

Thursday, 5 October 2023

1
 2 (10.00 am)
 3 MR BEER: Good morning, sir. Can you see and hear
 4 me?
 5 SIR WYN WILLIAMS: Yes, I can. Thank you.
 6 MR BEER: With your leave, may I call Duncan
 7 Atkinson KC, please.
 8 SIR WYN WILLIAMS: Of course, yeah.
 9 RICHARD DUNCAN ATKINSON KC (sworn)
 10 Questioned by MR BEER
 11 MR BEER: Good morning, Mr Atkinson. As you know,
 12 my name is Jason Beer and I ask questions on
 13 behalf of the Inquiry. Can you give us your
 14 full name, please?
 15 A. My full name is Richard Duncan Atkinson but
 16 I answer to the name of Duncan.
 17 Q. Thank you. You've been instructed by the
 18 Inquiry as an independent expert to assist the
 19 Inquiry -- and this is a very high level summary
 20 of the tasks -- as to the law and practice of
 21 the conduct of investigations and prosecutions
 22 by a private investigator or prosecutor between
 23 the years 2000 and 2013 and the compliance or
 24 not of the Post Office with that law and
 25 practice in some of the investigations that it

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1 the work I'd done at the time. I prepared this
 2 report with a view to completing Part 2 but
 3 I have not yet completed Part 2.
 4 Q. I understand. Now, the first part of your task,
 5 that's addressed in volumes 1 and 1A of your
 6 report; is that right?
 7 A. Yes.
 8 Q. Can we look at those, please. Volume 1 is -- it
 9 will come up on the screen for you and I think
 10 you've got a hard copy there --
 11 A. I have.
 12 Q. -- EXPG0000002. Is that the first page of
 13 Volume 1 of your report?
 14 A. Yes, it is.
 15 Q. I think it runs to 181 pages including
 16 appendices?
 17 A. I'm afraid so.
 18 Q. That report addresses all issues of the Part 1
 19 task, apart from expert evidence; is that right?
 20 A. Yes.
 21 Q. Are the contents of this report true to the best
 22 of your knowledge and belief?
 23 A. Yes.
 24 Q. Can we turn, please, to page 167. You should
 25 find there Appendix 1 --

3

1 undertook and the prosecutions that it initiated
 2 and pursued in those years; is that right?
 3 A. Yes.
 4 Q. You have, I think, at the Inquiry's request,
 5 divided your task into two parts: the first part
 6 concerns the legal framework for investigation
 7 and prosecution, both in the Post Office and
 8 more broadly, and the framework relating to the
 9 responsibilities of prosecuting authorities,
 10 investigators, charging decisions, prosecutions,
 11 expert evidence and disclosure.
 12 A. Yes.
 13 Q. That concerns consideration of the applicable
 14 statutory provisions, the codes of practice
 15 issued under statute, guidelines, guidance, case
 16 law and other material from a range of sources,
 17 and then consideration of the policy documents
 18 and guidance issued by the Post Office?
 19 A. Yes.
 20 Q. The second part of your task is to assess how
 21 the framework that you have so outlined was in
 22 fact applied by the Post Office in specific
 23 investigations and prosecutions by reference to
 24 specific cases?
 25 A. Yes, and I should say that I have moved beyond

2

1 A. Yes.
 2 Q. -- which contains an expert's declaration. I'm
 3 not going to ask you to read it all out now but
 4 if the operator can just scroll through, please,
 5 we'll see 11 paragraphs of a declaration, it
 6 goes over the page. Are the declarations you
 7 make on those two pages correct?
 8 A. Yes.
 9 Q. Thank you. Can we turn to volume 1A, please,
 10 which is EXPG0000003.
 11 Is this the front page of follow 1A of your
 12 report?
 13 A. Yes, it is.
 14 Q. I think, with appendices, that is 15 pages long.
 15 Are the contents of that report true to the best
 16 of your knowledge and belief?
 17 A. Yes, they are.
 18 Q. Do the expert witness declarations that we've
 19 just seen, the 11 declarations, apply equally to
 20 this report too?
 21 A. Yes, they do.
 22 Q. Thank you very much. I think you are to provide
 23 the Inquiry with a Volume 2 report reflecting
 24 your opinion on Part 2 of your instructions and
 25 you're to return to the Inquiry later this year,

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1 in December, to provide further oral evidence;
2 is that right?

3 **A.** Yes, that's right.

4 **Q.** I think it's right however, as you've just said,
5 that you've now already reviewed a quantity of
6 the material that's relevant to your Volume 2
7 report, and has that assisted you in
8 understanding and giving an opinion on the
9 issues raised in the two reports that we're
10 considering today?

11 **A.** Yes, it has.

12 **Q.** Can I start then, please, with your background
13 and experience. Your CV is set out in
14 Appendix 2 to your Volume 1 report. It's
15 page 169 through to 171 for the transcript but
16 can I summarise it, and tell me whether you
17 agree or disagree, certainly the key elements of
18 it. You were called to the Bar in 1995 and took
19 silk in 2015; is that right?

20 **A.** *(No audible response)*

21 **Q.** You were Treasury Counsel between 2009 and
22 2022 --

23 **A.** Yes.

24 **Q.** -- including a period of Senior Treasury Counsel
25 from 2015?

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1 those publications that are significant and
2 relevant for our purposes, are you a co-author
3 of *Blackstone's Guide to the Criminal Procedure*
4 *Rules*, an OUP publication?

5 **A.** Yes.

6 **Q.** Also are you a contributor to *Blackstone's*
7 *Criminal Practice* also by Oxford University
8 Press?

9 **A.** Yes, the latter in a more up-to-date way than
10 the former.

11 **Q.** Thank you. I've already set out at a high level
12 the nature of your instructions. Can we look at
13 your Volume 1 report at page 5, please. That's
14 EXPG0000002 at page 5. This sets out, in
15 slightly more detail, the issues that you were
16 asked to consider and they were divided in broad
17 terms between issues relating to investigations,
18 on the one hand, and prosecution on the other;
19 is that right?

20 **A.** Yes, that's right.

21 **Q.** "In relation to investigation [you were asked:
22 "Whether any special difficulties arise,
23 where the same body is the victim, a witness,
24 the investigator and the prosecutor and, if so,
25 what should be done to ensure independence of

7

1 **A.** Yes.

2 **Q.** You are a specialist criminal practitioner with
3 elements of your practice involving both public
4 law and public inquiry work?

5 **A.** Yes.

6 **Q.** Have you regularly prosecuted for the Crown
7 Prosecution Service?

8 **A.** Yes.

9 **Q.** But also the Health and Safety Executive --

10 **A.** Yes.

11 **Q.** -- the Serious Fraud Office, the SFO --

12 **A.** Yes.

13 **Q.** -- and the Environment Agency?

14 **A.** Yes.

15 **Q.** Have you ever been instructed by Post Office
16 Limited?

17 **A.** No.

18 **Q.** Do you have any direct experience of private
19 prosecutions during what I'm going to call the
20 relevant period, which is 2000 to 2013?

21 **A.** Yes.

22 **Q.** Is that as prosecuting counsel or defence
23 counsel or both?

24 **A.** Both.

25 **Q.** I think you are widely published but, amongst

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1 decision making", and you address that in your
2 report?

3 **A.** Yes, I do.

4 **Q.** You were asked to address:

5 "The terms, and adequacy, of [the Post
6 Office's] policy documents concerning the
7 conduct of investigations ..."

8 You addressed that in your report?

9 **A.** Yes.

10 **Q.** You were asked to consider:

11 "The duties of an investigator to pursue
12 a reasonable line of enquiry (generally, and
13 also where a person positively asserts that they
14 believed the problems they had experienced,
15 (accounting shortfalls at their Horizon
16 terminals) might lie with the computer system)."

17 **A.** Yes, that's right.

18 **Q.** Then, in relation to the second half broadly,
19 you were asked to address, under the heading of
20 "Prosecutions", charging decisions, including
21 the test that the prosecutor applied or ought to
22 have applied, including an analysis of Post
23 Office, prosecutorial guidance and policy and
24 any policy decisions made in relation to
25 prosecutions based on Horizon evidence.

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1 A. Yes.
 2 Q. You address that in your report.
 3 A. *(The witness nodded)*
 4 Q. The evidence that the prosecutor reviewed when
 5 making a charging decision or which they ought
 6 to have reviewed; the extent to which the
 7 charging decisions appear to be thorough and
 8 conscientious; the approach said to have been
 9 undertaken of charging theft and false
 10 accounting; and your attention was drawn to the
 11 decision of the Court of Appeal in *Eden* in which
 12 the practice of the Post Office charging both
 13 theft and false accounting received judicial
 14 disapproval.
 15 You were asked to address how proceedings
 16 were commenced by the application for the issue
 17 of a summons in the Magistrates Court and the
 18 existence of a duty of candour when applying for
 19 such a summons.
 20 A. In relation to that and, indeed, in relation to
 21 3A(ii)(3) and to an extent (4), what I've looked
 22 at for the purposes of this report is what there
 23 is in policy terms and in terms of why the
 24 guidance in relation to those issues, what
 25 evidence was actually reviewed. The

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1 arises in case A, there is a duty to give
 2 disclosure of it in cases B, C and D, et cetera.
 3 You address that in this report?
 4 A. To an extent but I think that's more a question
 5 for Volume 2.
 6 Q. Lastly, prosecutorial practice:
 7 "The practice said to have been undertaken
 8 of 'plea bargaining' (ie offering no evidence on
 9 a count of theft in return for a plea on a count
 10 of false accounting)."
 11 Lastly:
 12 "The relevance of the approach taken to
 13 reliance on Horizon data to the repeal of
 14 [Section 69] of the Police and Criminal Evidence
 15 Act 1984 by the Youth and Criminal Evidence Act
 16 1999."
 17 A. Yes.
 18 Q. That can come down, thank you. I think you were
 19 provided with a very large volume of material;
 20 is that right?
 21 A. Yes.
 22 Q. That's listed in Appendix 3 to your report.
 23 There's no need to turn it up. For the
 24 transcript, it's pages 173 to 179 of the
 25 transcript. Did you yourself additionally refer

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1 thoroughness or otherwise of actual charging
 2 decisions, and so on, is a Volume 2 matter
 3 rather than for now.
 4 Q. Yes. You were asked to, under this heading,
 5 consider thirdly "Disclosure":
 6 "Whether there was a "disclosure officer"
 7 (as would exist in a prosecution conducted under
 8 the CPIA), or equivalent (and, if not, any
 9 difficulties that this created) ..."
 10 Again, is that something of a mixed --
 11 A. Yes, it is.
 12 Q. -- issue, in that in this report or in these
 13 reports you've considered whether there was
 14 policy relating to that issue. In your Volume 2
 15 report, you'll address the position on the
 16 ground?
 17 A. Absolutely.
 18 Q. Under this heading you were asked to consider
 19 whether prosecutors reviewed the adequacy of
 20 disclosure. Again, mixed question in this
 21 report; you consider whether policy documents
 22 required them to?
 23 A. Yes, or equipped them to.
 24 Q. The extent, lastly, under this subheading, of
 25 the duty of cross disclosure, ie where an issue

10

1 to a large volume of publicly available
 2 material?
 3 A. Yes, in the versions that I was able to obtain.
 4 Q. More of which later?
 5 A. Yes.
 6 Q. So, in your Volume 1 and 1A reports, you
 7 cross-refer to publicly available material by
 8 way of hyperlinks that are embedded in your
 9 report --
 10 A. Yes.
 11 Q. -- so the reader can click through and read
 12 them, to or by footnotes --
 13 A. Yes.
 14 Q. -- in your Volume 1 and 1A reports. Is all of
 15 that material listed in Appendix 3, Part 2 --
 16 A. Yes.
 17 Q. -- of your Volume 1 report. That's pages 179 to
 18 181, for the transcript.
 19 Were you additionally provided with
 20 a quantity of material emanating from the Post
 21 Office, consisting of, in broad terms, policies,
 22 guidelines and guidance.
 23 A. Yes, at various stages while I was working on
 24 the report and since.
 25 Q. Were you provided more recently with a report

12

1 commissioned by the Post Office Limited and
 2 written by Jonathan Laidlaw King's Counsel?
 3 **A.** Yes, I was.
 4 **Q.** And also provided with a substantial body of the
 5 material that was referred to in his report?
 6 **A.** Yes.
 7 **Q.** I think you were assisted in the assimilation of
 8 material and the compilation of your volume 1
 9 and 1A reports by Catherine Brown?
 10 **A.** Yes, I was.
 11 **Q.** A barrister in your chambers --
 12 **A.** Yes.
 13 **Q.** -- I think, whose CV is set out on pages 171 and
 14 172 of your Volume 1 report. But are the
 15 opinions that you give in the report, and those
 16 that you're able to give today, your own?
 17 **A.** Yes, they are.
 18 **Q.** Thank you. Can we start, please, by looking at
 19 Volume 1 of the report, EXPG0000002, and look,
 20 please, at page 4. At paragraph 2.1, if we
 21 scroll down, you say:
 22 "I am asked to address the following
 23 questions in this report:
 24 "An explanation of the law and practice of
 25 the conduct of investigations and prosecutions

