case to obtain it.

If the investigator, disclosure officer or prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information, and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or as appropriate section 97 of the Magistrates Courts Act 1980 are satisfied, then the prosecutor or investigator should apply for a witness summons causing a representative of the third party to produce the material to the Court.

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Relevant information which comes to the knowledge of investigators or prosecutors as a result of liaison with third parties should be recorded by the investigator or prosecutor in a durable or retrievable form (for example potentially relevant information revealed in discussions at a child protection conference attended by police officers).

Where information comes into the possession of the prosecution in the circumstances set out in paragraphs 51-53 above, consultation with the other agency should take place before disclosure is made: there may be public interest reasons which justify withholding disclosure and which would require the issue of disclosure of the information to be placed before the court."

310. In relation to government departments, it was acknowledged (at para.48) "*…that investigators, disclosure officers and prosecutors cannot be regarded to be in constructive possession of material held by Government departments or Crown bodies simply by virtue of their status as Government departments or Crown bodies.*" Accordingly, the requirement (at para.47) was that: "*…reasonable steps should be taken to identify and consider* [material that may be relevant to an issue in the case]. *Although what is reasonable will vary from case to case, the prosecution should inform the department or other body of the nature of its case and of relevant issues in the case in respect of which the department or body might possess material, and ask whether it has any such material.*"

311. In the 2011 Supplement to the AG's Guidelines, material held by third parties outside the UK was separately addressed (from para.58). In short, the duty to pursue reasonable lines of enquiry applied, but (para.61) without an absolute duty to disclose such material. Rather (para.62-63): "*The obligation on the investigator and prosecutor under the CPIA 1996 is to take reasonable steps. Where investigators are allowed to examine files of a foreign state but are not allowed to take copies or notes or list the documents held, there is no breach by the prosecution in its duty of disclosure by reason of its failure to obtain such material, provided reasonable steps have been taken to try and obtain the material. Whether the prosecution has complied with its duty is for the court to judge in each case. In these circumstances it is important that the position is clearly set out in writing so that the court and the defence know what the position is. Investigators and prosecutors must record and explain the situation and set out, insofar as they are permitted by the foreign state, such information as they can and the steps they have taken.*"

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312. This section of the Supplement was removed when its content was otherwise incorporated into the 2013 version of the AG's Guidelines. It is also relevant to note that when the AG's Guidelines were amended in 2013, the wording relating to third party material was changed. At para.56, under the heading of third party material it said the following: "*There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, investigators, disclosure officers and prosecutors should take reasonable steps to identify, secure and consider material held by any third party where it appears to the investigator, disclosure officer or prosecutor that (a) such material exists and (b) that it may be relevant to an issue in the case.*" It therefore provided that where investigators/prosecutors believed the third party had material which might be relevant to an issue in the case then reasonable steps should be taken to identify and secure such material. In other words, the test for making enquiries was relevance, not the likelihood of disclosure. The wording of the current AG's Guidelines, which came into effect on 31st December 2020 is the same as the 2013 iteration of the Guidelines (see para.38).

313. It follows that in relation to the consideration of whether an enquiry should be made of a third party in relation to material they may hold, the court has a role in guarding against speculative enquiries without proper basis. However, it is clear that the assessment of whether the disclosure test is met occurs once access has been gained to the material, rather than as a determination of whether there is a proper basis to enquire or not. This Protocol, read together with the Code, does not suggest a test other than relevance for the establishment of a proper basis to enquire.

314. This analysis is also borne out by the approach of the Court of Appeal in *Bater-James*[258]. The Court of Appeal in that case considered "*…issues relating to the retention, inspection, copying, disclosure and deletion of electronic records held by prosecution witnesses*" (para.1). In addressing the issues of principle engaged (from para.65) the Court considered the "*extensive legislative and regulatory framework governing disclosure*". This included the iteration of the AG's Guidelines then in force, namely the 2013 version by reference to

[258] [2020] EWCA Crim 790

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which the "*proper basis*" for a request for third party material was identified as being "*usually that there are reasonable grounds to believe that it may reveal material relevant to the investigation or the likely issues at trial (a 'reasonable line of inquiry')*." The Court further observed (at para.70) "*it is not a 'reasonable' line of inquiry if the investigator pursues fanciful or inherently speculative researches. Instead, there needs to be an identifiable basis that justifies taking steps in this context. This is not dependent on formal evidence in the sense of witness statements or documentary material, but there must be a reasonable foundation for the inquiry.*"

315. It follows that the Court in *Bater-James* specifically endorsed the approach set out in the 2013 AG's Guidelines, and thus by implication the 2005 AG's Guidelines and 2011 Supplement that preceded them and in material respects adopted the same approach. This is further demonstrated, in the context of examination of a prosecution witness' digital material, at para.77 when Fulford LJ said: "*…regardless of the medium in which the information is held, a 'reasonable line of enquiry' will depend on the facts of, and the issues in, the individual case, including any potential defence. There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded, any more than there is a presumption that investigators will attempt to look through material held in hard copy. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation. Furthermore, as developed below, if there is a reasonable line of enquiry, the investigators should consider whether there are ways of readily accessing the information that do not involve looking at or taking possession of the complainant's mobile telephone or other digital device. Disclosure should only occur when the material might reasonably be considered capable of undermining the prosecution's case or assisting the case for the accused.*"

316. It is important to note that although the existence of the AG's guidelines was acknowledged in the "Disclosure of Unused Material – Criminal Procedures and Investigations Act 1996 Code of Practice" policy was issued in May 2001[259], it did not, either in that context or at all address third party disclosure. This serious omission was not remedied when the Post Office policy was updated in 2010[260], which both fails to address third party disclosure and to refer to the 2005 AG's Guidelines which do

[259] POL00104762
[260] POL00104848

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address that important matter in detail. Similarly, no Post Office training materials that address disclosure at all (and these are limited)[261], makes any reference to third party disclosure.

LESSONS TO BE LEARNED FROM LATER EVENTS

317. Having considered the various iterations of the CPIA Code and the AG's Guidelines that applied throughout the Inquiry's period of focus, it may assist also to consider significant changes to each of those that have been made more recently, so that any consideration of improvements to the approach to investigation, charging decisions, prosecutions and disclosure, take account of the present 2023 guidance for those tasks.

318. In February 2020 a consultation was launched by the Attorney General and Lord Chancellor of the time "*to identify and incorporate improvements*" into the CPIA Code and the AG's Guidelines. This was prompted by the AG's "Review of the efficiency and effectiveness of disclosure in the Criminal Justice System", published in November 2018, and the National Disclosure Improvement Plan, produced by the CPS, the College of Policing and police forces. The Review had highlighted what was consultation described as "*the need for leadership and culture change throughout the criminal justice system in order to improve the performance of disclosure obligations*".

319. There are a number of aspects to the "culture" that needed, the Review concluded, to change.

(a) The first was described in the consultation in this way: "*this culture meant that disclosure obligations were insufficiently prioritised, and that the relevant paperwork was not completed on time or to the necessary standard. This could affect the ability of a case to continue through to a final judgment. Issues identified in the Review included prosecutors failing to challenge gaps in the investigation, and signing off on inadequate unused schedules.*" In other words, one of the areas that the new Code and new AG's Guidelines are intended to address is disclosure as tick box exercise, where schedules are drawn up because the Code mandates them without necessarily

[261] POL00094173, POL00094141, POL00094117

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reflecting the intellectual analytical process that they are meant to encapsulate, and schedules are then issued and shared because they are required by the CPIA rather than as vehicles for effective compliance with the test the Act provides.

(b) The second is disclosure as a dialogue between prosecution and defence. The framework of the core provisions of the Criminal Procedure Rules, seen for example in the rules relating to case management in part 3, is the expectation that all parties to the criminal process will co-operate in ensuring its effectiveness and efficiency. The second part of the culture that the new AG's Guidelines seek to address is that spoken about by Thomas LJ in *R (DPP) v Chorley Justices*[262], when he made clear the importance of co-operation from those defending in narrowing the issues: "*If a defendant refuses to identify what the issues are, one thing is clear: he can derive no advantage from that or seek, as appears to have happened in this case, to attempt an ambush at trial. The days of ambushing and taking last-minute technical points are gone. They are not consistent with the overriding objective of deciding cases justly, acquitting the innocent and convicting the guilty.*"

320. The AG's Guidelines are therefore intended to encourage not only more effective prosecution disclosure but more defence engagement with the process by which that is achieved. For present purposes, the first of those cultural concerns is the relevant one, and the steps taken by the revised CPIA Code and AG's Guidelines are considered here.

321. A comparison with the 2013 iteration of the AG's Guidelines reveals that the underlying principles that should govern the investigation of and disclosure relating to criminal prosecutions remain as before, but with perhaps a change of emphasis and certainly a change of order. This aspiration of cultural shift underpins this change in the following pertinent respects:

(a) Encouraging co-operation of the parties in the disclosure process – for example at paras.3-4, in particular: "*A fair trial does not require consideration of irrelevant material. It does not require irrelevant material to be obtained or reviewed. It should not involve spurious applications or arguments which aim to divert the trial process from examining the real issues before the court. The statutory disclosure regime does*

[262] [2006] EWHC 1795 (Admin)

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not require the prosecutor to make available to the accused either neutral material or material which is adverse to the accused. This material may be listed on the schedule, alerting the accused to its existence, but does not need to be disclosed: prosecutors should not disclose material which they are not required to, as this would overburden the participants in the trial process, divert attention away from the relevant issues and may lead to unjustifiable delays. Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise. Prosecutors need to think about what the case is about, what the likely issues for trial are going to be and how this affects the reasonable lines of inquiry, what material is relevant, and whether material meets the test for disclosure.