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1 Prosecution Service, the CPS?
 2 **A.** Yes.
 3 **Q.** In that circumstance, it acts on behalf of or
 4 prosecutes for the Police Service?
 5 **A.** Amongst others, by reference to the Prosecution
 6 of Offences Act, which sets out its statutory
 7 position.
 8 **Q.** And there are a large number of other bodies
 9 that it prosecutes for?
 10 **A.** Yes. Which are listed in, I think, Section 3 of
 11 that Act.
 12 **Q.** You identify in paragraph 34 of your report --
 13 there's no need to turn it up -- other entities
 14 with the statutory power to prosecute during the
 15 relevant period covered by your report, those 13
 16 or so years, including the SFO, the Serious
 17 Fraud Office, or the Director of the SFO, the
 18 Department of Work and Pensions the Health and
 19 Safety Executive and the Environment Agency.
 20 Would you agree that those entities are public,
 21 rather than private prosecutors?
 22 **A.** They're, in some respects, something of
 23 a hybrid, certainly on the basis to the approach
 24 that the Court of Appeal and House of Lords have
 25 taken to it. Sometimes they have treated them

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1 by a private investigator/prosecutor between
 2 2000 and 2013 (focusing on the application or
 3 non-application (as the case may be) of", and
 4 then a series of statutes and other instruments.
 5 **A.** Yes.
 6 **Q.** Would you agree that a private prosecution is
 7 a prosecution started by a private individual or
 8 a private entity which is not acting on behalf
 9 of the police or some other prosecuting
 10 authority?
 11 **A.** Certainly not acting on behalf of the police.
 12 I think it slightly depends on your definition
 13 of the authority as to whether it is a private
 14 prosecution truly ascribed or not.
 15 **Q.** Would a way of describing a "prosecuting
 16 authority", in inverted commas, include
 17 an entity which has a statutory power to
 18 prosecute?
 19 **A.** Yes.
 20 **Q.** But it could extend beyond that?
 21 **A.** Yes.
 22 **Q.** So it includes but not limited --
 23 **A.** Absolutely, yes.
 24 **Q.** -- to such an entity. So would the classic
 25 example of a public prosecutor be the Crown

14

1 as being public and sometimes private but with
 2 a statutory basis for their activities.
 3 **Q.** In what context have they approached that
 4 hybrid --
 5 **A.** Looking at the -- usually, in the context of
 6 a challenge to a decision either to prosecute or
 7 not to prosecute, as to the extent to which they
 8 were required to apply, for example, the Code
 9 for Crown Prosecutors and, if not, what test
 10 they were meant to apply.
 11 **Q.** So is your answer to the question it is too
 12 simplistic to put a label on them of "public
 13 prosecutor" or "private prosecutor"?
 14 **A.** Yes.
 15 **Q.** Did you consider, for the purposes of your
 16 report, the policy and practice of any other
 17 classically private prosecutor, other than the
 18 Post Office?
 19 **A.** I think, on the definition I've just given,
 20 clearly I looked at a number of agencies that
 21 did prosecute but which did not have the
 22 Prosecution of Offences Act as their bedrock for
 23 doing so, like the Environment Agency, for
 24 example, but in terms of an organisation, for
 25 example, a supermarket chain that prosecutes

16

1 theft itself or organisations of that sort, no,
 2 I didn't look at their practice.
 3 **Q.** So you looked at some that might or have been
 4 described as "hybrid" --
 5 **A.** Yes.
 6 **Q.** -- including the Environment Agency?
 7 **A.** Yes, and the Department of Work and Pensions is
 8 arguably another example of that. It has
 9 a statutory basis for what it does but it's not
 10 a police-related prosecuting organisation.
 11 **Q.** So for the purposes of these two reports, you've
 12 looked at their policy, as opposed to their
 13 on-the-ground practice?
 14 **A.** I've looked at their practice, insofar as that
 15 is identified by their policies, and their
 16 recognition in those policies of what statutory
 17 requirements applied to them, rather than, as
 18 you say, looking at how they actually made
 19 decisions on the ground.
 20 **Q.** You're proposing to examine the practice of the
 21 Post Office, in fact, between the years 2000 and
 22 2013 in your volume 2 report?
 23 **A.** Yes.
 24 **Q.** But you're not proposing to -- because it's
 25 an exercise, I don't think, that could

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1 deprived of access to any material necessary for
 2 me to reach the conclusions I have set out
 3 below. If further material is identified, I am
 4 happy to consider it and, if necessary, address
 5 it in an addendum to this report."
 6 So you're making the point there,
 7 essentially by way of caveat, that you have used
 8 every endeavour to find the iterations of the
 9 guidelines and guidance and other material that
 10 was applicable in the relevant period but have
 11 not always succeeded?
 12 **A.** No, and an example of that is the Code for Crown
 13 Prosecutors because it is available on the CPS
 14 website. It is available on that website in its
 15 present form. I was and I am conscious that
 16 that's a code that has evolved over time but it
 17 was only, I'm afraid, quite recently that it
 18 occurred to me where, in the back of
 19 *Blackstone's*, of all places, to find earlier
 20 versions. And so at the time I wrote Volume 1,
 21 I was looking at the 8th Edition, as I make
 22 clear, rather than earlier versions.
 23 **Q.** We'll come to it in due course but the *Code for*
 24 *Crown Prosecutors, 8th Edition*, I think, was
 25 dated October 2018?

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1 realistically be done -- compare that to the
 2 practice of other truly private or hybrid
 3 private prosecutors in that 13-year period?
 4 **A.** No, I took my instruction for the purposes of
 5 this volume -- so far as I was looking at
 6 practice as well as law -- was to look at the
 7 policy position in relation to the Post Office
 8 and, where I could obtain it, other agencies, to
 9 see what that told me about their practice but,
 10 so far as the Post Office practice is concerned,
 11 that is very much Volume 2.
 12 **Q.** Thank you very much. In terms of the relevant
 13 period, if we can look, please, at page 7 of
 14 your Volume 1 report. Look at paragraph 6. You
 15 say that you have:
 16 "... endeavoured, with the assistance of
 17 Catherine Brown and the Inquiry Secretariat, to
 18 obtain the versions of statutory provisions,
 19 codes of practice issued under statute,
 20 guidelines and guidance, case law and other
 21 relevant material that had application during
 22 the period from 2000 to 2013. It has not always
 23 been possible to do so with certainty as to
 24 completeness. I have made clear that which
 25 I have seen. I am not conscious of having been

18

1 **A.** Yes.
 2 **Q.** You have helpfully found for us two earlier
 3 iterations, if we can just show those on the
 4 screen, so everyone has got the references,
 5 please. RLIT0000171. Is that a copy of the
 6 2009 edition of the *Code for Crown Prosecutors*.
 7 **A.** It's the 2009 *Blackstone's* and, therefore, the
 8 2004 *Code for Crown Prosecutors*, the 5th
 9 Edition.
 10 **Q.** Thank you for that correction, so 2004, in the
 11 2009 edition of *Blackstone's*?
 12 **A.** Yes.
 13 **Q.** Then, equally, if we can look at RLIT0000170.
 14 Is that the edition that was in the 2012
 15 *Blackstone's*?
 16 **A.** Yes, which is the 6th Edition, the 2010 version
 17 of the Code.
 18 **Q.** Thank you very much. We'll come later to
 19 whether there are any material differences to
 20 the opinions that you give by looking at these
 21 back issues of the Code within the relevant
 22 period?
 23 **A.** Yes.
 24 **Q.** Thank you. That can come down.
 25 Just looking at other comparators still,

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1 that excursion into back issues over, as far as
 2 the DWP, the HSE -- the Health and Safety
 3 Executive -- and the Environment Agency are
 4 concerned, you, I think, have only had sight of
 5 their more recent policies; is that right?
 6 **A.** Yes, that's right.
 7 **Q.** As opposed to all of the back issues that would
 8 have been operative in the years 2000 to 2013;
 9 is that right?
 10 **A.** Yes, for the same reason that that is what was
 11 available on their website.
 12 **Q.** So that's a limitation -- is this right -- in
 13 that you can't make a direct comparison to the
 14 actual policies that were in place or may have
 15 been in place in those institutions throughout
 16 the entirety of the 13-year period?
 17 **A.** No, that's right.
 18 **Q.** Your instructions required you to consider both
 19 the law and the practice of a private prosecutor
 20 during the relevant period and -- would this be
 21 fair -- you focused in your report primarily on
 22 the Crown Prosecution Service as a comparator?
 23 **A.** Yes.
 24 **Q.** Would it be the case that any comparison between
 25 the practice of the Crown Prosecution Service

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1 fact complied with its written policies?
 2 **A.** No, and I'm aware that there are inspectorate
 3 reports, for example, in relation to the Crown
 4 Prosecution Service because it does audit its
 5 activities in that way. I wasn't asked to and
 6 I haven't looked at those for that reason.
 7 **Q.** Is that by a CPS Inspectorate?
 8 **A.** Yes.
 9 **Q.** Is there, to your knowledge, any equivalent of
 10 such an inspectorate for Post Office Limited?
 11 **A.** Not that I've seen, no.
 12 **Q.** Okay, can we turn then to some general questions
 13 before we get into the detail. Would you agree
 14 that the supervision of the investigation of
 15 criminal offences and the supervision of the
 16 instigation and conduct of criminal proceedings
 17 is immensely important?
 18 **A.** Yes.
 19 **Q.** Is that because it's important to ensure that
 20 the application of the criminal law to
 21 individual citizens is not oppressive,
 22 unjustified or misconceived but is, instead,
 23 fair and reasonable?
 24 **A.** Yes, and consistent.
 25 **Q.** Can we turn, please, to page 7 of your first

23

1 and the practice of the Post Office would have
 2 to be based on the actual practice of the Crown
 3 Prosecution Service during the relevant period,
 4 rather than just its written guidance and
 5 policies, or is there a value in the exercise
 6 that you have nonetheless performed?
 7 **A.** It seemed to me that because, for the purposes
 8 of Volume 1, I was looking at that which was on
 9 paper, effectively -- so what the law was but
 10 also how that had been addressed by prosecuting
 11 agencies -- that there was a valid comparison
 12 between looking at how different prosecuting
 13 agencies approached the same challenges in
 14 practice. Clearly, one could then go on to look
 15 at how well or otherwise those issues were
 16 addressed in practice by different prosecuting
 17 agencies. It seemed to me from my instructions
 18 that really, at that stage, I was being asked to
 19 focus on the Post Office, rather than to carry
 20 out an audit of how well or otherwise other
 21 prosecuting agencies did --
 22 **Q.** Yes.
 23 **A.** -- in that period.
 24 **Q.** So you weren't asked to audit for a decade and
 25 a half, whether the CPS across the country in

22

1 report, please?
 2 Look at paragraph 8, at the foot of the
 3 page. You helpfully give us an overview of your
 4 conclusions at the beginning of your report and
 5 then there is a very substantial section at the
 6 end of your report setting out your detailed
 7 conclusions.
 8 **A.** Yes, that's right.
 9 **Q.** If we can start, please, with an overview of
 10 your conclusions to let us know where we're
 11 heading. You tell us in this paragraph that,
 12 throughout the relevant period and indeed for
 13 a significant period before that:
 14 "... there had been a network of statutory
 15 requirements, regulation provided through Codes
 16 of Conduct issued under statute, and other forms
 17 of directly applicable and mandated guidance in
 18 place. This sought to ensure that the
 19 procedures employed and decisions taken by
 20 investigative and prosecutorial bodies, were
 21 fair, transparently auditable and accorded with
 22 the interests of justice. The structure erected
 23 by that network of material was detailed and
 24 therefore complicated. It required those
 25 engaged in the investigation and prosecution of

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1 crime to receive training, instruction and
2 guidance for each important stage of their
3 duties."

4 So what you describe there, the network of
5 materials from statute down, that was intended
6 to achieve the aims that we have just discussed:
7 fair, reasonable and consistent application of
8 the criminal law.

9 A. Yes.

10 Q. At this point -- is this right -- you're drawing
11 no distinction between public and private
12 prosecutions?

13 A. No.

14 Q. Can we turn, please, to page 145 of your report.
15 Just look at paragraph 335 at the bottom. If we
16 just scroll up a little bit, so we can catch
17 334. There you essentially repeat what we've
18 just looked at in the overview --

19 A. Yes.

20 Q. -- and then you carry on here in the
21 conclusions, 335:

22 "Those requirements [that's in the network
23 of instruments] applied in critical respects,
24 every bit as much to a private prosecutor or
25 non-crime agency investigation as to a police

25

1 So the decision in Kay is our tab D23, which
2 is RLIT0000117. Thank you very much. You'll
3 see that it's a decision of a Divisional Court
4 consisting of Lord Justice Gross and Mr Justice
5 Sweeney and we see, from the top right, it was
6 a decision made on 23 May 2018.

7 A. Yes.

8 Q. It's reported under the neutral citation number
9 that I've just given. If we go to the second
10 page, please, we'll see that Mr Justice Sweeney
11 gives the judgment and then, right at the end,
12 we'll see that Lord Justice Gross agrees with
13 him?

14 A. Yes, he does.

15 Q. If we can turn to page -- I think it's 15.
16 Scroll down, please, and again. It's just on
17 the next page, then. Looking for paragraph 23.
18 Under the cross-heading of "The duties of
19 a private prosecutor", the court said:

20 "It is not disputed that authorities such as
21 ..."

22 I'm not going to cite them all. They are,
23 by name of party *Watts*, *Charison*, *Dacre*, *Barry*,
24 *Zinga* and *Haigh*:

25 "... established that:

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1 investigation or a CPS prosecution. This was
2 made clear, for example, in *R(Kay) v Leeds*
3 *Magistrates' Court [2018 EWHC 1233]*, in which
4 [Mr Justice Sweeney] observed (at paragraph 23):
5 'a private prosecutor is subject to the same
6 obligations as a minister for justice as are the
7 public prosecuting authorities -- including the
8 duty to ensure that all relevant material is
9 made available both for the court and the
10 defence'."

11 Then you say:

12 "Although that was a case decided in 2018,
13 that was a position that had been made clear for
14 a considerable period before that."

15 Now, given the importance of the point that
16 you have made, based on the extract from the
17 Divisional Court's decision in *Kay* and
18 an additional sentence after the one you quoted,
19 and some questions I'm going to ask you in
20 a moment, I think it may pay dividends,
21 unusually, to look at the decision itself.

22 I'm not going to do this very frequently,
23 you'll be pleased to hear, because for many
24 documents you've quoted and extracted them in
25 full in your report.

26

1 "(1) Whilst the Code for Crown Prosecutors
2 does not apply to private prosecutions,
3 a private prosecutor is subject to the same
4 obligations as a minister for justice as are the
5 public prosecuting authorities -- including the
6 duty to ensure that all relevant material is
7 made available both for the court and the
8 defence."

9 Then the second point, and this is what
10 I just wanted to pull out of this decision, the
11 court says that those authorities establish,
12 secondly:

13 "Advocates and solicitors who have the
14 conduct of private prosecutions must observe the
15 highest standards of integrity, of regard for
16 the public interest and duty to act as
17 a minister for justice in preference to the
18 interests of the client who had instructed them
19 to bring the prosecution -- owing a duty to the
20 court to ensure that the proceeding is fair."

21 In your report you said that, although this
22 case was decided in 2018, the position set out
23 in these paragraphs was one which had been made
24 clear for a considerable period before 2018.

25 A. Yes.

28

1 Q. If we just scroll up, please, you'll see that
 2 what the court says is "It is not disputed
 3 that", then there's a list of authorities,
 4 "establish" those two principles.
 5 The first of those two cases referred to,
 6 *ex parte Watts*. If we just scroll up for the
 7 citation, keep going and keep going.
 8 A. I think we may just have missed it.
 9 Q. Okay, scroll down, thank you.
 10 A. Beginning of paragraph 22.
 11 Q. I think we'll see that it's a decision of 1999.
 12 If we scroll down a little bit more, please.
 13 It's the second case cited there, *Watts*.
 14 A. Yes, I think that may, with all due respect to
 15 Mr Justice Sweeney, be a typing error. It's
 16 actually a case from 1992. So it's [1992]
 17 *2CrAppR 188*, rather than 1999. And, perhaps in
 18 this context, it's worth noting that, in that
 19 case, where they concluded that a private
 20 prosecutor was subject to the same obligations
 21 as a minister of justice as a public prosecutor,
 22 they relied on a decision called *George Maxwell*
 23 *Developments Limited*, which was a decision from
 24 1980 that said the same thing.
 25 Q. So when in your report you said that, although

29

1 rather than it being anything new in 2018.
 2 Q. Thank you. That can come down. Would you agree
 3 that *Kay* emphasises what the duties are and the
 4 fact that they exist for both private and public
 5 prosecutors, rather than saying that a public
 6 prosecutor and a private prosecutor have to
 7 discharge them in the same way?
 8 A. No, that's right.
 9 Q. So the obligation is one of outcome, of result,
 10 rather than means?
 11 A. Yes, which is why, for example, it makes clear,
 12 at the first of those paragraphs, that the Code
 13 for Crown Prosecutors does not apply to
 14 a private prosecutor because it is, on the face
 15 of it, a document for the Crown Prosecution
 16 Service but the underlying approach to decisions
 17 on prosecutions be recognised to be the same, in
 18 effect, for a long period before that, not least
 19 because a defendant, it is well recognised, had
 20 the right to know what test was being applied in
 21 a decision to prosecute them, whoever it was
 22 making the decision to prosecute them.
 23 Q. So *Kay*, and, indeed, no other case, does not
 24 establish that the Post Office was under
 25 an obligation to have the same policies --

31

1 the case was decided in 2018, *Kay*, it was
 2 a position that had been made clear from
 3 a considerable period before that, were you
 4 relying on this list of cases, essentially --
 5 A. Yes.
 6 Q. -- to ground that point, or your experience, or
 7 both?
 8 A. Both.
 9 Q. So this wasn't something that came out of the
 10 clear blue sky from Mr Justice Sweeney in 2018?
 11 A. No, not at all.
 12 Q. So, in answer to a question "Are you able to
 13 point to any authorities relating to private
 14 prosecutions before the period 2013, which made
 15 clear the duties and positions you would refer
 16 to", you would say, "Yes, see that list of cases
 17 there"?
 18 A. Yes, and those that those cases, in turn, relied
 19 upon.
 20 Q. So in general terms, how well established would
 21 you say it was, or not, that the principles that
 22 are set out by the court in paragraph 23(1) and
 23 (2) were embedded or not in the law?
 24 A. Sorry, they were well established principles,
 25 which were restated by the court in that case,

30

1 A. No.
 2 Q. -- as the Crown Prosecution Service?
 3 A. No, as it happens, certainly from 2007, the
 4 documents that I've seen from the Post Office
 5 did indicate that they were going to apply the
 6 Code for Crown Prosecutors but that was a choice
 7 that they made as to the test, as indeed other
 8 agencies had done, for example the Department of
 9 Work and Pensions or the Environment Agency.
 10 Q. You use a phrase in paragraph 9 and also in 335
 11 of your report, that the network of instruments
 12 that you have described sought to ensure that
 13 the procedures employed by investigators and
 14 prosecutors are "transparently auditable"?
 15 A. Yes.
 16 Q. Can you explain what you mean by "transparently
 17 auditable"?
 18 A. First, what I mean by that is that, for there to
 19 be proper supervision of those who are making
 20 those decisions, it is important that the
 21 criteria that they are applying are
 22 identifiable, so that those supervising them can
 23 test what they have done against those criteria;
 24 secondly, it's important that a court that is
 25 dealing with a case brought by that agency is

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1 able to understand the criteria that had been
2 applied; and, thirdly, it is important that
3 those who defend in such a case understand the
4 criteria that had been used to make the
5 decision, for example, to prosecute.

6 **Q.** So, even if the Post Office did not owe, say
7 public law duties, in terms of the publication
8 and accessibility of its investigative and
9 prosecutorial policies and guidance, that would
10 not be a reason not to have such investigative
11 and prosecutorial policies and guidance?

12 **A.** No, and the risk that would be run if an agency
13 didn't have that kind of policy in place is,
14 firstly, that decisions could be taken
15 arbitrarily; secondly, they could be taken
16 inconsistently; and, thirdly, it would difficult
17 for them to justify those decisions if
18 challenged, if they weren't able to point to the
19 basis on which they'd reached them.

20 **Q.** Thank you. Can we go back, then, to the
21 overview, page 8 of your report, please. It's
22 paragraph 9 and following that I'm going to take
23 you through, if I may. So this is before we get
24 into the detailed reasons for your developed
25 conclusions, I would like, if I may, to address

33

1 policies that acknowledge that it exists but
2 they don't identify within the policy which
3 parts of what is quite a substantial piece of
4 legislation, those who are undertaking work for
5 the Post Office were meant to be applying or how
6 they were meant to be applying it. And clearly,
7 as we'll go on to, training plays a role in that
8 but my concern -- and it is these a real
9 concern -- is that it is a different thing to
10 say this Act applies to you and to say this part
11 of this Act applies to you and this is how it
12 applies to you and this is what you are meant to
13 do under it.

14 If you do the latter, there is much greater
15 chance that it will be done correctly and so
16 I think it is a serious concern that there was
17 acknowledgement, rather than explanation, in
18 relation to those very important pieces of
19 legislation, which are in place to ensure
20 consistency and fairness in investigation and
21 prosecution.

22 **Q.** So what's the vice of bare reference to the
23 application of a statute in a policy by the way
24 PACE applies to your investigations or CPIA
25 applies?

35

1 briefly the conclusions in overview form.

2 You set them out from paragraph 9 onwards
3 and you say that you have:

4 "... reviewed the Post Office policies in
5 relation to the investigation, prosecution and
6 related areas, and have concerns as to their
7 adequacy to achieve these objectives. The
8 policies recognise that the Post Office as
9 an investigator and prosecutor was and is
10 subject to [PACE and the CPIA] and the Codes
11 issued under each Act. However, in particular
12 during the earlier period from 2000, policies
13 referred to that fact without setting out the
14 ways in which this was the case, the specific
15 aspects of those Acts and Codes that applied,
16 and the ramifications of that to those
17 undertaking investigation and prosecutions."

18 **A.** Yes.

19 **Q.** You say in the first sentence that you have
20 concerns as to the adequacy of the Post Office
21 policies in the relevant period. Can you
22 calibrate your level of concern for us, please?

23 **A.** In a sentence, my concern in relation to,
24 particularly, the Criminal Procedure and
25 Investigations Act is that there are various

34

1 **A.** The risk is, first, that someone will have
2 received training when they started and they
3 will recall that there was this piece of
4 legislation and it had parts that applied to
5 them, and they will rely on their memory. They
6 will look at the Police and Criminal Evidence
7 Act and see that it is vast and stop. And there
8 is the risk that they will look at the Act, find
9 a part that they think is the right bit, look at
10 it and do their best to understand it. But, on
11 that approach, you may have any number of
12 different interpretations operating within the
13 same prosecuting agency, rather than one clearly
14 defined one, which is why other agencies -- and
15 the Crown Prosecution Service is an example of
16 this -- have detailed guidance on the approach
17 to different parts of these acts, so that there
18 is a consistency -- at least the intention is
19 there would be a consistency in how it is
20 applied.

21 **Q.** So your expectation is that there ought not to
22 be just bare references but an explanation as to
23 how the relevant parts of the legislation,
24 a code or other instrument, are to be carried
25 into effect in this organisation?

36

1 A. Yes.
 2 Q. Can we turn to paragraph 10, please. You say:
 3 "In some respects, the policy documents
 4 themselves differed from training materials
 5 which did seek to address the PACE Codes of
 6 Practice, and do identify which parts apply in
 7 what context. However, such training materials
 8 did not represent a suitable alternative to
 9 policy documents which themselves steered the
 10 correct path through the application of PACE, or
 11 the Codes thereunder. Such training documents
 12 would not necessarily ensure the application of
 13 up-to-date regulation. I have also not seen
 14 comparable training materials relating to the
 15 CPIA or the Code thereunder, save in relation to
 16 the retention of investigators' notebooks, until
 17 2012."
 18 Why would training material not represent
 19 a suitable alternative to policy documents,
 20 which steer the correct path through, in this
 21 example, the application of PACE or the Codes
 22 issued under it?
 23 A. The -- I should say, in relation to training
 24 materials, that when initially started to
 25 prepare this report and, indeed, produced
 37

1 a policy document should do that and so it could
 2 never be a substitute for a policy addressing
 3 the responsibilities of, for example,
 4 an investigator in sufficient detail, so that
 5 they could do so lawfully and consistently and
 6 fairly. For them to rely on training material,
 7 instead, seemed to me an unsatisfactory
 8 alternative because it could well be out of
 9 date.
 10 Q. So although the training materials focused on,
 11 I think you've mentioned, the conduct of
 12 searches --
 13 A. Yes.
 14 Q. -- and interviews in particular --
 15 A. Yes.
 16 Q. -- the second level of concern that you express
 17 here is that you had not seen comparable
 18 training materials in relation to the CPIA?
 19 A. No, and that is the statute that regulates the
 20 disclosure process and sets out the
 21 responsibilities of investigators and the
 22 supervision of those investigators by
 23 prosecutors. And so the detail of the
 24 requirements of that Act are centrally important
 25 to those processes being undertaken consistently
 39

1 a first draft of this report, I hadn't seen any
 2 real training materials at all. I then received
 3 them, and in relation, for example, to the Codes
 4 of Practice under the Police and Criminal
 5 Evidence Act, which are codes to address, for
 6 example, how interviews are correctly to be
 7 undertaken, how searches are to be undertaken,
 8 and matters of that sort, the training material
 9 did identify "This is the Code of Practice that
 10 applies to this activity", for example
 11 interviews, "These are the parts of the Code
 12 that apply", and they were correct and clear in
 13 that training document.
 14 But the Codes change and there is the risk
 15 that, if someone is relying on their training
 16 notes, that they may not be looking at
 17 an up-to-date version of the Code or appreciate
 18 that that is the position.
 19 The fact that the training documents were
 20 able to set out that kind of analysis and that
 21 kind of application, to my mind, underlined the
 22 importance of the policy documents doing that as
 23 well, because the point of putting it in the
 24 training is so people understand how the Code
 25 applies to them. Well, similarly, in my view,
 38

1 and fairly and I didn't see training material
 2 that did that drilling down into those
 3 requirements and why they applied and how they
 4 applied and who they applied to, in the same way
 5 that there had been training material that
 6 addressed the Police and Criminal Evidence Act.
 7 Q. So in relation to duties of disclosure and the
 8 duty to pursue reasonable lines of inquiry --
 9 A. Yes.
 10 Q. -- there was an absence of both policy and
 11 training materials?
 12 A. Yes.
 13 Q. How, if you can -- again, calibrate your level
 14 of concern as to that, please?
 15 A. I think it's a very serious concern, if the
 16 position that an investigator or a prosecutor is
 17 left with is that it is left to them to do their
 18 own research of an important piece of
 19 legislation, for them to work out how they think
 20 it applies to them, rather than it being clear
 21 to them from the policy that they are required
 22 to apply exactly how it applies to them and what
 23 they're meant to do under it, there is a very
 24 real risk, in my view, if you leave it to
 25 initial training or self-interpretation, that
 40

1 things will go wrong.