(b) Ensuring proper prioritisation for disclosure by the prosecution – for example at paras.5-10: "*There will always be a number of participants in prosecutions and investigations. Communication within the prosecution team is vital to ensure that all disclosure issues are given sufficient attention by the right person.* A disclosure log needs to be kept because "*Any prosecutor must be able to see and understand previous disclosure decisions before carrying out their continuous review function. The role of the reviewing lawyer is central to ensuring that all members of the prosecution team are aware of their role and their duties. Where prosecution advocates are instructed, they should be provided with clear written instructions about disclosure and provided with copies of any unused material which has been disclosed to the defence. Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. Investigators and disclosure officers should be familiar with the CPIA Code of Practice - in particular their obligations to* ***retain and record*** *the relevant material, to* ***review*** *it and to* ***reveal*** *it to the prosecutor (see paragraphs 3-7 of the Code). Investigators and disclosure officers should be deployed on cases which are commensurate with their training, skills and experience.*"

322. The AG's Guidelines follow this statement of principle in relation to the balancing of a fair trial with the protection of privacy with, at paragraph 13, a series of principles that investigators and prosecutors are to apply. In summary:

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(a) Collecting and processing personal data can only be done when necessary and proportionate. For this to be the case *"an investigator must be pursuing a reasonable line of inquiry in seeking to obtain the material"*;

(b) In deciding whether collecting personal data is likely to be reasonable, consideration needs to be given to *"the prospect of obtaining relevant material; and what the perceived relevance of that material is, having regard to the identifiable facts and issues in the individual case"*;

(c) A range of considerations are identified at para.13(d) in determining whether and to what extent personal data is to be obtained, and the rationale for and ambit of investigation needs to be "open and transparent".

(d) If someone refuses to allow access to data that, having gone through these hoops an investigator seeks, that refusal, its circumstances and reasons for it need to be documented.

(e) If someone provides it, it should only be disclosed if it meets the disclosure test.

(f) Finally: *"Where there is a conflict between both of these rights, investigators and prosecutors should bear in mind that the right to a fair trial is an absolute right. Where prosecutors and investigators work within the framework provided by the CPIA, any unavoidable intrusion into privacy rights is likely to be justified, so long as any intrusion is no more than necessary."*

323. The 2013 version of the AG's Guidelines, having identified the general principles of disclosure, was divided into sections by reference to the roles of various parties to the disclosure process: investigators, disclosure officers, prosecutors and various scenarios within the criminal justice system: magistrates courts, crown court, complex cases. The 2020 Guidelines have a different structure, which effectively tracks a case from cradle to grave, with the investigation as the cradle and confiscation as grave.

324. That is not to say that roles of key players in the disclosure process are not addressed at all. They are identified, for example, in the new Code of Practice – issued to run alongside the new AG's Guidelines:

(a) in the definitions section (para.2), and

(b) the role of the investigator and the disclosure officer are dealt with in the Code in detail under the headings of general responsibilities (para.3), with specific

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responsibilities dealt with thereafter, for example as to retention of material (para.4), and preparation of unused schedules (para.5).

(c) Similarly, the role of the prosecutor is addressed by the Code in particular in the section on disclosure to accused (para.10).

325. To start with the investigation, the Guidelines assert (para.14) that "*Consideration of disclosure issues is an integral part of an investigation and is not something that should be considered in isolation.*" An important innovation to the pre-charge stage of the investigation, in terms of identification of material that is relevant and therefore to be retained, is the involvement of the defence. In keeping with earlier guidance that the defence can be invited to input into the identification of what should be searched for on a complainant's mobile phone, the Guidelines envisage pre-charge engagement when it is perceived to be "*possible that such engagement will lead to the defence volunteering additional information which may assist in identifying new lines of inquiry*".

326. This pre-charge engagement is addressed in detail in the new Annex B. Pre-charge engagement is there defined (at.para.3) as: "*…voluntary engagement between the parties to an investigation after the first PACE interview, and before any suspect has been formally charged. Pre-charge engagement is a voluntary process and it may be terminated at any time. It does not refer to engagement between the parties to an investigation by way of further PACE interviews….. Should a defendant choose not to engage at this stage, that decision should not be held against him at a later stage in the proceedings.*" Such engagement will occur when it is agreed between the parties that it will assist the investigation.

327. In terms of what pre-charge engagement might involve, para.4 provides a list:

a. *Giving the suspect the opportunity to comment on any proposed further lines of inquiry.*
b. *Ascertaining whether the suspect can identify any other lines of inquiry.*
c. *Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.*
d. *Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.*

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e. *Agreeing any key word searches of digital material that the suspect would like carried out.*

f. *Obtaining a suspect's consent to access medical records.*

g. *The suspect identifying and providing contact details of any potential witnesses.*

h. *Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.*

328. The following potential benefits are identified:

a. *Suspects who maintain their innocence will be aided by early identification of lines of inquiry which may lead to evidence or material that points away from the suspect or points towards another suspect.*

b. *Pre-charge engagement can help inform a prosecutor's charging decision. It might avoid a case being charged that would otherwise be stopped later in proceedings, when further information becomes available.*

c. *The issues in dispute may be narrowed, so that unnecessary inquiries are not pursued, and if a case is charged and proceeds to trial, it can be managed more efficiently.*

d. *Early resolution of a case may reduce anxiety and uncertainty for suspects and complainants.*

e. *The cost of the matter to the criminal justice system may be reduced, including potentially avoiding or mitigating the cost of criminal proceedings.*

329. The Guidelines, like their predecessor, and in very similar terms, addresses the responsibilities of the investigator to "*pursue all reasonable lines of inquiry in relation to material held by third parties*" both within the UK, in other Government departments, and overseas. The basic premise of the AG's Guidelines remains as before, namely that the investigator, in consultation with the prosecutor, is required to seek out such third party material of potential relevance.

330. The repeated injunction in the Guidelines is that the investigator and prosecutor should take reasonable steps. These steps can, for example, involve taking out a summons to obtain material from domestic bodies, but the Guidelines also makes clear, in the context of international enquiries (para.49): "*The obligation on the*

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investigator and prosecutor under the CPIA Code is to take reasonable steps. Where investigators are allowed to examine the files of a foreign state but are not allowed to take copies, take notes or list the documents held, there is no breach by the prosecution in its duty of disclosure by reason of its failure to obtain such material, provided reasonable steps have been taken to try and obtain it. Prosecutors have a margin of consideration as to what steps are appropriate in the particular case, but prosecutors must be alive to their duties and there may be some circumstances where these duties cannot be met. Whether or not a prosecutor has taken reasonable steps is for the court to determine in each case if the matter is raised."

331. The new AG's Guidelines include a section focused on the initial disclosure that the prosecution should make to the defence either before the first hearing in a case expected to be tried in the Magistrates' Court, or before the PTPH in a case sent to the Crown Court. In keeping with the intention of the new Guidelines that disclosure should be a dialogue of the parties rather than all take by one and give by the other, the new Guidelines state (at para.81-82): "*The prosecutor must also encourage dialogue and prompt engagement with the defence about the likely issues for trial. The defence are under a duty to engage with the prosecutor in order to aid understanding about the defence case and the likely issues for trial at this early stage. This engagement assists in ensuring compliance with the overriding objective of the Criminal Procedure Rules*"

332. The guidance at para.87 (p.19) also identifies material which is likely to meet the test for disclosure. This is another of the innovations to the new Guidelines, which was foreshadowed in the consultation, namely the rebuttable presumption of disclosure of certain types of material. The consultation stated (at para.12) "*This presumption is intended to provide assistance to investigators and prosecutors, by 'nudging' them to consider this list of material. It is important to note, however, that this proposal is not intended to encourage 'automatic' disclosure: investigators and prosecutors should always apply the disclosure test, and consider each item of material carefully in the context of the case in question.*" The list of material likely to meet the test for disclosure appears at para.87, and at para.5.4 of the new Code. The list was helpfully summarised in the consultation (para.18) as follows:

"*a) Crime reports, including: crime report forms or any contemporaneous recording of an incident; an investigation log; any record or note made by an investigator, on which they later make a statement or which relates to contact with the suspects, victim or witnesses; an account*

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of an incident or information relevant to an incident or record of actions carried out by officers (such as house-to-house, CCTV or forensic enquiries) noted by a police officer in manuscript or electronically;

b) The defendant's custody record;

c) Any incident logs relating to the allegation;

d) Records which are derived from tapes/recordings of telephone messages (for example, 999 calls) containing descriptions of an alleged offence or offender;

e) Any previous accounts made by a complainant or by any other witnesses;

f) Interview records (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);

g) Any material casting doubt on the reliability of a witness e. g. previous convictions and cautions of any prosecution witnesses and any co-accused."

CONCLUSIONS

333. In the hope that it assists, I shall structure the conclusions that I have reached by reference to the questions I was asked to consider and in that order.

(a) Question 1: explanation of law and practice of the private conduct of investigations and prosecutions between 2000 and 2013

334. I have sought in the analysis above, at I am conscious some length, to explain the law and practice of the conduct of investigations and prosecutions by a private investigator/prosecutor between 2000 and 2013. What that analysis demonstrates is that throughout the Inquiry's period of focus, and indeed for a significant period before that, there had been a network of statutory requirements, regulation provided through Codes of Conduct issued under statute, and other forms of directly applicable and mandated guidance which sought to ensure that the procedures employed and decisions taken by investigative and prosecutorial bodies were fair, transparently auditable and accorded with the interests of justice.