2 **Q.** Turn to paragraph 11, please. You say:
3 "During ... the relevant period the degree
4 of detail and guidance in [the] policies did
5 improve, and was thorough, for example, as to
6 the conduct of interviews."

7 **A.** Yes.

8 **Q.** You've just said that. Did that seem to be
9 a topic that was marked out, how Post Office
10 investigators should interview their suspects?

11 **A.** Yes, there was an increasing amount and,
12 certainly by the latter part of the period,
13 a good deal of material, almost too much
14 material, in relation to interviews, which was
15 in stark contrast to other areas, like
16 disclosure.

17 **Q.** "Moreover, there was guidance for the disclosure
18 of unused material in place from at least 2001.

19 However, there were other aspects of the
20 structure of statute and regulation that were
21 not addressed in detail, and in some instances
22 not really addressed at all."

23 You would identify the following areas:

24 "(a) First, there was a lack of explicit
25 instruction to investigators to undertake or

41

1 inquiry, including those leading away from the
2 person that you are investigating and it is, in
3 my view, fundamental that that is a guiding
4 light to any investigation and any review of
5 an investigation and, if, as was the case, the
6 disclosure policy, for example, of the Post
7 Office did not refer to that requirement until
8 2010, that is a serious omission because it does
9 not put front and centre, in policy terms, for
10 those doing those roles, that that is what they
11 are meant to be doing.

12 **Q.** You said there -- we'll come back to this in
13 more detail in a moment -- that the disclosure
14 policy didn't even refer to the requirement
15 until 2010. When had the requirement entered
16 into the law?

17 **A.** It had applied throughout the period of concern
18 for this Inquiry and it was not included in the
19 2001 disclosure policy, which was otherwise
20 designed to address for the Post Office how they
21 were meant to undertake disclosure in accordance
22 with that Act of Parliament and the Code
23 thereunder.

24 **Q.** If we go to (b) over the page, please, you say:

25 "Secondly, the AG's Guidelines ..."

43

1 prosecutors to monitor the CPIA Code requirement
2 that 'In conducting an investigation, the
3 investigator should pursue all reasonable lines
4 of inquiry, whether these point towards or away
5 from the suspect. What is reasonable in each
6 case will depend on the particular
7 circumstances'."

8 You say:

9 "This duty is of central importance to the
10 securing of a fair trial, not least through the
11 achieving of fair and adequate disclosure."

12 Again, if we can just go back to that,
13 please. That first concern, the lack of
14 instruction to investigators and lack of
15 instructions to prosecutors in relation to that
16 Code requirement to "pursue reasonable lines of
17 inquiry [that] point towards or away from the
18 suspect", can you calibrate your level of
19 concern in relation to that, please?

20 **A.** That is a fundamentally important requirement,
21 because it makes explicitly clear to both
22 an investigator in them undertaking
23 an investigation and a prosecutor in their
24 review of that process, that the requirement for
25 the investigation is to look at all lines of

42

1 We're going to come back to this in a moment
2 but can you summarise what the AG's guidelines
3 were, please?

4 **A.** Yes. Those were a series of guideline documents
5 starting from the year 2000, which were designed
6 to flesh out the requirements for investigators
7 and prosecutors as to how to undertake their
8 disclosure responsibilities. They were
9 a recognition by a succession of Attorney
10 Generals that, for there to be fair and
11 consistent disclosure, they needed to give more
12 guidance than the CPIA or the Code under that
13 had already given. And so they address, stage
14 by stage, what investigators and those
15 supervising them and what prosecutors and those
16 supervising them had to do and how they were to
17 work with each other.

18 **Q.** Thank you. You say that they were not
19 addressed:

20 "This limited the guidance as to the role of
21 prosecutors in overseeing, monitoring and
22 securing proper compliance with the requirements
23 of disclosure. It also meant that there was
24 almost no guidance as to the handling of third
25 party disclosure throughout the Inquiry's

44

1 relevant period."
2 So you mention two consequences there, or
3 two facts there. Again, can you calibrate the
4 level of concern that you had in relation to
5 those two issues or each of those two issues,
6 please.

7 **A.** Yes. So as we will see or anticipate, the 2001
8 policy in relation to disclosure acknowledged
9 that there was an Attorney General's Guideline
10 in relation to disclosure. Interestingly, the
11 2010 version didn't. But that was the extent,
12 in the material that I have seen, of that
13 recognition and so there was at least the risk
14 that those who were seeking to engage in the
15 disclosure process would overlook the Attorney
16 General's guidelines and, therefore, overlook
17 the detailed guidance that those guidelines gave
18 them for how to do their job correctly and
19 fairly. And third party disclosure --

20 **Q.** Just tell us what you mean by "third party
21 disclosure"?

22 **A.** Yes. That is material that is not in the
23 possession of the prosecutor or the investigator
24 but which they have reasonable grounds to
25 anticipate a third party would have. So, for

45

1 a very significant omission, because if there's
2 no reference to the Attorney General's
3 Guidelines in your policy, it's difficult to see
4 how you can be satisfied that they will be
5 applied, nonetheless, and they have to be,
6 because they are fundamental to getting the
7 disclosure right.
8 **Q.** Just at this point, may I ask if you carried
9 out, as an investigator and prosecutor, a set
10 number of types of investigation -- they might
11 be robberies on branch, they might be burglaries
12 of branches, they might be thefts in the mail,
13 they might be fraud committed by customers, they
14 might be fraud committed by Post Office staff,
15 using umbrella term -- and the sources of
16 third-party data are different for each of them,
17 would your expectation be that the policy should
18 say, "For X species of investigation, we
19 habitually rely on this data to either prove or
20 disprove the offence, and one must, therefore,
21 consider the following categories of material
22 that should be sought", or "The data is held in
23 this repository, this the contact of the person
24 in that very repository to get the data from".
25 Would that be your expectation?

47

1 example, an investigator who was relying on
2 computer data that is provided by a computer
3 system operated by a separate entity would
4 recognise that that entity was likely to have
5 material that was relevant to the reliability of
6 the data, and that would be third-party material
7 and the Attorney General's Guidelines have
8 always made clear that there is a responsibility
9 on investigators and prosecutors to identify
10 where there may be such third-party material and
11 to take steps to obtain it, so they can review
12 it for disclosure.

13 That is something that is addressed
14 primarily, in fact, in the Attorney General's
15 Guidelines, rather than the CPIA or the Code
16 thereunder and so, if one is not looking
17 routinely at the Attorney General's Guidelines,
18 one could miss that important responsibility.
19 And if there is no reference in your policy to
20 third-party material, again, there is a risk
21 that it will be overlooked.

22 **Q.** How, again, would you calibrate your level of
23 concern in relation to that issue?

24 **A.** I think if one is assessing, insofar as one can,
25 the practice from what was written down, it is

46

1 **A.** It would certainly be the safest way to make
2 sure it was undertaken properly. I don't think,
3 on the material that I have seen, it could be
4 said that that was how other agencies were
5 routinely undertaking that responsibility, but
6 they were -- for example, the Crown Prosecution
7 Service, in their policy documents, were
8 identifying in detail what the disclosure
9 requirements were, in relation to third-party
10 materials, so that anyone undertaking
11 a disclosure exercise by reference to their
12 policy would know that they had to consider that
13 topic. But, obviously, the Crown Prosecution
14 Service are dealing with a much wider range of
15 offences and situations.

16 If an agency had a more limited range than
17 they had greater scope to give greater help to
18 their investigators and prosecutors in how to do
19 those more limited range of offence
20 investigations well.

21 **Q.** Thank you. Can we turn to paragraph 12, please.
22 You say:

23 "I consider that the policy landscape ..."

24 By that, do you mean the Post Office policy
25 landscape?

48

1 A. Yes.

2 Q. "I consider that the Post Office policy

3 landscape for a significant period was not

4 sufficient to ensure consistent and

5 comprehensive compliance with a number of

6 important aspects of the [Police and Criminal

7 Evidence Act] and CPIA regimes, and in

8 particular in relation to independent decisions

9 as to charge, disclosure of material that might

10 undermine the reliability of data systems and

11 third party disclosure. It will readily be

12 appreciated that each of these is an area of

13 importance to the Inquiry's terms of reference."

14 This is an overarching conclusion; is that

15 right?

16 A. Yes.

17 Q. In it, you highlight, firstly, concerns as to

18 independence of decision making, as to charging?

19 A. Yes.

20 Q. You highlight, secondly, concerns over the

21 disclosure of material that may undermine the

22 reliability of data systems and you highlight

23 concerns over obtaining third-party disclosure?

24 A. Yes.

25 Q. Again, can you calibrate the level of your

49

1 affected your concern or heightened it?

2 A. I think heightened it, in the sense that I have

3 seen evidence of recommendations from

4 investigators as to what -- whether there should

5 be a prosecution and, if so, for what. I have

6 seen evidence of lawyers providing advice,

7 albeit, I have to say, that those advices have

8 been brief. But it's not clear, on what I have

9 seen, who then actually made the decision and on

10 what basis. And that is an area that the

11 policies left opaque to me and the material

12 I have seen has not clarified.

13 So that -- what I thought was a risk does

14 look like it is materialising in the material

15 I've seen for Volume 2.

16 Q. Thank you. The second concern, disclosure of

17 material that may undermine the reliability of

18 data systems. Again, if you can calibrate your

19 level of concern there?

20 A. Because the evidence that I saw of training in

21 relation to disclosure, of policy guidance in

22 relation to disclosure and the lack of

23 cross-reference to the fundamental sources of

24 guidance as to disclosure was as it was, and

25 because I did not see anything that highlighted

51

1 concern in relation to each of those three,

2 please?

3 A. Those were areas that I was alive from my

4 instructions were areas that, certainly by the

5 time I come back in December, I will need to

6 have addressed. But, at this stage, looking at

7 the policies and how well they equipped the

8 process for those things to happen, though I had

9 concern as to whether the policies did properly

10 ensure independent decisions as to charge. So

11 that's decisions by lawyers applying identified

12 criteria to make that decision, rather than

13 there being a risk that non-lawyers were

14 ultimately making those decisions and, if so, on

15 what criteria they were making them, and the

16 policy position in relation to that was unclear,

17 at the very least, to me.

18 And so I have a concern about that but

19 I recognise that that might be a concern that

20 could be allayed by a detailed understanding of

21 how the decisions were actually made in the

22 cases. So that's perhaps one I will have to

23 return to in Volume 2.

24 Q. What you've read so far of the Volume 2

25 material, has that allayed your concerns, not

50

1 disclosure and material that might undermine

2 reliability as a topic at all, that was and

3 remains, a very real concern to me because it

4 is -- has the potential to result in fundamental

5 failures of disclosure, through omission of

6 instruction.

7 Q. Then, thirdly, an insufficient policy landscape

8 concerning third-party disclosure?

9 A. The reality, as I saw it, barring a reference in

10 2001 to the existence of an Attorney General's

11 Guideline, was that there was no internal Post

12 Office policy guidance as to third-party

13 disclosure and, therefore, the very real risk

14 that that could be overlooked. And that could

15 have fundamental consequences, clearly.

16 Q. Sorry, I missed what you said there. That could

17 have?

18 A. Fundamental consequences because, if one has not

19 appreciated that you don't just look at what you

20 have already got as part of your disclosure but

21 what you ought to get as part of your

22 disclosure, then there's the real risk that you

23 wouldn't get it and, if you don't get it, you

24 won't review it; and, if you don't review it,

25 you won't disclose it; and, if you don't

52

1 disclose it, then important disclosure necessary
 2 for fairness will not happen.
 3 **Q.** Can we turn to paragraph 13, please. You say:
 4 "Similarly in relation to decisions to
 5 charge, I do have concerns about the adequacy of
 6 policy guidance to achieve a proper division of
 7 responsibility so as to achieve independence,
 8 transparency, accountability and consistency.
 9 Whereas in other areas, for example pursuant to
 10 the Prosecution of Offences Act 1985, such
 11 a division is instilled and maintained, Post
 12 Office policies left it open for the same
 13 person, or group of persons, to make key
 14 investigation and prosecution decisions. Whilst
 15 such prosecutions were, by reference to a number
 16 of important policies, to be undertaken with the
 17 application of the [CPS] Code for Crown
 18 Prosecutors, there was in my view, a lack of
 19 detailed guidance as to how this was to be done,
 20 or how compliance with proper standards was to
 21 be achieved or monitored."

22 You mention that you have concerns about the
 23 adequacy of policy to achieve independence
 24 transparency and accountability and consistency.
 25 Again, if you can calibrate the level of your

1 **Q.** You mention that, although there was
 2 a cross-reference to the Code for Crown
 3 Prosecutors, there was a lack of detailed
 4 guidance as to how it was to be applied and how
 5 compliance was to be achieved or monitored.