335. Those requirements applied, in critical respects, every bit as much to a private prosecutor or non-crime agency investigation as to a police investigation or a CPS

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prosecution. This was made clear, for example, in R(Kay) v Leeds Magistrates' Court[263], in which Sweeney J observed (at para.23): *"a private prosecutor is subject to the same obligations as a Minister for Justice as are the public prosecuting authorities – including the duty to ensure that all relevant material is made available both for the court and the defence".* Although that was a case decided in 2018, that was a position that had been made clear for a considerable period before that.

336. The Judicial Protocol and Criminal Procedure Rules applied to those engaged in private prosecutions but other sources of statutory requirements, regulation issued through Codes of Conduct issued under statute, and other forms of directly applicable and mandated guidance had greater application to the issues I am otherwise asked to consider. In particular, this meant PACE and the Codes thereunder, CPIA and the Code thereunder and the AG's Guidelines.

337. Moreover, it was made explicitly clear, by section 67(9), PACE that PACE and the codes thereunder had application to investigators beyond police officers, and, by section 26, CPIA, that the CPIA and the Code thereunder had application to investigators and prosecutors beyond the police and CPS. The structure erected by this network of directive and guiding material is detailed and therefore complicated. It required those engaged in the investigation and prosecution of crime to receive instruction and guidance for each important stage of their duties. This, in my judgement, goes well beyond an acknowledgement that such material exists, and requires a clear exposition of what that material requires those involved in investigations and prosecutions to do, what tests they have to apply and how they are to apply them to the types of investigations and prosecutions in which they are required to engage. It also required a defined process to supervise their activity, and to ensure that they were applying the correct standards correctly.

338. In this regard, I have noted from the Post Office Security and Investigation Services workbook, entitled 'Investigation Policies and Health and Safety'[264], that the Post Office maintained the Lotus Notes Corporate Security Database. The training for accessing this database suggests that the Post Office operated a database on which its

[263] [2018] EWHC 1233
[264] POL00095320

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investigative policies were accessible, including its Investigative Standards and Criminal Procedures. I have not seen any detail as to what this database contained, how it was accessed and by whom. Clearly, there is great value to there being a readily accessible database both of Post Office policies and the network of directive and guiding material that these policies had to apply to Post Office investigations and prosecutions. However, it is not enough to know how to access such a database, it is essential that those charged with investigation and prosecution know what material they need to access, and how they need to apply it. There is also a need for those with a responsibility for directing and supervising their activities to know how to ensure they are applying the correct standards and directives correctly.

339. The CPIA (at section 3), although amended at various points, has always mandated the disclosure of material in the possession of the prosecution that undermines its case or assists the case of the defence. The CPIA Code addressed how this duty was to be undertaken, roles that had to be fulfilled in that process and how they were to be executed. This was, therefore, a duty on those undertaking investigations and prosecutions for the Post Office, and the roles to be performed, that applied to the Post Office throughout the relevant period. The duty was addressed in outline by a Post Office policy from 2001[265], but not in any real detail until July 2010[266]. These roles were addressed in Post Office policy documents from at least 2001[267], but not by reference to other sources of guidance that defined those roles and their requirements, such as the CPIA Code and especially the AG's Guidelines. Other aspects of the CPIA Code were addressed in Post Office documents only in the sense that the existence of the Code was acknowledged but its application was not.

340. The CPIA (at section 23(1) is explicit in requiring that "*where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued*". The Code of Practice thereunder is explicit in requiring (at para.3.4) that "*in conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect*". Those obligations applied to the Post Office throughout the 2000-2013 period, and there was

[265] POL00104762
[266] POL00104848
[267] POL00104762

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a requirement that this be recognised by those undertaking investigations for them. The first statement of this important principle in a Post Office policy document was in 2010[268]. Its omission from the earlier 2001 version is of concern. Also of concern is the lack of training material that I have seen that in any real way addresses the roles and responsibilities laid down by the CPIA, and the CPIA Code.

341. Importantly, in terms of guidance in relation to disclosure in particular, HM Attorney General has issued a succession of iterations of Guidelines on disclosure. The first version of this was issued at the beginning of the Inquiry's relevant period and two further versions were issued within those 13 years. Each was clear on its face that it applied to all prosecutors and investigators, and therefore it applied to those fulfilling those roles for the Post Office. The guidelines address the application of the CPIA Code as to the pursuit of reasonable lines of enquiry, the important role of prosecutors in advising the investigator on reasonable lines of disclosure and the undertaking of disclosure, the direct role of the prosecutor in relation to disclosure and the requirement for investigator and prosecutor to address the disclosure of third party material.

342. I have seen very little reference in any Post Office policy document to the AG's Guidelines, and no meaningful reference. The Guidelines were acknowledged but not analysed or applied in 2001, and even that acknowledgement was not replicated in the 2010 update of the Post Office policy. I have similarly not identified any substantive reference to, or addressing of the investigator or prosecutor's obligations in relation to third party material in any Post Office policy. Whilst there is reference to the obtaining of material from Fujitsu in relation to the Horizon System, this is in the context of obtaining evidence, rather than material that might undermine the prosecution case. Again, it is a real concern that such training material that I have seen that addresses disclosure (and that appears largely to date from 2012 and later[269]) does not refer to the AG's Guideline beyond recognising its existence, or to third party disclosure at all.

343. The CPS Code for Crown Prosecutors explicitly applies to the CPS, however, it is now recognised as a standard to be applied in determining decisions whether or not to

[268] POL00104848
[269] POL00094173 in 2012, POL00094141 in 2014, and POLPOL00094117 and POL00094121 in 2015

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prosecute by a much wider range of prosecuting authorities, and it was observed in *R(Holloway) v Harrow Crown Court*[270] that private prosecutors were expected to adopt the same approach as was there identified. This involves a determining of whether there is sufficient evidence to prosecute and that it is in the public interest to do so. The Post Office, in policy documents that I have seen, has acknowledged the application of the Code to its prosecutorial decisions since 2007[271], but there was not a detailed exposition of the application of the test laid down by the Code until 2013[272]. I have not seen any training material which sought to equip those who had to apply the Code for Crown Prosecutors as to how to go about doing so. Moreover, there was little if any analysis of those aspects of the Code of particular pertinence to the types of cases that the Post Office was prosecuting.

(b) Question 2(a): Issues relating to non-independent investigations

344. In my judgement, special difficulties can arise where the same body is the victim, a witness, the investigator and the prosecutor.

345. It has been recognised, for example in *Asif v Ditta*[273], that the fact that a private prosecutor has a motive other than the pursuit of justice for their actions does not necessarily make it improper for them to bring a prosecution. However, it is also clear from the analysis in that case that the motivation of a private prosecutor carries with it a risk that proceedings are brought that are not in the public interest or the interests of justice. Moreover, and importantly, the roles of investigator and prosecutor are roles that carry with them significant responsibilities, touched on in my consideration of question 1 above. Those responsibilities have, if they are to be undertaken properly, to be undertaken dispassionately, objectively and fairly.

346. There is a significant contrast between the Post Office as both investigator and prosecutor on the one hand, and the police, CPS and other prosecutorial and investigative agencies on the other. Both the police and CPS operate on a statutory basis. The powers of the police are contained, for example, in PACE. The role of both

[270] [2019] EWHC 1731 (Admin), at para.19
[271] POL00104812
[272] POL00030686
[273] [2021] EWCA Crim 1091

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the CPS and the DPP are laid down by the POA 1985. That Act also sets out in important respects the relationship between the CPS and investigative agencies, as are the foundations for decisions to prosecute. The SFO is also a creation of statute, and its operation and the superintendence of its Director are similarly laid down in statute, and a similar position arises in relation to other agencies, such as the Department of Work and Pensions. It is well recognised, for example in *R(Corner House Research) v Serious Fraud Office*[274] that independence was and is fundamental to the proper exercise of the powers of each prosecuting agency. The statutory structure for the operation of each agency, and the investigative agencies with whom they interact, provide a means not only to identify the powers that they are using, but the means by which they are using them.

347. There is a risk that may arise from a lack of such a statutory structure in that there is a lack of clarity and transparency as to areas of responsibility, routes to accountability and considerations relevant to the making of necessary decisions both in investigative and prosecutorial terms. More than that, the virtue of the deliberate distinction drawn by statute between prosecutor and investigator in, for example, the POA 1985 is that it ensures an independence of one from the other, and a role in terms of advice, superintendence and ultimate decision making in relation to criminal prosecutions to be taken by one rather than the other. In areas such a disclosure this is important because the structure depends on the prosecutor providing advice as to and undertaking a second review of decisions taken by the investigator to ensure that the correct decisions are reached. No such safeguards are built inherently or transparently into the system where the same organisation performs each role, and even more so where that organisation is also the victim of the alleged offending.

348. A solution to this difficulty is arguably presented by the approach adopted (at least now) by the HSE. The HSE Enforcement policy entrusts the decision of whether to commence a prosecution to the Approval Officer, who should not be closely involved in directing, or identified with, the investigation process. Whilst the decision making is within the same organisation, there is an attempt to separate the prosecution decision from the investigator.

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[274] [2009] 1AC 756, for example at paras.49 and 69

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349. In that regard here the wording of relevant policies operated by the Post Office does give rise to concern.

350. For example, the March 2000 Investigation and Prosecution Policy[275] identifies that investigations be undertaken, in part, by the Security and Investigation Services, which is to be superintended by the Director of Security who also takes prosecution decisions. The Director is enjoined to obtain legal advice, but the decision, as I read it, was then taken by a non-lawyer. That remained the case in policy terms in 2007[276], 2010[277] and 2012[278]. Similarly, the Royal Mail Group Prosecution Policy in 2009[279] and 2011[280] involved the Human Resources Director in prosecution decisions. Even where those decisions are required to apply the Code for Crown Prosecutors, they are decisions that are undertaken on legal advice by non-lawyers, as I read the policies. Moreover, the involvement of Human Resources, which has a role in the consideration of employment and disciplinary issues in the making of decisions as to criminal proceedings is of concern, as it might be suggested that prosecution was a part of the disciplinary process, rather than independent of it.

351. Similarly, a number of Post Office policies draw attention to financial and business-related factors in making investigative and prosecutorial decisions. For example:

(a) The Consignia Investigation Procedure issued in January 2001[281] stated: "*factors that influence as to whether certain actions are required [in the context of an investigation] are based upon the following: the potential loss to Consignia business in value, reputation and customer retention; quality and integrity of the information (intelligence) and the level of incident, of probability; timeliness as to whether the incident reported is recent or not; a named suspect.*"

(b) The factors relevant to investigative decisions in the Royal Mail Group Criminal Investigation and Prosecution Policy[282] included "*priorities of the business*".

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[275] POL00031012
[276] POL00104812
[277] POL00030580
[278] POL00030604
[279] POL00031011
[280] POL00030685
[281] POL00030687, at para.3.1
[282] POL00104812

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(c) The Crime and Investigations Policy, created in September 2008, in both an undated version[283] and in the October 2009[284] and April 2011[285] versions, identified that prosecution may be appropriate as an option "*where a business leader, manager or employee is the subject of a criminal investigation and grounds are established to suspect them of having committed a criminal offence, breached Royal Mail Group's code of business standards or subverted business systems, controls or policies.*"

352. I note that policies introduced in 2013[286] sought explicitly to introduce more independence into the prosecutorial decision making process, but I also note that a paper produced in February 2014[287] still talked in terms of there being an identified decision maker in relation to prosecutions being a future prospect. It is also of note that for those Post Office policies that acknowledged that legal advice would be taken in reaching prosecution decisions, there was little assistance as to what such advice would address, or what weight be accorded to it.

353. At this stage, I have not addressed the case specific decision making of Post Office personnel as to investigatory and prosecutorial steps, but any such assessment starts with consideration of the statutory framework and the policy instruction and guidance for those steps. On the review I have undertaken, one proper reading is that the same personnel were involved in dealing with decisions whether to start a disciplinary process, a criminal investigation and a criminal prosecution, and at each stage taking account of business priorities and financial considerations. That is not a reading that instils confidence in the independence, fairness or transparency of those decisions.

(c) Question 2(b): Post Office investigations policies

354. The terms, and adequacy, of Post Office policy documents concerning the conduct of investigations falls to be judged in a number of categories, by reference to the iteration of the policy being considered, and the statutory and other extra-Post Office guidance that applied to the areas addressed by those policies.

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[283] POL00031003
[284] POL00031003
[285] POL00030786
[286] POL00030686
[287] POL00100193

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355. In those policies which sought to address investigative areas otherwise covered by PACE, what was and is required is for them:

(a) to identify those areas that Post Office investigators can and cannot do themselves, and those which require involvement of the police;
(b) to identify how that liaison with the police is to operate, and how its results are to be assessed;
(c) to identify those areas which, by virtue of section 67(9), PACE, are governed by the Codes issued under PACE, and how their requirements are to be met.

356. There was identification in the policies of when the police had a role to play, for example in the Arrest Procedure Policy issued in 2001[288]. However, in those policies that came into effect early in the Inquiry's relevant period, there was in the main very little to address either of the other criteria. For example, the Consignia Investigation Procedure, issued in January 2001[289] stated (at para.3.1.2) "*Investigations. Collection of facts in accordance with the Police and Criminal Evidence Act and the other legislation.*" However, there was no reference in the document to the application or otherwise of the Codes, for example in relation to arrest, search, seizure or interviews, or even identification of which aspects of PACE and which "other legislation" was in contemplation. The same approach, and the same comment, applies to the Post Office Rules and Standards policy, as issued in October 2000[290], which identifies that investigators are bound by PACE and the Codes thereunder, without saying how.

357. There was, therefore, a risk that there would have been inadvertent non-compliance or inconsistent compliance with PACE. That risk was, to an extent, addressed by the training materials that were copyright in 2000 and which did seek to address relevant sections of the PACE Codes of Practice, for example in the context of searches, arrests and interviews.[291] However, the fact that such training material, apparently in 2000, identified PACE Codes and sections of those Codes that were of particular application to Post Office investigations, raises the question as to why the same analysis was not

[288] POL00104760
[289] POL00030687
[290] POL00104754
[291] POL00095326, POL00095334, POL00095321

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set out in relevant policies, so that it was clear to those applying those policies, and to those supervising or assessing such persons.

358. Later, the Royal Mail Group Ltd. Criminal Investigation and Prosecution Policy[292], in its December 2007 version and its November 2010 reissue[293], identified the areas to which PACE 1984 and its Codes had application generically, for example by reference to arrests and interviews, without setting out in any detail which aspects of which Code had to be referred to in order to understand how this application was to be achieved. Consistent PACE-compliance was therefore still not secured by application of the policies, and the same concerns as to the limited extent to which training alone could overcome these limitations again apply.

359. I also note in regard to the adequacy of earlier policies that under the section on "enquiry methods" in the 2001 policy relating to investigations[294] began "*these important aspects of investigation are the subject of detailed training given to new entrants to the Security Community and comprehensive training notes are issued. Aspects dealt with in this chapter are, therefore, restricted to procedures which need to be applied*". I have reviewed such training material as has been provided, which does helpfully and pointedly deal with the PACE Codes in various respects. However. it would not be adequate to expect those undertaking criminal enquiries to rely on the notes that they were given during training in order to secure statutory compliance during investigations, not least because the statutory and other framework will inevitably alter, and such notes will quickly be rendered out of date.

360. Indeed, that was recognised in the training for accessing the Lotus Notes Corporate Security Database[295] which stated "*legislation and Post Office Policies are always evolving and as such there are always changes in the law and the way in which investigations are conducted*". However, whilst the need to ensure that policies were kept up to date was there recognised, there are a number of occasions when this was not the case, for example in seeking to address revisions of the CPIA Code, or the new iterations of the AG's Guideline. Moreover, the need to ensure that those who had to apply the network

[292] POL00104812
[293] POL00104912
[294] POL00030687
[295] POL00095320

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of legislation and guidance did apply the current versions would not be satisfied just by putting new versions onto the database, if such an exercise was in fact undertaken. It would be necessary to ensure that they were made aware of such new versions, trained in such versions, and had the revised versions of policies which addressed in detail, not in very outline terms, how the policies gave effect to the current law.

361. Moreover, it is important that the procedures that are to be applied to criminal investigations are clearly and comprehensively identified in a resource open to all tasked with such investigations and accessible to those who have to audit, assess or apply the fruits of such investigations.

362. The position was addressed in greater detail, and did change as to detail in particular, in relation to interviews. However, my concern there was rather that there were too many policies. For example, policies issued in 2011 separately addressed interviewing suspects[296] with appendices which addressed "dealing with defence solicitors and complaints by suspects"[297], "juveniles and appropriate adults"[298], the use of interpreters[299] and "interviewing suspects in prison"[300]. There is an argument that one comprehensive document would have been of greater assistance. However, overall this package did allow for PACE-compliant interviews to be undertaken. The training in relation to interviews, and related aspects of the applicable PACE Code was also more detailed than in respect of other areas, the CPIA and guidance thereunder being an obvious contrasting example.

363. A similar approach, and similar development of detailed guidance in policy documents, can be identified in relation to those investigatory policies that addressed the application, by virtue of section 26, CPIA, of the CPIA and its Code of Practice to the Post Office. In policies issued in 2000[301], 2007[302] and 2010[303] there were references to the need to comply with the CPIA, without any identification of which parts of the

[296] POL00104867
[297] POL00104893
[298] POL00104894
[299] POL00104869
[300] POL00104870
[301] POL00104747
[302] POL00104812
[303] POL00104912

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CPIA were engaged, how compliance was to be achieved or reference beyond the fact of its existence to the Code. It is difficult to see how compliance would either be achieved or measured by reference to such policies, or by the lack of direct and detailed training, by reference to the training materials that I have seen.

364. Although elsewhere[304] the definition of a criminal investigation in Post Office policies accorded with that in the CPIA, the rationale and considerations relevant to those included some of the business-related factors referred to in answer to question 2(a) above. There was a development in the degree of detail given as to the different investigatory roles and the 3 Rs of recording, retention and revelation, from an adequate starting point in the Disclosure of Unused Material policy issued in May 2001[305], however as its name suggests this concerned disclosure rather than investigations more generally, where the more generic guidance above was more directly applicable. In relation to roles, it is of note that the CPIA Code recognised at para.3.1 that the functions of investigator and disclosure officer, whilst separate, could be undertaken by the same person. In contrast, in the 2001 Post Office it was recognised that this would be the norm. It follows that the necessary separation was normally not achieved as a norm rather than exception, and that cross-monitoring opportunity was lost.

365. In short, therefore, the policies that I have seen would have been of assistance to those engaged in investigations but would not have been sufficient of themselves to ensure that they understood which aspects of PACE, CPIA and their Codes had application, or how to monitor such application by others. This was stark in relation to disclosure, which I discuss further below, and to the pursuit of reasonable lines of enquiry, to which I turn now.