6 Again, can you calibrate the level of your
 7 concern about that issue?

8 **A.** Again, on the material I saw there, it's a very
 9 real concern because, if the interpretation I've
 10 just described is right and the person making
 11 the decision, albeit on legal advice, may not be
 12 a lawyer, then they need all the more clear
 13 guidance as to how the two tests within the Code
 14 for Crown Prosecutors -- which are the realistic
 15 prospects of conviction and whether
 16 a prosecution is involved public interest -- how
 17 those work for the offence they're considering,
 18 the offending that they are considering, or
 19 alleged offending that they are considering, and
 20 that needs specific guidance.

21 The material that I saw acknowledged that
 22 the Code for Crown Prosecutors was to be applied
 23 but not how it was to be applied, which factors
 24 within it were likely to be particularly
 25 relevant to a Post Office prosecution or not,

1 concern, please?

2 **A.** So I recognise that the Post Office is not the
 3 Crown Prosecution Service and it's not under the
 4 Prosecution of Offences Act, so that decisions
 5 as to prosecution are taken in a clearly defined
 6 way that is separate from investigative
 7 decisions taken by the police. But it is
 8 recognised much more generally, including for
 9 private prosecutors, that it is important that
 10 the decision to prosecute is taken in
 11 an independent accountable way, and the
 12 expectation, certainly, that that would be done
 13 by a lawyer.

14 The policies that I saw left room for
 15 an interpretation that, although legal advice
 16 was being provided, it was not necessarily the
 17 lawyer that was making the decision. It could
 18 be, on some of the policies I saw, with input
 19 from HR or from the Director of Security, who
 20 was also the person responsible for supervising
 21 the investigation.

22 And so you could have the investigator
 23 deciding on the prosecution, taking -- having
 24 received legal advice but by no means clear
 25 whether they had to follow it or not.

1 and there was also, in the material I saw,
 2 references to a series of factors that it was
 3 considered were relevant to a prosecution, which
 4 included the best interests of the business and
 5 the integrity of the mail, as opposed to the
 6 much more nuanced and detailed set of criteria
 7 that would or should be applied to a prosecution
 8 decision by reference, for example, to the Code.

9 **Q.** Thank you. Then, lastly, before we take the
 10 break, paragraph 14. You say:

11 "There was a similar lack of guidance as to
 12 proper decisions as to which charges to prefer,
 13 and for example little guidance as to the
 14 application of the Court of Appeal decision in
 15 *Eden*."

16 We mentioned that briefly.

17 **A.** Yes.

18 **Q.** Could you just summarise, before we get into the
 19 detail, probably tomorrow, what the guidance
 20 that the Court of Appeal gave in *Eden* was?

21 **A.** So in *Eden*, the Court of Appeal were considering
 22 a situation where the individual, who was
 23 a postmaster, had been prosecuted for theft and
 24 false accounting, charges which I'm aware
 25 regularly occur in the cases that we are here

1 considering, and there was a concern from the
2 Court of Appeal as to the prosecution for both
3 offences, in reality on exactly the same
4 allegation, and whether it was right to have
5 both charges there, where actually, it was
6 an allegation of theft, rather than
7 an allegation of theft and a separate allegation
8 of false accounting.

9 And so it was a Court of Appeal decision,
10 looking at a particular factual situation but in
11 relation to charges that are -- have been
12 routinely used by the Post Office and it,
13 therefore, seemed to me helpful to consider the
14 extent to which that guidance from the Court of
15 Appeal had been acknowledged and applied by the
16 Post Office, and the best way to see that was to
17 see where it appeared in their policies, and the
18 answer was that, until 2013, it didn't.

19 **Q.** So that 1971 decision didn't appear in any
20 policy documents --

21 **A.** Not in those I saw, no.

22 **Q.** -- that you saw --

23 **A.** Yes, until 2013. Yes.

24 **Q.** -- until 2013. You continue:

25 "There was equally no reference to the
57

1 "... I have not identified any reference to
2 the duty of candour required in applying for
3 a summons to initiate criminal proceedings in
4 any of the policies I have considered where that
5 might have been expected."

6 Again, can you just summarise the duty of
7 candour, in particular how it applies in
8 relation to the point at which one initiates
9 proceedings?

10 **A.** Yes. So one method of initiating proceedings,
11 and the method that was used by the Post
12 Office -- and I have no criticism of them for
13 that because it was the obvious one for them to
14 apply because they were not a police force --
15 was to summons the defendant to attend at the
16 Magistrates Court and proceedings initiated as
17 a result.

18 There is a longstanding requirement on
19 anyone seeking a summons to what is called have
20 a duty of candour which is to identify to the
21 court anything -- any relevant circumstance that
22 may incline that court not to grant the summons.
23 So they have to be satisfied, the court, that
24 there's a proper basis for a prosecution but
25 they also need to have an understanding of
59

1 [Attorney General's] Guidelines on the
2 Acceptance of Pleas until 2016 ..."

3 Again, can you just summarise now the AG's
4 Guidelines on pleas?

5 **A.** Yes, so this was again the Attorney General,
6 with their supervisory responsibility for
7 prosecutions, beyond any particular agency,
8 setting out guidance as to how properly to
9 approach decisions as to whether to accept
10 a plea. So, for example, using the offences
11 we've just referred to, when it was appropriate
12 to accept a plea to false accounting in the
13 alternative to an offence of theft and the
14 criteria to ensure that that was done in a fair
15 and non-oppressive way, so, for example, that
16 the person being prosecuted did not feel under
17 pressure to plead to false accounting because
18 the theft charge was there, in a way that would
19 be unfair.

20 And so those guidelines, which have been in
21 place for a long time, have set out how that is
22 properly to be done and I didn't see a reference
23 to those in Post Office materials until, as
24 I say, 2016.

25 **Q.** Thank you. You continue:
58

1 whether such a prosecution might be an abuse of
2 process, whether there is material that would
3 make them less likely to grant the prosecution.
4 And that is a well recognised duty.

5 I saw very little material, in fairness, at
6 all about obtaining summonses and how they were
7 to be obtained within the Post Office material
8 that I saw, but nowhere did I see a reference to
9 that duty.

10 **Q.** So no reference to the duty on the Post Office
11 to be candid with the court?

12 **A.** Yes.

13 **Q.** You say:

14 "These omissions in the policy documents
15 were consistent with the failure of the training
16 materials that I have seen to address these
17 topics."

18 So in these three cases, the suggestion of
19 cure through training wouldn't run?

20 **A.** Certainly not on the material that I saw.

21 **Q.** You say:

22 "Finally, I have considered the implications
23 of the repeal of Section 69 [of] PACE as to the
24 obtaining of confirmation as to the reliability
25 of computer data. The real concern however, is
60

1 and was as to the appreciation of the need to
 2 consider reliability of computer data in
 3 reaching charging decisions as to the disclosure
 4 of material that undermined that reliability."
 5 **A.** Yes.
 6 **Q.** Can you explain, firstly, what, just in summary
 7 form, Section 69 of PACE was about, the repeal
 8 of it and when, and your identification of what
 9 you say was the real concern?
 10 **A.** So when originally enacted, the Police and
 11 Criminal Evidence Act included at Section 69,
 12 a requirement for there to be a satisfaction as
 13 to the reliability of computer data as,
 14 effectively, a precursor for reliance on that
 15 data. The Law Commission made proposals for the
 16 repeal of that because the Law Commission
 17 considered it to be cumbersome and not to
 18 actually be achieving its objectives.
 19 There was a consultation in relation to
 20 that, a range of organisations responded,
 21 including the Post Office. There was a broad
 22 support amongst those organisations,
 23 interestingly with the exception of one that
 24 related primarily to computer software
 25 personnel, but a broad support for repeal of the
 61

1 break, please, until 11.45.
 2 **SIR WYN WILLIAMS:** Yes, of course. We'll resume
 3 then. Thank you.
 4 **MR BEER:** Thank you very much, sir.
 5 (11.26 am)
 6 (A short break)
 7 (11.45 am)
 8 **MR BEER:** Sir, good morning. Can you continue to
 9 see and hear us?
 10 **SIR WYN WILLIAMS:** I can, thank you.
 11 **MR BEER:** Thank you very much. Mr Atkinson, we're
 12 turning to the Post Office as a private
 13 investigator and as a private prosecutor.
 14 I just want to examine briefly, if I can, to
 15 start with, some of the risks that may arise for
 16 a private investigator and a private prosecutor.
 17 Can you explain what risks might arise for
 18 the Post Office in its position as potential
 19 victim of a crime, potential witness to a crime,
 20 the investigator of the crime and the prosecutor
 21 of the crime?
 22 **A.** Those risks can be encapsulated in the risk that
 23 those different categorisations can become
 24 merged and the risk that it is not clear to
 25 identify which of those hats is being worn by
 63

1 section.
 2 So there was no longer that precursor of
 3 satisfying a reliability test for computer
 4 material thereafter. But that -- the point
 5 I would seek to make in this paragraph, is that
 6 did not mean that the reliability of computer
 7 data became irrelevant. It's always been well
 8 recognised that the reliability of the evidence
 9 that underpins the prosecution is something that
 10 investigators have to address, that prosecutors
 11 have to consider and that, where necessary, both
 12 have to demonstrate in criminal proceedings.
 13 And so I rather took the view that it wasn't
 14 so much the repeal of Section 69 that was the
 15 fundamental question, as whether the material
 16 I saw in policy terms addressed that question:
 17 is this material -- is this data reliable or
 18 not?
 19 **Q.** Did it?
 20 **A.** No. There were references occasionally to
 21 computer data but more in the sense of how to go
 22 about getting it, rather than how to go about
 23 testing it.
 24 **MR BEER:** Thank you, Mr Atkinson.
 25 Sir, with your permission, can we take the
 62

1 a particular person at a particular time, unless
 2 great care is taken to make sure that there are
 3 measures in place to keep a separation between
 4 those different categorisations.
 5 **Q.** So would you agree that the risks might include,
 6 fundamentally, a lack of objectivity?
 7 **A.** They can do, yes, and with private prosecutors,
 8 in perhaps the most literal sense, an individual
 9 who feels aggrieved and seeks to take recourse
 10 themselves to a criminal court to address that,
 11 clearly they are both the victim and, as they
 12 perceive themselves to be, and the prosecutor.
 13 So their decisions, which are meant to be
 14 objective decisions as to investigative steps
 15 and/or prosecutorial decisions, could be taken
 16 from their perspective as an aggrieved person,
 17 rather than a minister of justice.
 18 **Q.** Would a second risk include the bringing of
 19 prosecutions on the basis, or the conducting of
 20 prosecutions on the basis, of the furtherance of
 21 impermissible objectives?
 22 **A.** Yes, and so again, taking that example of
 23 someone who is an aggrieved individual, they may
 24 feel aggrieved at someone who they perceive
 25 having cheated them a business arrangement, and
 64

1 their pursuit of the matter may be with view to
2 obtaining ultimately financial redress through
3 confiscation, rather than where the objective
4 tests that ought to be applied by any prosecutor
5 along the way have been applied.

6 **Q.** So over-emphasising or the use of the
7 prosecution as a facility to recover money?

8 **A.** Yes. So if one of your criteria for deciding
9 whether to prosecute or not is the best
10 interests of the business, you may be guided by
11 the fact that there is a loss identified to the
12 business, as a reason to prosecute, rather than
13 stepping back to identify whether, objectively,
14 there is a proper basis for prosecuting
15 an individual in relation to that loss.

16 **Q.** Would a third risk be a win-at-all-costs
17 mentality?

18 **A.** It could be, yes.

19 **Q.** Would you agree that those risks, if they exist,
20 may be multiplied or not called in to be
21 checked, if there is no external inspection or
22 oversight of the prosecutorial process?

23 **A.** It's both harder to identify them at the time
24 and harder to address them after the event, if
25 there isn't that kind of oversight.

65

1 a particular person and who then seeks to
2 prosecute them, clearly, is both the loser, with
3 grounds, certainly in their head at least, to be
4 aggrieved about that, and the prosecutor.

5 Where the Post Office was prosecuting
6 someone that they perceived had cheated them,
7 and had caused them loss, then they were both
8 the person who had suffered the loss -- the
9 organisation, rather, that had suffered the
10 loss, the organisation that wanted to recoup the
11 loss and the person prosecuting the person they
12 held responsible for the loss.

13 **Q.** Can I also draw some distinguishing features,
14 perhaps, between those two classes of people?

15 **A.** Yes.

16 **Q.** The Post Office had been prosecuting for
17 hundreds of years; is that right?

18 **A.** Yes.

19 **Q.** So it was an established private prosecutor?

20 **A.** Yes.

21 **Q.** The nature, number and scale of its private
22 prosecutions is obviously very different from
23 the individual that you just mentioned?

24 **A.** Yes.

25 **Q.** It had, itself, given over whole departments to

67

1 **Q.** Would you say that scrutiny of the private
2 prosecutorial function ought to begin in-house?

3 **A.** Yes, and I recognise different ways that that
4 can be done and different ways that it is done
5 by different organisations that have private or
6 quasi-private prosecutorial functions but that
7 they should have that independent scrutiny and
8 separation of scrutiny, clearly, is a way to
9 ensure that there is effective scrutiny.

10 **Q.** You've used the example, in answer to a couple
11 of my questions, of a private individual
12 aggrieved at a financial loss that they say that
13 they have sustained. In terms of the Post
14 Office -- and like you in your report I am
15 referring to the Post Office in each of its
16 legal entities --

17 **A.** Yes.