(d) Question 2(c): lines of enquiry

366. It is an important part of the Code under the CPIA that *"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular*

[304] For example POL00104762
[305] POL00104762

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circumstances". That obligation arises in every criminal investigation, and accords with the attitude of the Court of Appeal in *Ward*[306], which was one of the prompts for the CPIA and was a case where scientific material that undermined the prosecution case had not been disclosed and which, in the Court of Appeal's view, should have been. The requirement to pursue all reasonable lines formed part of the original 1997 Code (para.3.4), and it remained in the later iterations that applied throughout the Inquiry's relevant period (at para.3.5).

367. Despite this, the duties of an investigator to pursue a reasonable line of enquiry including those leading away from the suspect was not spelt out in any Post Office policy that I have identified until the 2010 revision of the 2001 Disclosure of Unused Material policy[307]. Similarly, this requirement was addressed in the 2013 Conduct of Criminal Investigations policy[308]. It follows that there was a significant period of time when, on my review of the policies, the need to investigate lines of enquiry that might exonerate the suspect was not spelt out as being necessary. It is difficult, therefore, to conclude at the policy level that such a requirement was recognised or undertaken. No training material that I have seen would have remedied this omission.

368. Clearly, in the present circumstances, that requirement in particular involves consideration of whether investigations included consideration of whether accounting shortfalls at Horizon terminals might lie with the computer system, either as a matter of course or where such a possibility was raised by a suspect in interview. Until 2013, no policy document that I have considered addressed the need for such a line of inquiry to be pursued. Indeed, if anything there was some suggestion to the contrary in the Post Office Casework Management policy[309], which both in its 2000 iteration and the February 2002 version of this policy[310] required full details of any "*failures in security or operational procedures are identified which may or may not be directly connected to the offence*" should be included in the investigation report. The policy added "*the issue of dealing with information concerning procedural failures is a difficult one. Some major procedural weaknesses, if they become public knowledge, may have an adverse effect on our*

[306] [1993] 1 WLR 619
[307] POL00104848
[308] POL00030670, at para.5.5.9
[309] POL00104747
[310] POL00104777

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business". Although the section concluded *"The usual duties of disclosure under the CPIA 1996 still apply."* In short, if my reading of the policies is correct, the need to be aware of the reliability or otherwise of Horizon data was not identified as a matter to be investigated routinely.

369. In the 2013 policy[311] just mentioned, there was reference to Horizon in the investigation context[312]. However, there was no reference to consideration of, or either investigation of or disclosure of, anything that might suggest a failure in the operation of the system, as opposed to failure by the subject in its operation. It was in the 2013 Prosecution Policy[313] that there was a reference to consideration of whether there was an issue as to the integrity or reliability of IT and data systems.

370. Clearly, this lack of guidance until 2013 is a matter for real concern. It did nothing meaningful to address the risk that those engaged in Post Office investigations would not have appreciated the need to consider the operation of Horizon and its operation as part of their investigations. This would in particular have been an issue after the repeal of section 69, PACE, to which I return below. It did not encourage prosecutors to consider this topic as a matter of course. Equally, its omission from policy reduced the chances of this being identified as an omission in any supervision or review of investigative steps and lines of inquiry. The extent to which this occurred in practice is a matter to be addressed in my second report.

Question 3(a): Charging decisions

371. There is a distinction between that which I can address in this report and that which will have to await the analysis of specific cases in my second report in relation to charging decisions. In this report I will consider the question of the test that the prosecutor ought to have applied in reaching charging decisions. Whether they in fact did so will need to await my second report. In the same way, questions as the evidence that the prosecutor reviewed when making a charging decision and the extent to

311 POL00030670, para.5.5.7
312 There was further, similar, reference in POL00114559
313 POL00030686, para.6.2

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which the charging decisions appear to be thorough and conscientious will be addressed in Volume 2.

372. The clear benchmark for the assessment of charging decisions is the Code for Crown Prosecutors. This sets out a detailed analysis that is required for the CPS to reach decisions as to whether a suspect should be prosecuted, by reference to whether there is a realistic prospect of a conviction evidentially and whether such a prosecution is in the public interest. Each of these two criteria, evidential and public interest, is addressed as a series of questions to be considered. This detail is important because it highlights a range of factors relevant to both stages of the test, some of which will have greater import in some factual circumstances than others. They can include, for example, consideration of material that might call into question the reliability of evidence that is relied on, and the fairness of relying on it. In other words, it is not sufficient simply to ask is there enough evidence to prosecute, but to drill down into the elements of that evidence and the implications of it.

373. The "full code" test contained in the Code has also been applied by a range of other prosecuting authorities, such as the SFO and Department of Work and Pensions. The Post Office similarly has identified the Code for Crown Prosecutors as containing the test to be used in reaching charging decisions. The earliest reference to the Code in Post Office policy in relation to prosecution decisions that I identified was in 2007[314], however the policy acknowledged the use of the Code, rather than addressing in any detail at all how it was to be applied, or which features peculiar to the offences investigated by the Post Office were most relevant to a charging decision in those cases. In policies thereafter, there were similarly explicit references to the Code in some instances[315], but equally others[316] where there was a reference to the two stage test alone without any reference to the Code and its unpinning analysis of what the application of each of those stages necessarily involved. In some of the latter instances[317], business and financial considerations were explicitly identified, where the Code and the factors it lists were not.

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[314] POL00030578
[315] For example POL00030685, POL00030682
[316] For example POL00030598, POL00031003
[317] For example POL00031003, POL00030786

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374. Of particular relevance here, the Code for Crown Prosecutors identified consideration of the reliability of evidence, and material identifying reasonable lines of enquiry in relation to that evidence. Each of those would logically include, where a potential prosecution depended on Horizon Data, whether there was anything that might undermine its reliability, and whether the investigation had identified and pursued the question of its reliability as a reasonable line of enquiry. On my reading, this was not addressed by Post Office polices until 2013, when the Prosecution Policy[318] specifically invited consideration of this issue.

375. It follows that for almost if not the whole of the Inquiry's relevant period, Post Office policies did not include any detailed application of the Code for Crown Prosecutors, to the extent that they recognised its application at all. The decision makers in relation to charging decisions would have received legal advice, at least from where such advice was mentioned in 2010[319], but the actual decision was at least potentially taken by a non-lawyer who may not have had necessary familiarity with the nuances of the Code, and received little assistance from the Post Office policies themselves as to how to approach their important task. I have not seen any training material that would have assisted with that process. Certainly, by reference to the policy documents themselves, it is not possible to be satisfied that charging decisions were reached through the proper, detailed and consistent application of the Code, and it is not possible to dispel the risk that they were not.

376. Beyond the core CPS guidance contained in the Code for Crown Prosecutors, the DPP has issued Guidance on Charging which addresses the interrelation of investigative and prosecutorial decision making in reaching charging decisions. This seeks to underline the independence of prosecution decisions. There is no reference to this guidance in the Post Office policies that I have seen. In contrast, as identified in relation to question 2(a) above, the Post Office policies at least suggested if not mandated a merging of the investigatory and prosecutorial decisions so that charging decisions were taken by persons involved in the superintendence of the investigation process, and who may have made the decision to investigate at all. This removed the

[318] POL00030686, at para.4.4
[319] POL00030580

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potentially important safeguard of an independent and ultimately decisive second opinion before a decision to charge was reached.

Question 3(b): The decision in *Eden*

377. The Court of Appeal sought to provide guidance as to the proper approach to be undertaken in relation to charging theft and false accounting as alternatives in *Eden*[320]. In short, Sachs LJ invited the Post Office to determine the circumstances in which theft and false accounting were alternatives, and the circumstance in which they sought a conviction for both offences. Although that decision was reached in 1971, I have not identified any explicit reference to it, or the considerations to which it gave rise, in Post Office policies relevant to charging until 2013[321]. That was not because there were no documents that addressed the selection of offences or their elements. Given that these were offences that would regularly form part of a charging decision process, it would have been of assistance to make sure that the decision and its ramifications were considered by those making those decisions.

378. As to whether it was a practice of the Post Office to charge both theft and false accounting despite having received judicial disapproval, this is a question that can further be evaluated in Volume 2 of my report. However, it is of note that in a paper "Post Office Audit, risk and compliance Committee Prosecution Policy", by Chris Aujard, dated February 2014[322] (at para.3.1) it recorded that the Post Office "*typically*" prosecuted sub-postmasters "*for false accounting combined with theft and/or fraud*". The paper went on to say that "*the choice of charge is largely dependent on whether we have obtained an admission of guilt, or other compelling evidence that the Defendant has taken money directly from us, or have only secured evidence that the Defendant covered up losses by falsely recording the branch's financial position…typically Defendants plead guilty to a charge of false accounting, with the charge of theft then being dropped*". It follows that there is on the material that I have seen no evidence of the implications of *Eden* being addressed, and some evidence that they had not.

[320] (1971) 55 Cr. App. R. 193
[321] POL00030686
[322] POL00100193

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379. Allied to this is the question posed as to whether there was a practice of plea bargaining in this regard (i.e. offering no evidence on a count of theft in return for a plea on a count of false accounting). Again, whether such a practice is demonstrated by the cases I am asked to consider will be addressed in Volume 2. At this stage, however, it is right to note that HM Attorney General issued guidelines as to the acceptance of pleas in 2000. These sought to address the circumstances in which alternative pleas might be taken in resolution of proceedings, and factors relevant to that assessment. I was unable to identify any explicit reference to this guidance in any Post Office policy before 2016[323]. This is, therefore, another category in which I have seen no evidence of the implications of the AG's Guidelines have been addressed, and some evidence that they had not.

Question 3(c): Initiation of proceedings

380. I am asked to consider how proceedings were commenced. It is clear from the policies that I have seen[324] that this was routinely undertaken through an application for the issue of a summons in the Magistrates' Court. This is a perfectly proper mechanism for the Post Office to have used, especially given that they did not have a routine power of arrest.