18 **Q.** -- across the piece and not distinguishing when
19 it was RMG and when it became Post Office
20 Limited -- would you equate the Post Office as
21 a private prosecutor to such an individual or is
22 it different, in any way?

23 **A.** There are potential similarities in the sense
24 that the individual who feels that they have
25 lost financially through their dealings with

66

1 investigative and prosecutorial work, hadn't it?

2 **A.** Yes.

3 **Q.** The Security Department and the Criminal Law
4 Team, the CLT --

5 **A.** Yes.

6 **Q.** -- to name just two. Would this, in any way, be
7 a relevant feature: that the company was
8 entirely owned by the Government, through
9 ownership of a single share? Does that bear on
10 the issues that we're looking at or not, in your
11 view?

12 **A.** It certainly doesn't have to. The -- so to take
13 an example that was flagged up in the report
14 that I've seen recently, that where the London
15 Fire Service were both responsible for fire
16 safety but also, potentially, for a prosecution
17 in relation to a fire, the fact that they had
18 separate parts of their organisation dealing
19 with one and dealing with another was a factor
20 to ensure that they were capable of dealing with
21 that fairly.

22 So the fact that there are separate
23 departments within organisation that keep them
24 separate from their owner, for example, can
25 overcome any issue. It depends on how it's

68

1 done.

2 And so to answer your question, the fact
3 that the Post Office was effectively owned by
4 the Government, on the one hand gave them more
5 of a responsibility to ensure that they applied
6 policy and statute that were laid down by
7 Government to ensure that the job they were
8 doing was done appropriately and fairly; but, if
9 they built the necessary separations and
10 independent scrutiny into their system, then
11 there would be no pressure on them from their
12 owner for how they did it or there shouldn't be.

13 **Q.** Thank you. Can we turn to the status of
14 proceedings that the Post Office brought and
15 this is page 10 of your report.

16 **A.** Yes, thank you.

17 **Q.** If we can have that up on the screen, please.
18 EXPG0000002 -- thank you -- page 10. If we
19 scroll down to get paragraphs 15 and 16. In
20 paragraphs 15 and 16 of your report you
21 summarise the history of the postal service
22 undertaking investigations and prosecutions of
23 criminal offences. I'm not going to ask you
24 about that and instead take these paragraphs as
25 read.

69

1 that I'll be ready when you are.

2 **MR BEER:** Thank you very much, sir. Maybe if

3 Mr Atkinson can go to the room. Thank you.

4 (11.58 am)

(A short break)

6 (12.09 pm)

7 **MR BEER:** Sir, I can now see you. Can you see and
8 hear me? Thank you. Apologies for that delay
9 and apologies, Mr Atkinson, for that delay.

10 We were trying to look at POL00027501, which
11 I think is now on the screen. Just to orientate
12 ourselves in the document, if we go to page 5,
13 please, and look at the foot of the page. We
14 can see that it is authored by Chris Aujard on
15 8 November 2013.

16 Go back to the front page, please. We can
17 see the document is entitled "Post Office Audit,
18 Risk and Compliance Committee [and] Prosecutions
19 Policy". You can see the purpose of the policy
20 set out in paragraphs 1.1 and 1.2, but it is
21 what is said about the Post Office's power to
22 bring prosecutions that I wanted to draw to your
23 attention.

24 We can see at paragraph 2.2 it says, since
25 that update -- last October, that was -- Brian

71

1 In the course of that investigative work
2 that you undertook, I believe you sought to
3 identify the statutory basis for the Post
4 Office's investigation of and prosecution of
5 offences --

6 **A.** Yes.

7 **Q.** -- and you didn't find one, I think that's
8 right?

9 **A.** No, that's right.

10 **Q.** I think you were heartened by some material that
11 you found amongst the documents that you were
12 given by the Inquiry that emanated from the Post
13 Office's then general counsel --

14 **A.** Yes.

15 **Q.** -- Chris Aujard, dated 8 November 2013.

16 If we just look at that, please. It's
17 POL00027501. If you're working from hard copy,
18 Mr Atkinson, it's E4.

19 **A.** Thank you very much.

20 **MR BEER:** Sir, I'm afraid we'll have to take
21 a break. There's something gone wrong with the
22 system. Can we leave it that we'll come back to
23 you when that fault has been cured?

24 **SIR WYN WILLIAMS:** Yes, of course. I'll take myself
25 off screen but I won't leave the room I'm in, so

70

1 Altman, Queen's Counsel, has prepared two
2 separate reports, et cetera.

3 Then if we go down to paragraph 2.5:

4 "An important fact to emerge from the 2
5 reports [that's Mr Altman Queen's Counsel's
6 reports] is that the Post Office does **not** have
7 any special statutory powers to bring
8 prosecutions ..."

9 So this the Post Office's general counsel
10 saying it's emerged now that we, the Post
11 Office, don't have a special statutory power to
12 bring prosecutions:

13 "... rather it brings prosecutions in
14 a purely 'private' capacity further to
15 Section 6(1) of the Prosecution of Offences Act
16 1985, which gives all individuals and companies
17 the right to bring a private prosecution, should
18 they see fit. To that extent, therefore, the
19 decision to undertake prosecutions is
20 discretionary: no legislation or regulation
21 requires Post Office to undertake prosecutions,
22 nor is there any legislative policy that
23 mandates that prosecutions should be brought.
24 That is not to say that the standards of
25 evidence are in any way reduced, or that the

72

1 process is less rigorous than would be the case
2 with a public prosecution, it's simply that the
3 Post Office steps in to assume a function that
4 typically would be undertaken by the CPS, after
5 the referral to it of a case by the police."

6 I think you agree with what is summarised
7 there; is that right?

8 **A.** Yes.

9 **Q.** That's accurate --

10 **A.** Yes, it is.

11 **Q.** -- and provided, as I said, a heartening
12 reaffirmation of what you had discovered or
13 failed to discover as a result of your own
14 researches?

15 **A.** That's right.

16 **Q.** Can we look, then, please, at Section 6 of the
17 Prosecution of Offences Act -- sometimes called
18 the POA -- 1985, as it's a foundational
19 provision for the bringing of prosecutions.
20 That document, please, is at RLIT0000073.

21 That's the front page of the POA as
22 originally enacted. If we can scroll down,
23 please, to Section 6. I think that's on about
24 page 4., thank you. Section 6, "Prosecutions
25 instituted and conducted otherwise than by the

73

1 did, at this point in time, was to preserve that
2 right, even though, in other respects, it was
3 creating the Crown Prosecution Service and
4 setting out the duties of the Director in
5 relation to the bringing of prosecutions for
6 various agencies, including the police, more
7 generally.

8 **Q.** Can we go back, please, to POL00027501, which is
9 the document we were just looking at, the Chris
10 Aujard document. Thank you.

11 Can we look, please, at paragraph 2.4, which
12 we skipped over, towards the foot of the page.
13 Thank you.

14 The policy says:

15 "The forward looking report [that's
16 Mr Altman's report] is similarly positive in
17 tone with Brian Altman commenting that he had
18 '... seen no evidence to suggest that Post
19 Office Limited exercises its investigations and
20 prosecution function in anything other than
21 a well-organised, structured and efficient
22 manner, through an expert and dedicated team of
23 in-house investigators and lawyers, supported by
24 Cartwright King solicitors and their in-house
25 counsel ...'."

75

1 Service". The "Service" means the Crown
2 Prosecution Service, correct?

3 **A.** Yes.

4 **Q.** "Subject to subsection (2) below, nothing in
5 this Part shall preclude any person from
6 instituting any criminal proceedings or
7 conducting any criminal proceedings to which the
8 Director's duty ..."

9 The "Director" being the Director of the
10 Crown Prosecution Service?

11 **A.** The Director of Public Prosecutions, yes.

12 **Q.** "... to take over the conduct of proceedings
13 does not apply.

14 "(2) Where criminal proceedings are
15 instituted in circumstances in which the
16 Director is not under a duty to take over their
17 conduct, he may nevertheless do so at any
18 stage."

19 So this is essentially the power to bring
20 private prosecutions --

21 **A.** Yes.

22 **Q.** -- reflected in statute. It's not obviously
23 a requirement to bring such prosecutions?

24 **A.** Yes. There was always recognised to be a right
25 to bring a private prosecution. What this Act

74

1 I'm not going to ask you about that
2 assessment. We're going to come back to that
3 rosy assessment later in the year and into next
4 year. The policy continues:

5 "That said, it was noted that 'Post Office
6 Limited's prosecution role is perhaps
7 anachronistic ...', and that '[Post Office
8 Limited] is the only commercial organisation,
9 (albeit Government owned) I can think of (apart
10 from [Royal Mail Group] who retains a residual
11 prosecuting function) that has a prosecution
12 role, and it is, to that extent, exceptional if
13 not unique."

14 The policy notes, relying on what Mr Altman
15 had said, that the Post Office's prosecution
16 role is anachronistic and exceptional, if not
17 unique. In your researches, did you find or
18 uncover any similar organisation to the Post
19 Office?

20 **A.** No, and in my report I highlighted a further
21 document, again from Mr Aujard, which is
22 paragraphs 17 and 18 of my report, where he
23 undertook a further analysis of that suggestion,
24 that the Post Office's prosecution role being
25 an exceptional one and he highlighted that other

76

1 financial institutions, even with in-house
 2 investigative teams, would usually hand over
 3 their cases at a particular point to other
 4 prosecution and investigative agencies, rather
 5 than carrying out that role themselves.

6 And even those that did undertake
 7 a prosecution role themselves, like Transport
 8 for London or the RSPCA, were focused in doing
 9 that on persons outside its organisation,
 10 whereas the Post Office, of course, was
 11 prosecuting not only persons from outside but
 12 also in-house, in the sense of prosecuting its
 13 own employees themselves, rather than it being
 14 dealt with by others.

15 And so, in those respects, in particular,
 16 I would agree that it was exceptional and
 17 I didn't find any comparable organisation.

18 **Q.** Thank you. That can come down now, please. Can
 19 we go back to your report, please, at page 13,
 20 please.

21 So it has been established that, generally
 22 speaking, the Post Office has no special
 23 investigative powers and no special
 24 prosecutorial powers?

25 **A.** Yes.

77

1 set out the foundation of your approach?
 2 **A.** Yes, and I should make clear, I recognise that
 3 the Post Office was entitled, as a private
 4 prosecutor, to devise its own approach to areas
 5 that the police and/or the Crown Prosecution
 6 Service dealt with but it seemed to me a good
 7 way of testing the effectiveness of those, to
 8 see not only what the police and the CPS had in
 9 policy terms set out but what the purpose of
 10 that was, and to see whether those purposes were
 11 also comparably being addressed by how the Post
 12 Office, in policy terms, was doing it.

13 **Q.** Now, what you're saying is that, is this right,
 14 the materials, whether they're statutes, codes,
 15 guidelines and policies, which make up the
 16 framework or the network that you have
 17 described, have importance in three ways.
 18 Firstly, in some cases they may be directly
 19 applicable?

20 **A.** Yes.

21 **Q.** So some parts of the CPIA 1996 are directly
 22 applicable and bind, as a matter of law, the
 23 Post Office --

24 **A.** Yes.

25 **Q.** -- when it's acting as a private prosecutor.

79

1 **Q.** Can we look at paragraph 22, please. You say:
 2 "It follows from this independent role that
 3 the Post Office, as an investigative and
 4 prosecutorial agency, has always operated
 5 separately from the agencies and mechanisms of
 6 mainstream investigation and prosecution of
 7 crime. In particular, the police in relation to
 8 the first and the CPS to the second. It is,
 9 however, entirely appropriate to consider ...
 10 the Post Office in the undertaking of criminal
 11 investigations and the prosecution of criminal
 12 offences by reference not only to the statutory
 13 regime and guidelines that had direct
 14 application to the Post Office in these
 15 capacities but also to the statutory regime and
 16 guidelines that applied in the same time period
 17 to the police and CPS. The relevance of the
 18 latter is both that it provides a bench mark
 19 against which to assess investigatory and
 20 prosecutorial practices by the Post Office
 21 between 2000 and 2013, but also because in
 22 important respects there was an expectation by
 23 Parliament and the judiciary that they would
 24 have regard to them."

25 Does this essentially, in this paragraph,

78

1 Secondly, those materials, even if they're
 2 not directly applicable to the Post Office, they
 3 provide a benchmark against which to judge the
 4 Post Office's policies and practices and
 5 ultimately its conduct?

6 **A.** Yes.

7 **Q.** Thirdly, in any event, there was an expectation
 8 by Parliament and the courts that private
 9 investigators and prosecutors would have regard
 10 to such policies and practices?

11 **A.** Yes.

12 **Q.** Can I turn to the separation of the
 13 investigative and the prosecutorial functions.
 14 In a number of passages in your report --
 15 I don't ask for them to be turned up, but
 16 they're paragraphs 26 to 35 and 55 -- you are
 17 critical of the Post Office's policies for not
 18 spelling out the separation of functions between
 19 the investigative function, on the one hand, and
 20 the prosecutorial function, on the other, based
 21 on a comparison with the positions of the CPS
 22 and the SFO; is that right?

23 **A.** Yes, or, perhaps more precisely, that the Post
 24 Office policies that I saw allowed for or didn't
 25 prevent a merging of investigative and

80

1 prosecuting decision making, in a way that, in
2 their different ways, the CPS and the SFO had,
3 and other organisations had.