381. However, it was made clear in *R (Kay) v Leeds Magistrates' Court*[325] that there is an important duty of candour when applying for the issue of a summons. That duty is not addressed, in so far as I can see, in any of the relevant Post Office policies, and is also not alluded to in any training material that I have seen. In that case the types of matters that there was an expectation should be raised when an application for a summons was made were whether there was a potential application for abuse of process and whether the essential elements of the offence were not made out. There is an argument that this duty of candour would be engaged where it was appreciated that issues as to reliability in the Horizon system undermined the reliability of the core evidence relied on when applying for the summons and/or where it was appreciated that those issues, and issues as to disclosure of those issues, potentially rendered any proceedings an abuse of process. I will consider actual applications for summonses,

[323] POL00030686
[324] POL00104763, POL00104810 and POL00030670
[325] [2018] EWHC 1233 (Admin)

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where they are available, in Volume 2. However, the lack of reference to the duty of candour in policies referring to such applications does not instil confidence that the duty was appreciated or satisfied.

Question 3(d): Disclosure

382. I am asked to address a number of specific questions as to disclosure, which I will seek to do in Volume 2 of my report. However, it will be clear from my answer to question 1 that I do have concerns as to the adequacy of the disclosure regime established under pertinent Post Office policies during the 2000-2013 period, and that there is real question as to whether those policies were sufficient to ensure that disclosure was properly undertaken, considered and completed in cases prosecuted by the Post Office in that period. At the very least, by reference to those policies and the limitations to the training materials which addressed disclosure, there was a real risk that disclosure would not be completed properly.

383. This is of very real concern because the risks posed by failures of disclosure were already well understood before the Inquiry's relevant period commenced. The very real concerns about disclosure in *Ward*[326] have resonated through the criminal justice system for almost a decade, and early into the Inquiry's relevant period Lord Bingham had famously observed[327] *"Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."*

384. The Post Office correctly identified and at least briefly addressed the duty of disclosure under the CPIA, and the amplification of that duty in the CPIA Code, from 2001 in its disclosure policy[328]. However, it did so in outline, without specific reference to the Code. It did not do so in detail until July 2010[329], and evidence of any direct training in relation to disclosure post-dated that. The roles identified in the CPIA Code were,

[326] [1993] 1WLR 619
[327] H, C [2004] UKHL 3, at para.14
[328] POL00104762
[329] POL00104848

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similarly, addressed in Post Office policy documents from at least 2001[330]. As I have already made clear, it was not until that 2010 revision that the duty to address "*all reasonable lines of inquiry, whether these point towards or away from the suspect*" was explicitly set out in a Post Office policy. Those obligations applied to the Post Office throughout the 2000-2013 period, and there was a requirement that this be recognised by those undertaking investigations for them.

385. Importantly, as I have identified above, my particular concern in policy terms is the failure of Post Office policies that I have seen to refer to, apply and address the succession of iterations of the AG's Guidelines on disclosure. The guidelines address the application of the CPIA Code as to the pursuit of reasonable lines of enquiry, and, vitally, the important role of prosecutors in advising the investigator on reasonable lines of disclosure and the undertaking of disclosure.

386. Also critically, in my view, as a consequence perhaps of the fact that the AG's Guidelines were not addressed in Post Office policies the important guidance in the Guidelines as to the disclosure of third party material were not addressed. This is of great potential importance given that Fujitsu would represent a third party in possession of material that might have been relevant to prosecution cases by reference to its relevance to the reliability of the Horizon system. There was nothing in the Post Office policies that I have seen explicitly to direct a prosecutor's attention to the need to consider whether material had been sought as to the reliability of the system, or to assist as to how and from where that material should be sought if it was outstanding. That is a far from satisfactory position.

387. The CPS has routinely issued and updated a manual on disclosure so as to assist investigators and prosecutors as to how to understand and comply with their disclosure obligations, included as to third party disclosure. Whilst it might be said that this is a counsel of perfection by a far larger and busier prosecution authority, the fact remains that the Post Office had not produced any comparable, comprehensive guidance to those undertaking these same obligations in their cases. The fact that the CPS has long considered such a document to be necessary underlines the importance

[330] POL00104762

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of a resource that provides clarity as to how the important responsibility of disclosure in criminal proceedings is achieved. It underlines that a recitation of the central test is insufficient to achieve that end, and further underlines the need for clear and comprehensive guidance for anyone with a role in that process in any such case.

Question 3(e): Section 69, PACE

388. Finally, I am asked to address the potential relevance of the approach taken to reliance on Horizon data to the repeal of section 69 of PACE 1984 by the Youth and Criminal Evidence Act 1999.

389. It is right to acknowledge that the operation of section 69, PACE and the requirement for certification of the reliable operation of computer systems as a precursor to reliance on the output of such systems would have meant that there would have been routine consideration of the reliability of the Horizon system in Post Office prosecutions. It is beyond the scope of this report to address whether the material in the hands of investigators and prosecutors would have led to a realisation that such certification was not possible, and that reliance on such evidence was equally not permitted. However, it is clear that the operation of section 69 did cause very real resource implications for a range of prosecution authorities, and it was the Law Commission who ultimately decided that section 69 and its requirements were not necessary to achieve fairness in criminal proceedings.

390. It would be wrong to argue that the Post Office were either alone or in the vanguard of the process by which repeal of section 69 came about. They supported that repeal, but so too did a range of other prosecuting authorities, including the CPS. However, it would equally be wrong to say that the repeal of section 69 rendered it unnecessary further to consider the reliability of computer systems or the disclosure of material that touched on that reliability. Whilst there was a presumption of proper operation of such systems once section 69 had gone, it was a rebuttable presumption and the Law Commission proceeded, correctly, in the anticipation that material undermining the reliability would be obtained and disclosed.

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391. The mischief, therefore, if my analysis of Post Office disclosure policies is correct, was not in supporting the repeal of an explicit reminder and check on the reliability of computer data, but in not ensuring that a requirement to consider material relevant to that reliability represented an explicit and enforced aspect of the post-repeal disclosure regime.

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REPORT TO THE POST OFFICE HORIZON IT INQUIRY

PHASE 4

INVESTIGATION, DISCLOSURE AND CRIMINAL PROSCECTION IN ENGLAND AND WALES AND INVESTIAGTIONS AND PROSECUTIONS BY THE POST OFFICE 2000-2013

APPENDIX 1

DECLARATION

I, DUNCAN ATKINSON KC, DECLARE THAT:

1. I understand that my primary duty in writing reports and giving evidence is to give an objective, unbiased opinion on matters within my expertise in order to help the Inquiry to achieve its Terms of Reference. I understand that this duty overrides any obligation to the person from whom I have received instructions or by whom I am paid, I have complied and will continue to comply with that duty.

2. I have no conflict of interest of any kind, other than any which I have disclosed in this report, and I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issue about which I have expressed an opinion.

3. I have set out in my report what I understand from those instructing me to be the questions in respect of which my opinion as an expert is required.

4. I have endeavoured in my report and my opinions to be accurate and to have covered all relevant issues concerning the matters stated which I have been asked to address. The absence of any comment in this report does not indicate that I have no opinion on a matter. I may not have been asked to deal with it. All of the matters on which I have expressed an opinion lie within my field of expertise.

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5. I have endeavoured to include in my report those matters, of which I have the knowledge or of which I have been made aware, that might adversely affect the validity of my opinion.

6. Where, in my view, there is a range of reasonable opinion, I have indicated the extent of that range in the report and given reasons for my own opinion.

7. I have indicated the sources of all the information I have used.

8. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others (in particular my instructing lawyers).

9. At the time of signing the report, I consider that it is complete and accurate. I will notify those instructing me if, for any reason, I subsequently consider that the report requires any correction or qualification or if, between the date of this report and the giving oral evidence to the Inquiry, there is any change in circumstances which affect my declarations at (2) above.

10. I understand that: a) My report, subject to any corrections before swearing as to its correctness, will form the evidence to be given under oath; b) I may be cross-examined on the report by a cross-examiner assisted by an expert; c) I am likely to be the subject of adverse public criticism by the Chair if the Inquiry concludes that I have not taken reasonable care in trying to meet the standards set out above.

11. This report is provided to those instructing me with the sole purpose of assisting the Inquiry in this particular case. It may not be used for any other purpose without my express written authority.

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APPENDIX 2

DUNCAN ATKINSON KC

1. I was called to the Bar by Gray's Inn in October 1995, having obtained an L.L.B degree in Law from the University of Bristol. I was taken on as a tenant at 6 King's Bench Walk, now 6KBW College Hill in 1996, and have practised law from there ever since.

2. My primary specialism is in crime, with an element of public law and inquiry work. As Treasury Counsel between 2009 and 2022, I appeared in numerous complex and high profile homicide cases, including a number of high profile "cold cases", together with homicides involving issues of contested medical causation, diminished responsibility and child-death. I have particular expertise in cases of gross negligence manslaughter, and deaths in the context of health and safety regulation or state detention.

3. I have also appeared regularly in numerous cases concerning allegations of terrorism, and relating to organised crime. I have been instructed both in an advisory capacity and as an advocate in cases relating to breaches of Health and Safety and environmental protection regulation, both in criminal and inquest proceedings. Most recently, this has included representing 6 of the bereaved families at the Manchester Arena Inquiry.

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4. I am very regularly instructed by the CPS, but have also been instructed in the past by the HSE, SFO, DWP and Environment Agency. I have never been instructed by the Post Office. Whilst Treasury Counsel, I advised the CPS as to the revision of the Code for Crown Prosecutors, the Disclosure Manual and a number of specific charging guidelines. I have also in the past advised the SFO in relation to their manual, and the AGO in relation to the AG's Guidelines on Disclosure.