4 **Q.** It's right that the CPS and the SFO were both
5 creatures of statute --

6 **A.** Yes.

7 **Q.** -- and the statutes that create them ensure and
8 have hard-written into them the separation of
9 investigative and prosecutorial functions?

10 **A.** Certainly, the Prosecution of Offences Act very
11 much creates a distinction of investigative and
12 prosecutorial roles and makes clear that the CPS
13 only occupies the latter of the two. The SFO is
14 different from that, in the sense that the
15 director of the SFO has a responsible for the
16 investigation of fraud as well as the
17 prosecution of fraud. But there is the clear
18 expectation in that, not least through its
19 supervision by the Attorney General and
20 Parliament, that those roles will be kept
21 separate.

22 And that is and always has been very clear
23 in how the SFO has conducted itself.

24 **Q.** So the answer to my question is, yes, so far as
25 the CPS is concerned, hard-written into the

81

1 of an independent, professional prosecuting
2 service, answerable to the Attorney General in
3 his role as guardian of the public interest, and
4 no one else' ... There is no comparable
5 oversight of the investigative and prosecutorial
6 activities of the Post Office", you add.

7 What, if anything, do you say are the
8 importance of Lord Bingham's remarks in *Manning*
9 to the present issues that we are considering?

10 **A.** What underscored what Lord Bingham there was
11 saying, in effectively saying that it would be
12 rare for a judicial review of a prosecutorial
13 decision to be successful, was that the reason
14 for that was that Parliament had entrusted
15 prosecuting decisions to the Director, the DPP,
16 but, more than that, that that was the DPP was
17 the head of an independent, professional
18 prosecuting service that was answerable to the
19 Attorney General, and thus to Parliament, and
20 so, in that context, the safety of prosecutorial
21 decisions came from that combination of
22 oversight and independence.

23 Where that combination is lacking or more
24 limited, the confidence one can have in
25 prosecutorial decisions is equally reduced.

83

1 statute --

2 **A.** Yes, absolutely.

3 **Q.** -- no, in relation to the SFO?

4 **A.** That's right.

5 **Q.** Thank you. Can we look, please, at page 17 of
6 your report and look at paragraph 29 at the foot
7 of the page. Sorry, did I say 17? I meant 15
8 of your report, paragraph 29 at the bottom.
9 Thank you?

10 You say:

11 "The status of the [Director of Public
12 Prosecutions], and the superintendence of the
13 [Crown Prosecution Service] by [His Majesty's]
14 Attorney General is recognised to have
15 significant importance. For example, in *R v*
16 *Director of Public Prosecutions Ex P Manning*
17 *[2001] QB330*, Lord Bingham of Cornhill [the Lord
18 Chief Justice] observed, in the context of
19 a challenge to a decision not to prosecute by
20 way of judicial [at paragraph 23]: '... as the
21 decided cases also make clear, the power of
22 review is one to be sparingly exercised. The
23 reasons for this are clear. The primary
24 decision to prosecute or not to prosecute is
25 entrusted by Parliament to the Director as head

82

1 **Q.** Thank you. You say at the end of the paragraph
2 that there is no comparable oversight of the
3 investigative and prosecutorial activities of
4 the Post Office. Is that right: is there no
5 oversight?

6 **A.** Not in the material that I saw, and I'm very
7 happy to be corrected on it, but certainly there
8 was identification of oversight within the Post
9 Office. So, for example, the Director of
10 Security had oversight of investigations but not
11 in the anyway that there was the independent
12 external oversight that there is for the CPS, by
13 way of example.

14 **Q.** Did you find, amongst any policy document or
15 guidance document that you were provided with,
16 any requirement that mandated Post Office Board
17 oversight of the Post Office's investigative and
18 prosecutorial activities?

19 **A.** Not that I can think of. I'm very happy, again,
20 to be corrected but not that I can think of.

21 **Q.** No, my purpose wasn't to set you up for a fall
22 on that one. It was to establish the position.
23 So, looking at internal scrutiny and oversight,
24 you didn't see anything in the policies that
25 mandated board oversight of this important

84

- 1 function of investigation and prosecution?
 2 **A.** No.
 3 **Q.** Can we look, please, at page 23 of your report.
 4 Look at paragraph 48 at the bottom. You're
 5 dealing here, in this part of your report, with
 6 the distinction of roles, the separation of
 7 powers and responsibilities between
 8 investigators, on the one side, and prosecutors,
 9 on the other --
 10 **A.** Yes.
 11 **Q.** -- in other organisations. You're establishing,
 12 I think, in paragraph 48 and the following
 13 paragraphs, that distinction or separation of
 14 roles amongst certain public investigators and
 15 public prosecutors -- here, the police and the
 16 CPS -- and you are identifying where that
 17 distinction of roles is recognised and what
 18 I call as hardwired into the system; is that
 19 right?
 20 **A.** Yes.
 21 **Q.** You start at paragraph 48 by looking at
 22 Section 3 of the Prosecution of Offences Act
 23 1985, which you mentioned in passing ten minutes
 24 ago, or so?
 25 **A.** Yes.

85

- 1 relation to prosecutions on the other."
 2 Then you cite from it.
 3 **A.** Yes.
 4 **Q.** Is that something that was unique to the 2018
 5 8th Edition iteration or is that separation of
 6 functions something that was ingrained right
 7 from the beginning?
 8 **A.** Right from the beginning. Different wording but
 9 the essential point and essential importance of
 10 that independence was always there.
 11 **Q.** As you recognise in your report, Parliament
 12 expressly permits prosecutions to be bought by
 13 private prosecutors --
 14 **A.** Yes.
 15 **Q.** -- and, in the legislation that permits that, it
 16 doesn't require them to have this separate
 17 separation -- sorry, this separation?
 18 **A.** Yes.
 19 **Q.** Are you aware of the reports of the Philips
 20 Commission which considered private
 21 prosecutions?
 22 **A.** Yes.
 23 **Q.** Is this right: that the Philips Commission
 24 considered but did not recommend that the CPS
 25 should take on responsibility of prosecutions

87

- 1 **Q.** Is the short point this: that the statute, the
 2 originating statute, itself draws a distinction
 3 and a clear one, between the investigative role
 4 of the police, on the one hand -- and other
 5 investigative agencies like the National Crime
 6 Agency, on the one hand, and the prosecutorial
 7 role of the CPS on the other?
 8 **A.** Yes.
 9 **Q.** If we go over the page, please, to paragraph 49.
 10 That distinction is drawn out and emphasised in
 11 a document called *Police and CPS Relations* which
 12 you refer and to quote from in paragraph 49; is
 13 that right?
 14 **A.** Yes.
 15 **Q.** So we've had the statute so far, this guidance
 16 document on police and CPS relations, secondly.
 17 If we go forwards, please, to page 25,
 18 paragraph 50, you say:
 19 "Similarly, Section 3 of the present edition
 20 of the *Code for Crown Prosecutors* ... (issued in
 21 October 2018), addresses decisions whether to
 22 prosecute, and again makes the distinction
 23 between the roles of investigative authorities
 24 such as the police in relation to investigations
 25 on the one hand and that of the Director and in

86

- 1 brought by non-police agencies and private
 2 individuals and corporations?
 3 **A.** That's right.
 4 **Q.** Given that Parliament required expressly
 5 separation between the police investigative
 6 function and the CPS prosecutorial function but
 7 declined to require it in the case of private
 8 prosecutors, why do you consider that the Post
 9 Office, as a private prosecutor, is obliged to
 10 maintain an inbuilt separation of functions in
 11 the same way as the police and the CPS do?
 12 **A.** Neither the Philips committee nor the
 13 Prosecution of Offences Act allowed private
 14 prosecutors to have merged functions. They
 15 didn't address that but that was already
 16 addressed in cases that we have already passed
 17 along the way, for example, I think, *Maxwell*,
 18 where it was recognised that private prosecutors
 19 nevertheless had to be ministers of justice
 20 first and foremost, and that is all about the
 21 independence of the prosecutor. And so it was
 22 put into statute because it was a statute that
 23 was creating a prosecution authority in the
 24 majority of cases but that does not mean that
 25 anyone who does not come within the Prosecution

88

1 of Offences Act was not nevertheless required to
2 have that independence of prosecutorial
3 decisions in place. It was already recognised
4 and the Act didn't take it away.

5 **Q.** Thank you. That document can come down, please.

6 So would this be right: the statutory regime
7 is itself a recognition of the fundamental
8 importance of the separation of functions?

9 **A.** Yes, and there are different ways it can be done
10 but that distinction is fundamental.

11 **Q.** Therefore, it's a recognition, would you say, of
12 the need for separation, the wisdom of doing so
13 and the consequences of not doing so?

14 **A.** Yes.

15 **Q.** So, would this be right from what you've just
16 said, it can't be said that, because Parliament
17 hasn't required it, there isn't a need for it to
18 be done?

19 **A.** No, that's right and, in one sense, Parliament
20 has identified the need for it, not just through
21 the Prosecution of Offences Act. But other
22 legislation and codes under legislation that
23 deal with investigative and prosecutorial
24 decision making, like the CPIA, by way of
25 example, all underlined that separation of

89

1 **A.** Because in the material that I've seen for the
2 purposes of Volume 2 it has not been entirely
3 clear to me who made the decisions to prosecute,
4 I can't there see a delineation of investigative
5 and prosecuting decisions that I couldn't find
6 in the policies.

7 **Q.** Thank you. What about, picking another
8 organisation, say the Health and Safety
9 Executive, have you experience of delineation or
10 separation of functions within the Health and
11 Safety Executive?

12 **A.** So, for example, the Health and Safety Executive
13 certainly since 2011, which was as early as
14 I was able to trace things via their website,
15 had approval officers who had a role in relation
16 to prosecutorial decisions who were independent
17 of the investigation. So that was a built-in
18 filter of independence into the process, in
19 a much more clearly defined way than I could
20 find in comparable Post Office policy.

21 **Q.** Thank you. Can we turn, then, to the Post
22 Office policies on this issue. In several parts
23 of your report, in particular paragraphs 30 and
24 55, you're critical of what you regard as a lack
25 of proper policy guidance as to the need for

91

1 responsibilities. So Parliament has emphasised
2 it, rather than taking it away.

3 **Q.** On the policies that you have seen, are you able
4 to help us in general terms as to whether the
5 Post Office itself hardwired a separation of
6 decision making, as between investigative
7 functions, on the one hand, and prosecutorial
8 decision making, on the other, in its policies?

9 **A.** It's clear that it had an Investigative
10 Department and a Criminal Law Department. The
11 latter was the department that would advise on
12 prosecutions; the former was the department that
13 would undertake investigations. And so, to that
14 extent, there were those two separate entities.
15 My concern was that, in relation to the
16 supervision of those and the ultimate decision
17 making as to prosecutions flowing from those,
18 there wasn't necessarily that clear separation,
19 so that the same person could be making
20 decisions as to prosecution who was also
21 supervising investigations.

22 **Q.** On what you've read so far of the Volume 2
23 material, if I can call it that, are you able to
24 help us as to whether, in fact, the Post Office
25 did enforce any separation of decision making?

90

1 a division of responsibility between
2 investigators and decision-makers in relation,
3 in particular, to a decision to charge. Can we
4 look, please, at page 27 of your report at
5 paragraph 55.

6 From this paragraph (a) right through to
7 (j), you analyse a series of Post Office
8 policies and guidance materials --

9 **A.** Yes.

10 **Q.** -- concerning investigation and prosecution and
11 analyse whether there is a proper policy
12 guidance within them on the division of
13 responsibilities; is that right?

14 **A.** Yes.

15 **Q.** So if we turn and look at paragraph 55(a), and
16 you refer there to the March 2000 Investigation
17 and Prosecution Policy. You say that:

18 "[It] identifies that investigations will be
19 undertaken by the Security and Investigations
20 Service ('SIS') or Business Security and
21 Investigation Unit. Whilst it refers to
22 prosecutorial decisions, which it says will be
23 taken in consultation with the SIS and Legal
24 Services Criminal Law Division, it does not
25 spell out by whom they are to be taken. It ...

92

1 does not indicate the standards to be applied,
2 or who is to ensure the standards are applied
3 correctly."

4 I think footnote 34 tells us that the 2002
5 revision of the Investigation and Prosecution
6 Policy is in the same terms.

7 **A.** Yes.

8 **Q.** So there are a collection of problems, is this
9 right, that you identify with that policy.
10 Firstly, it doesn't clearly state who will take
11 decisions to prosecute?

12 **A.** Yes.

13 **Q.** Secondly, it does not state the standards that
14 are to be applied, whoever that person is taking
15 the decision?

16 **A.** No, that's right.

17 **Q.** Thirdly, it doesn't state who is to ensure that
18 the standards are being applied correctly?

19 **A.** Yes, it doesn't either identify either the
20 decision-maker or the person who is there to
21 supervise or audit the decision-making process.

22 **Q.** A slightly later policy than the March 2000 one,
23 called the Post Office rules and standards
24 policies of October 2000, identifies that.

25 "... investigators are to maintain the
93

1 lead in dealing with the Police'. In relation
2 to prosecutions, at para 3.2.9, it states:
3 'decisions to prosecute in non-CPS cases will be
4 taken by nominated representatives in the
5 business with consideration to the advice
6 provided by [RMG] Criminal Law Team'. The
7 policy remained unchanged in each of these
8 respects in its November 2010 iteration."