5. In public law terms, I have represented the Crown in a substantial number of cases before the Administrative Court. These have included recently:

   (a) Challenge to the decision making of the Attorney General (*Slade* [2018] EWHC 3573 (Admin)) and the Director of Public Prosecutions (*Redston v DPP* [2020] EWHC 2692 (Admin);
   (b) Challenge to decisions on abuse of process and prosecution activity in the magistrates' court (*DPP v Sunderland Magistrates Court* [2018] EWHC 229 (Admin) and *DPP v Charlesworth* [2022] EWHC 2835 (Admin));
   (c) Challenges by judicial review relating to SFO/Police search warrant applications and the acceptance by the Home Secretary and Serious Fraud Office of letters of request.

6. I have appeared in the Court of Appeal in recent times in relation to:

   (a) Referrals by the CCRC where issues arose as to diminished responsibility (*Hunnisett* [2021] EWCA Crim 265) and secondary liability in homicide (*Johnson-Hayes* [2019] EWCA Crim 1217);
   (b) Challenges to the statutory framework of the sentencing regime (*Patel* [2021] EWCA Crim 231; *Baker* [2020] EWCA Crim 176 and *AYO* [2022] EWCA Crim 1271);
   (c) The definition of sexual touching (*AG's Reference No.1 of 2020* [2021] QB 441);

7. I have also appeared in the Supreme Court on 5 occasions, most recently in relation to the propriety of prosecutions based on activity by paedophile hunters (*Sutherland v HM Advocate* [2021] AC 427).

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8. In terms of publications:

(a) Editor, *EU Law in Criminal Practice* (Oxford University Press)
(b) Co-Author, *Blackstone's Guide to the Criminal Procedure Rules* (Oxford University Press)
(c) Contributor, *Fraud: Criminal Law and Procedure* (Oxford University Press)
(d) Contributor, Kingsley Napley & 6KBW College Hill: *Serious Fraud, Investigation & Trial*
(e) Contributor, *Blackstone's Criminal Practice* (Oxford University Press)

CATHERINE BROWN

1. I was called to the Bar by Middle Temple in July 2005, having obtained an LLB degree in Law from the University of Newcastle. I was taken on as a tenant at Furnival Chambers in 2011. I have practised law ever since, initially from Furnival Chambers until May 2021 when I moved to 6KBW College Hill.

2. Currently my specialisms are extradition, public law and inquiry work.

3. I have appeared in high profile extradition cases before the Divisional Court raising challenges to extradition of significant complexity, including:

i. *Tiganescu v. The County Court of Suceava, Romania* [2022] EWHC 1371 (QB) – Concerning a challenge brought in respect of retrial rights in Romania.
ii. *Cleveland v. Government of the United States of America* [2019] 1 W.L.R. 4392 – The Divisional Court provided clarification on the proper approach to the drawing of inferences when considering arguments relating to dual criminality.
iii. *Francis v Government of the United States of America* [2019] EWHC 2033 (Admin) – Challenges brought in respect of Article 3 ECHR relating to prison conditions in the United States and family life pursuant to Article 8 ECHR.
iv. *Visha v. Italy* [2019] EWHC 400 (Admin) - Challenges brought in respect of Article 3 ECHR relating to risk factors arising due to blood feuds and prison conditions in Italy.

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4. My practice initially focussed on criminal law and I retain instructions in domestic criminal matters. I recently appeared in the Court of Appeal in a referral by the CCRC (*Rex v Joseph Tsang* [2023] EWCA Crim 350).

5. Consequently, I have significant experience of advising on disclosure requirements in domestic criminal cases and the disclosure obligations within the extradition regime.

6. I am on the Attorney-General's B Panel of counsel and have represented His Majesty's Government and public bodies in numerous cases before the Administrative Court and the County Court including challenges brought by way of judicial review concerning immigration decisions, search warrant applications and Prison Law. I am currently instructed as junior counsel for the Home Office in the Undercover Policing Inquiry. I regularly advise Government Departments on disclosure obligations and the Duty of Candour.

7. Moreover, I have represented both organisations and individuals in inquest proceedings before the Coroners' Courts and I have been instructed in proceedings brought by regulatory bodies including the Nursing and Midwifery Council and the Health & Care Professions Council. I have never been instructed by the Post Office.

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APPENDIX 3

Documents referred to in Volume 1

URN	Document	Paragraph no.	Footnote no.
LCAS0000124	Copyrighted Article "A Brief History of Investigations, Prosecutions and Security in Royal Mail"	23	13
POL00005989	Post Office Policy Document - Contract Breach (Final Version)	84	102
POL00026582	Post Office Ltd Financial Investigation Policy	74, 110	86, 135
POL00027501	Post Office Audit, Risk and Compliance Committee - Prosecutions Policy	17	4
POL00030578	S02 Royal Mail Group Criminal Investigation and Prosecution Policy December 2007	373	314
POL00030579	Post Office Ltd Financial Investigation Policy, May 2010	74, 110	85, 134
POL00030580	Post Office Ltd - Security Policy: Fraud Investigation and Prosecution Policy v2	55c, 74, 88, 155b, 350, 375	38, 87, 110, 161, 277, 319
POL00030598	Royal Mail Prosecution Decision Procedure	55e, 55f, 155c, 373	41, 42, 162, 316

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POL00030604	POL: Criminal Enforcement and Prosecution Policy	55g, 155e, 157, 350	43, 167, 173, 278
POL00030659	Post Office Internal Prosecution Policy (Dishonesty), Andrew Wilson December 1997	161, 162	177, 178, 179
POL00030670	Post Office IS05 Conduct of Criminal Investigations Policy v0.2 effective from 29 August 2013	71, 75, 111, 112, 112, 121, 192, 367, 369, 380	77, 88, 139, 140, 141, 150, 208, 308, 311, 324
POL00030685	Royal mail Group Prosecution Policy, v3.0, April 2011 - Rob Wilson (Head of Criminal Law Team)	55d, 106, 155d, 350, 373	40, 124, 163, 280, 315
POL00030686	Post Office Prosecution Policy England and Wales (effective from 1/11/13, review 1/11/14)	55h, 117, 158, 170, 182, 343, 352, 369, 372, 377, 379	46, 146, 174, 186, 200, 272, 286, 313, 318, 321, 323
POL00030687	Investigation Policy - Investigation Procedures v2 January 2001	64, 82, 83, 109, 111, 351a, 356, 359	53, 93, 96, 98, 131, 137, 281, 289, 294
POL00030771	Post Office Group Executive New Prosecutions Policy Proposal (Jane MacLeod) 17 December 2015	55j	49
POL00030786	Royal Mail Group Policy - Crime and Investigation (S2) v3 effective from April 2011, owner Tony March, Group Security Director	90, 91, 156, 351c, 373	112, 114, 115, 116, 170, 171, 172, 285, 317
POL00030787	Royal Mail Group Ltd Criminal Investigation and Prosecution Policy December 2007 version	19b	9
POL00030796	Post Office Prosecution Policy v1.0	106, 155d	126, 166
POL00030811	Post Office Limited Prosecution Policy for England and Wales v1	159, 182	175, 201
POL00030902	Final Draft of the Post Office Conduct of Criminal Investigation Policy	75, 112, 114b, 115	90, 140, 141, 142, 143, 144
POL00031003	Royal Mail Group Crime and Investigation Policy v1.1 October 2009	90, 91, 156, 351c, 373	112, 113, 115, 116, 168, 169, 171, 172, 283, 284, 316, 317
POL00031010	Investigation Policy - Investigation and Prosecution Policy v2 June 2002	19a, 55a	6, 34
POL00031011	RMG Prosecution Policy (undated) V2.1	55d, 106, 155d, 350	39, 123, 164, 279
POL00031012	Investigation Policy Appendix 16 - Investigation and prosecution policy	19a, 55a, 350	6, 34, 275
POL00031034	Post Office Prosecution Policy V1	106, 155d, 373	125, 165, 315
POL00094117	Presentation on Principles of Disclosure	92, 117, 243, 290, 316, 342	120, 148, 241, 253, 261, 269

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POL00094121	The Pocket Notebook Presentation for investigating officers	92, 243, 342	118, 242, 269
POL00094140	Post Office training event guide: Preparing for interview & special statements; special warnings; stacked cases update; and witness statements - By Cartwright King	67b, 75	59, 92
POL00094141	POST OFFICE training event guide: excluding illegally obtained/unfair evidence; witness statements; commencing proceedings, the pocket notebook & police statutory arrest powers	67a, 75, 92, 192, 243, 316, 342	58, 92, 117, 214, 242, 261, 269
POL00094144	Guide on the cognitive witness interview process (Introduction to Investigations Workshop)	67b	59
POL00094145	3R's Template - suspect interviewing	67b	59
POL00094149	Criminal Investigation E-books 1-9 - Summary	73, 240, 264	84, 237, 249
POL00094151	Handout relating to Searching Policy, part of Introduction to Investigations Workshop	21, 67c	12, 60
POL00094173	Cartwright King / Post Office Training Day 20 - 21 December 2012 - PACE Code C	67b, 75, 92, 117, 243, 290, 316, 342	59, 91, 120, 147, 240, 252, 261, 269
POL00094195	Training exercise on Person Searches	21	12
POL00094206	Learning Session Guide on Searching of clothing, premises and cars, practical exercises	21, 67c	12, 60
POL00095320	The Post Office Security and Investigation Services workbook - Investigation Policies and Health and Safety.	25, 338, 360	14, 264, 295
POL00095321	Security & Investigation Services Manual re: Security Foundation Programme - Open Learning - Caution and Interview	65, 67b, 357	55, 59, 291
POL00095324	Security Foundation Programme - Open Learning Notebooks	92, 109, 240	119, 133, 238
POL00095325	The Post Office, Security Foundation Programme - Open Learning PACE Codes of Practice Workbook	64, 65, 69	53, 55, 68
POL00095326	Security Foundation Programme - Open Learning Powers of Arrest	67a, 357	8, 291
POL00095329	Security Foundation Programme - Open Learning: Theft 2 (Deception/Handling Stolen Goods/Going Equipped to Steal)	169	185
POL00095332	Security Foundation Programme - Open Learning Non-Police Prosecuting Agencies (NPA) Documentation	183	205
POL00095334	Workbook for Security Foundation Programme - Search (part of Post Office	21, 65, 67c, 357	12, 55, 60, 291

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	Security and Investigation Services training)		
POL00095337	The Post Office Guidance on conducting Tape Recorded Interviews England and Wales	67b	59
POL00100193	Post Office Audit - Risk and Compliance Committee - Prosecutions Policy	17, 55j, 168, 253, 378	5, 48, 181, 287, 322
POL00104744	Investigation Policy: Interview Recording v2.0	69	65
POL00104745	Investigation Policy: Appendix 1 - Interviews under PACE (England & Wales only)	69	66
POL00104746	Investigation Policy: Offender reports [Appendix 6 to Investigation Policy] v1.0	86	106
POL00104747	Investigation Policy: Casework Management (England & Wales) v1.0	86, 237, 263, 363, 368, 21, 72	105, 234, 246, 301, 309, 11, 80
POL00104753	Investigation Policy: Recording Evidence Gained on an Investigation [Appendix 10 Investigation Policy] v2.0	82	95
POL00104754	Investigation Policy: Rules & Standards v2.0	55a, 64c, 108, 356	35, 54, 129, 290
POL00104757	Investigation Policy: Relations with Police Authorities and Other Public Bodies v3.0	19a	8
POL00104758	Investigation Policy: Interviewing v2.0	69	64
POL00104759	Investigation Policy: Reporting of Criminal Offences to Police [Appendix 15 Investigation Policy] v1.0	19a	7
POL00104760	Investigation Policy: Arrest procedures v2.0	68, 127, 356	61, 151, 288
POL00104762	"Investigation Policy: Disclosure of Unused Material, Criminal Procedures and Investigations Act 1996 Codes of Practice" v0.1	83, 106, 207, 109, 111, 238, 264, 274, 316, 339, 364, 384	97, 122, 128, 132, 138, 236, 248, 250, 259, 265, 267, 304, 305, 328, 330
POL00104763	Royal Mail Group Security – Procedures and Standards: Summons & Cautioning England and Wales v4.0	183, 192, 380	202, 209, 324
POL00104765	Investigation Policy (App 1a): Interview Recording v3.0	69	65
POL00104774	Investigation Policy: Interviews under PACE (England & Wales only) v4.0	69	66
POL00104777	Investigation Policy: Casework Management (England & Wales) v4.0	86, 110, 237, 263, 368	107, 136, 235, 247, 310
POL00104793	Investigation Policy: Reporting of Criminal Offences to Police [Appendix 15 Investigation Policy] v3.0	19a	7

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POL00104806	Royal Mail Group Security – Procedures and Standards: Standards of behaviour and complaints procedure No.10-X v2	55a	35
POL00104807	Royal Mail Group Security – Procedures and Standards: Reporting of Criminal Offences to Police No. 1-X v2	19a	7
POL00104810	Royal Mail Group Security – Procedures and Standards: Summons & Cautioning (England and Wales) P&S Doc 9-X v1	183, 192, 380	203, 210, 324
POL00104812	"Royal Mail Group Ltd Criminal Investigation and Prosecution Policy"	19b, 55b, 67, 73, 84, 85, 87, 155a, 343, 350, 351b, 358, 363	9, 36, 56, 82, 99, 101, 103, 108, 159, 271, 276, 282, 292, 302
POL00104819	Royal Mail Group Security Procedures & Standards: Official Notebooks, P&S Doc 5.2 v2	82	94
POL00104823	Royal Mail Group Security Procedures & Standards: Criminal Offences Points to Prove P&S Doc 7.3 v2	169	182
POL00104828	Royal Mail Group Security Procedures & Standards: Searching No. 7-X v5	21	11
POL00104848	Royal Mail Group Security Procedures & Standards: Appendix 1 to P&S 9.5 Disclosure of Unused Material & The Criminal Procedure & Investigations Act 1996. Version 1.	89, 106, 108, 116, 121, 241, 274, 316, 339, 340, 367, 384	111, 127, 130, 145, 149, 239, 251, 260, 266, 268, 307, 329
POL00104849	Royal Mail Group Security Procedures & Standards: Searching doc 7.5 v6	21, 72	11, 80
POL00104853	Post Office's Financial Investigation Policy	74	85
POL00104859	Appendix 1 to P&S 7.4 Interviewing suspects on tape quick reference guide England and Wales doc 7.4 v1	70	75
POL00104867	Royal Mail Internal Information Criminal Investigation Team: Interviewing Suspects 7.4 v1 policy	70, 362	69, 296
POL00104868	"Royal Mail Internal Information, Criminal Investigation Team: Suspect Approach and Arrest Procedures" v1	68	62
POL00104869	Royal Mail Internal Information, Criminal Investigation Team, Appendix 9 to 7.4 – Interpreters at Suspect Interviews v1	70, 362	72, 299
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RLIT0000037	Inland Revenue response to Law Commission Consultation Paper 138 - Evidence in Criminal Proceedings: Hearsay and Related Topics	208d	226

Publicly Available Documents

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1	Bates v Post Office Ltd (No.6: Horizon Issues) [2019] EWHC 3408 (QB)	2	2
2	Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)	2	1

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3	Hamilton v Post Office Ltd [2021] EWCA Crim 577	2	3
4	R. v DPP Ex p. Manning [2001] QB 330	29	15
5	R. (on the application of Corner House Research) v Director of the Serious Fraud Office [2008] EWHC 714 (Admin)	33	17
6	R. (Corner House Research and another) v Director of the Serious Fraud Office (Justice intervening) [2009] 1 AC 756	33, 346	16, 274
7	R. v Puddick (1865) 4 F & F 497	37	20
8	R. v Banks (Frank Herbert) [1916] 2 KB 621 at p. 623	37, 43	21, 26
9	*R v Gonez* [1999] All ER (D) 674	37	22
10	R (Virgin Media Ltd) v Zinga [2014] EWCA Crim 52; R. v Zinga (Munaf Ahmed) [2014] 1 WLR 2228	40	23
11	R. (on the application of Kay) v Leeds Magistrates' Court [2018] EWHC 1233 (Admin)	41, 137, 189, 381	24, 154, 207, 325
12	R v Becerra and Cooper (1975) 62 Cr App R 187	42	25
13	Asif v Ditta [2021] EWCA Crim 1091; Asif v Ditta [2021] 2 Cr. App. R. 21	44, 345	27, 273
14	*R. v Maxwell (Paul)* [2010] UKSC 48	44	28
15	Tan Soon Gin (George) v Cameron (1993) 96 Cr. App. R. 405	45	29
16	D Ltd v A & Ors [2017] EWCA Crim 1172	46	31
17	R. (on the application of Smith-Allison) v Westminster Magistrates' Court (No.1) [2021] EWHC 2361 (Admin)	46	30
18	The Director of Public Prosecutions, R (On the Application Of) v Sunderland Magistrates' Court [2014] EWHC 613 (Admin)	53	32
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24	R. v Eden (Thomas Henry) (1971) 55 Cr. App. R. 193	164, 377	180, 320
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26	R. v Soanes (Dorothy Clara) (1948) 32 Cr App R 136	174	189
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29	SI 1981/552 (The Magistrates' Court Rules 1981)	185	206
30	Sophocleous v Ringer [1988] RTR 52	193	215
31	R. v Minors (Craig) (1989) 89 Cr. App. R. 102	196	216
32	Law Commission Consultation Paper No.138, para.14.7	199	217
33	'Computer Statements in English Civil Proceedings' (1994) 3(1) Law, Computers & Artificial Intelligence 3,13	202	219
34	Phipson, 5th edition (1979) p.47, as quoted by the Law Commission at para.14.28	202	220
35	The Hearsay Rule in Civil Proceedings (1993) Law Com. No.216, para.4.43	202	218
36	HOCO0000001, page 1	205	221
37	HOCO0000001, pages 2 to 3	206	222
38	Cracknell v Willis [1988] AC 450	209	227
39	R. v Ward (Judith Theresa) [1993] 1 WLR 619	214, 366, 383	231, 306, 326
40	H, R v [2004] UKHL 3	216, 306	232, 256
41	Part 15, Criminal Procedure Rules 2020, and rule 15.2	228	233
42	Alibhai & Ors, R v [2004] EWCA Crim 681	253a, 299, 300	244, 254, 255
43	Bater-James & Anor v R [2020] EWCA Crim 790	253b, 307, 314	245, 257, 258
44	Kay & Anor, R (on the application of) v Leeds Magistrates' Court & Anor [2018] EWHC 1233	335	263
45	Broad (1978) 68 Cr App R 281	173a	188
46	Director of Public Prosecutions, R (on the application of) v Chorley Justices & Anor [2006] EWHC 1795 (Admin)	319b	262
47	SI 2015 No.1783 (The Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015)	58a	50
48	SI 2013 No.1542 (The Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013	58b	51
49	SI 2009 No.1922 (The Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009)	58c	52