9 So the two issues that you identify as
10 potentially problematic within that December
11 2007 version of the policy, you tell us by your
12 footnote 37, remained unchanged in the 2010
13 iteration, yes?

14 **A.** Yes.

15 **Q.** Can we look, please, at the policy to which
16 you're referring. This is POL00104812. This is
17 the December 2007 version of the policy. If we
18 just scroll through it, we'll see how long it
19 is. I think it's three pages, isn't it? Scroll
20 down, keep going. Thank you, that's the end of
21 it.

22 Okay, so back to page 1 of the policy. If
23 we just look at -- I'm not going to do this with
24 every policy; I just want to pick some examples
25 to see where you have cited from the policy,
95

1 highest standards of professionalism, without
2 seeking to define them in any detail."

3 **A.** That's right.

4 **Q.** What's the problem with that, saying, "You're to
5 maintain the highest standards of
6 professionalism", full stop?

7 **A.** Two people's versions of what the highest
8 unspecified standards are may well be different
9 and one may be more exacting than another and,
10 in fact, neither of them may be right.

11 **Q.** Can we look at paragraph 55(B), please. You say
12 that:

13 "The Royal Mail Group Limited Criminal
14 Investigation and Prosecution Policy, in its
15 December 2007 version, states (at para 3.1.4):
16 'The conduct, course and progress of
17 an investigation will be a matter for the
18 investigators as long as it is within the law,
19 rules and priorities of the business.
20 Investigators will ultimately report to the
21 Director of Security with regard to the conduct
22 of a criminal investigation'. The Investigators
23 are defined, at [paragraph] 3.1.3, '[RMG]
24 Security Investigation Teams are the providers
25 of in-house investigations and will maintain the
94

1 quoted from the policy, what the policy in fact
2 looks like, to get a bit more context.

3 3.1.3, if we can scroll down, please,
4 "Policing Crime", this something you cite:

5 "Royal Mail Group Security Investigation
6 Teams are the providers of in-house
7 investigations and will maintain the lead in all
8 dealings with the police."

9 So that's essentially narrative, isn't it?

10 **A.** Yes.

11 **Q.** Then if we go to 3.1.4:

12 "The conduct, course and progress of
13 an investigation will be a matter for the
14 investigators as long as it is within the law,
15 rules and priorities of the business."

16 What's wrong with that?

17 **A.** My concern about that is the lack of specificity
18 about each of those, as long as it's within the
19 undefined law, the undefined rules and the
20 unspecified priorities of the business, and
21 without identification as to which of those
22 trumps which.

23 **Q.** So what are the potential issues which arise?

24 **A.** Inconsistency of application, and one could read
25 that -- not least because if one looks further
96

1 up the policy box, and the first two policy
2 objectives, at 3.1.1, are "Protecting the
3 Integrity of the Mail" and 3.1.2 of "Protecting
4 the Business" -- that protecting the business is
5 the most important and, whilst that may not be
6 the intention, if it's not spelt out with
7 necessary guidance as to what it's talking
8 about, there's the risk of it going wrong.

9 **Q.** So a reader could read priorities of the
10 business as being those priorities identified in
11 3.1.1 and 3.1.2?

12 **A.** Yeah.

13 **Q.** So what's missing from that sentence
14 "investigations are a matter for investigators,
15 as long as they are within the law, rules and
16 priorities of the business"?

17 **A.** If it spelt out there the Post Office policy
18 that they were to apply, which itself identified
19 the relevant statutes, the relevant codes under
20 statute, the relevant guidance from the Attorney
21 General, and so on, then the reader would know
22 exactly what it was talking about and what the
23 standards were.

24 Where it doesn't spell those out, there's
25 the risk that important areas of the law and the

97

1 it had in mind, then we would know.

2 **Q.** So is this one of the examples that we spoke
3 about earlier, where there is a flashing
4 reference to an Act but it doesn't say in any
5 meaningful sense what's to be done?

6 **A.** Yes, and it could either here refer to the
7 relevant parts or it could refer to a policy
8 where those parts are identified. So, if there
9 was a policy that addressed the way in which
10 investigations were to be reported to
11 prosecutors and the parts of those that Act and
12 that Code that applied in that context, then
13 that would do the job.

14 **Q.** If we can look, please, at 3.2.9, "Prosecution":
15 "Suspect offenders will be prosecuted where
16 there is sufficient evidence and it is in the
17 public interest in accordance with the Code for
18 Crown Prosecutors. Decisions to prosecute in
19 non-Crown Prosecution Services cases will be
20 taken by nominated representatives in the
21 business with consideration to the advice
22 provided by the Royal Mail Group Criminal Law
23 Team."

24 Two questions there. What, if anything, is
25 wrong with that; and what, if anything, is

99

1 rules will be missed.

2 **Q.** So the reader doesn't know which law?

3 **A.** No.

4 **Q.** Which rules, what priorities?

5 **A.** *(Non-verbal answer)*

6 **Q.** Are you advocating or are you saying that it
7 should all be stated in here or could be done by
8 cross-reference?

9 **A.** It could be done by cross-reference.

10 **Q.** If we go to page 3, please, and look at 3.2.9 at
11 the foot of the page. I should read 3.2.8
12 first:

13 "Investigations leading to potential
14 prosecution will be reported in accordance with
15 the [CPIA] and the [CPIA] Code of Practice."

16 What do you understand that to mean, that
17 investigations will be reported?

18 **A.** I must confess it's not altogether clear to me
19 what that means in the context of reporting
20 investigations. The CPIA addresses aspects of
21 the investigation and aspects of the disclosure
22 regime; the Code addresses those areas and also
23 the interaction of investigators and
24 prosecutors. So it may relate to that but, if
25 it's set out which parts of the Code and the Act

98

1 missing?

2 **A.** This, I think I'm right in saying in 2007, was
3 the first policy reference in the Post Office
4 policies I had seen to the Code for Crown
5 Prosecutors as being the test to be applied. It
6 doesn't actually reflect that test in referring
7 to sufficient evidence, rather than a realistic
8 prospect of conviction.

9 It then refers to decisions on prosecutions
10 being taken by nominated representatives in the
11 busy with consideration to advice but it doesn't
12 make clear how that consideration is to work.
13 On the face of this, the nominated
14 representative could have obtained advice from
15 the Criminal Law Team and ignore it, in the
16 sense that they could come to a contrary view to
17 the one expressed in the advice that they had
18 received, as long as they had obtained it.

19 **Q.** So in relation to the first concern, there's
20 a cross-reference to the Code for Crown
21 Prosecutors for the first time, so far as you've
22 been able to see --

23 **A.** Yes.

24 **Q.** -- in December 2007, so well into our relevant
25 period. What's wrong with a policy saying,

100

1 "You're to take decisions in accordance with the
2 Code for Crown Prosecutors"?

3 **A.** Well, firstly, going back to an earlier
4 question, if those decisions are to be taken in
5 relation to a fairly defined range of possible
6 scenarios, there would be sense in your policy
7 addressing those scenarios and how decisions to
8 prosecute should be taken in those situations,
9 rather than referring -- just referring to
10 a code that is broader than that.

11 Secondly, if the nominated representative in
12 the business is making the decision and they may
13 not be a lawyer, then they need help as to how
14 to apply the Code for Crown Prosecutors, what
15 factors in it they need to focus on, how they
16 interact with each other, and so just being told
17 there is a code that will be applied may not be
18 enough.

19 It depends on who the nominated
20 representatives are, how they are trained, how
21 they are otherwise instructed beyond the scope
22 of this paragraph. But this paragraph, on its
23 own, doesn't make it clear.

24 **Q.** Reading on to 3.2.10 under the heading "Conduct
25 and Oversight of Investigations", the policy

101

1 **Q.** It doesn't explain the standards to be applied
2 and it doesn't explain how those standards are
3 going to be measured or audited to ensure that
4 they're being applied correctly?

5 **A.** And it doesn't identify, in addition to those,
6 how legal advice is to interplay into that
7 process.

8 **Q.** Thank you.

9 Can we go back to your report, please, at
10 page 27. I'm going to through the rest of (b)
11 to (j) in your examination of the policies but
12 without, on each occasion, going back to the
13 source.

14 **A.** Yes.

15 **Q.** You tell us -- and I think we've got time to fit
16 this in just before lunch -- at your
17 subparagraph (b), if we scroll down, please:

18 "The [RMG Limited] Criminal Investigation
19 and Prosecution Policy ..."

20 **A.** That's the one we just looked at, I think.

21 **Q.** Yes, quite right. Over the page to (c), thank
22 you at 28. Moving forward to April 2010:

23 "The Post Office Limited Security policy --
24 [Fraud and investigation policy] identifies the
25 fraud investigation team as being in-house

103

1 tells us that:

2 "Royal Mail Group Security employees perform
3 a vital role on behalf of the public, the
4 Criminal Justice system and Royal Mail Group
5 Limited customers and employees. These
6 stakeholders must have absolute confidence in
7 the integrity, conduct and professional status
8 of Investigators.

9 "This means adherence to the laws,
10 regulations and codes along with their
11 respective Procedure and Standards referred to
12 above."

13 What's wrong with that, if anything?

14 **A.** Clearly, that is an entirely correct
15 observation, that that is what stakeholders
16 should have an absolute confidence in. Whether
17 this document and the references it makes at
18 this point to earlier parts of the document is
19 sufficient to ensure that, is a separate
20 question.

21 **Q.** So, overall, looking at this policy document,
22 your principal criticisms, is this right, are as
23 follows: it doesn't say who's in fact going to
24 take a decision to prosecute?

25 **A.** No.

102

1 investigators answerable to the Head of
2 Security. In relation to prosecutions at,
3 paragraph 3.15, it states: 'decisions to
4 prosecute will be taken by nominated
5 representatives in the business with
6 consideration to the advice provided by the
7 Royal Mail Group Criminal Law Team and where
8 there is sufficient evidence and it is in the
9 public interest.'

10 Is there any difficulty with that?

11 **A.** In this context, unlike the previous document,
12 there isn't a reference to the Code for Crown
13 Prosecutors and, therefore, no clear indication
14 as to how evidential sufficiency or the public
15 interest are to be assessed, providing those two
16 boxes are ticked. And again, my concern, which
17 may be overexacting but it is my concern, that
18 consideration to the advice provided by lawyers
19 could be interpreted as "As long as you've got
20 it, you don't have to follow it".

21 **Q.** So the principal problem, is this right, if
22 problem it is, is that, whereas three years
23 previously, there had been at least a reference
24 to the Code for Crown Prosecutors, that seems to
25 have evaporated?

104

1 A. Certainly in this particular document, it wasn't
 2 there.
 3 Q. So would a person taking a decision by reference
 4 to this policy in April 2010 know that they've
 5 got to apply the Code or not?
 6 A. It would depend on what they were reading beyond
 7 this. If this was all that they were applying,
 8 then there's clearly the risk that they wouldn't
 9 apply the Code. If they were looking at a wider
 10 pool of policy instruction and/or training, then
 11 they might extract it from that but they
 12 certainly wouldn't get it from this.
 13 Q. It doesn't say what "sufficient evidence"
 14 means --
 15 A. No.
 16 Q. -- nor give guidance on how to ascertain it --
 17 A. Right.
 18 Q. -- nor explain what "the public interest" means?
 19 A. As we'll see when we look at the Code in its
 20 various iterations in due course, neither of
 21 those is a one-line situation, although there
 22 are a whole range of factors that are identified
 23 as being relevant to the assessment of
 24 evidential sufficiency and an even larger range
 25 of factors that are relevant to the assessment

1 October 2009 and April 2011, and states:
 2 "The decision to prosecute Royal Mail
 3 investigations in England and Wales will be
 4 reached in agreement between the Human Resources
 5 Director for the affected business unit or his
 6 or her nominated representative, the nominated
 7 representative from the Investigation team and
 8 the lawyer advising."
 9 The document at 5.5 addresses the process
 10 where there is no agreement between those people
 11 as to whether to prosecute or not. That's
 12 obviously a change from the previous position?
 13 A. Yes.
 14 Q. But did you identify an issue or concern with
 15 the policy being formulated in that way?
 16 A. Well, it appeared, on my reading of it, to
 17 identify who the nominated representatives may
 18 have been in the earlier policies, which were
 19 not spelt out in those, but it did suggest that
 20 decisions as to prosecution would involve human
 21 resources, amongst others, and that -- again, it
 22 wasn't quite clear how the legal advice would
 23 factor in to that process. So those were the
 24 two areas that jumped out at me.

25 Q. Was there any concern that a member of the

1 of the public interest. They're not
 2 straightforward questions.
 3 MR BEER: On that note, it's 1.00, sir, would that
 4 be an appropriate moment to break until 2.00?
 5 SIR WYN WILLIAMS: Yes, of course. Thanks very
 6 much.
 7 MR BEER: Thank you very much, sir.
 8 (1.00pm)

(The Short Adjournment)

9
 10 (2.00 pm)
 11 MR BEER: Good afternoon, sir, can you see and hear
 12 me?
 13 SIR WYN WILLIAMS: I can, thank you. Yes.
 14 MR BEER: Thank you very much.
 15 Good afternoon, Mr Atkinson. Can we go back
 16 to page 28 of your report, please?
 17 A. Yes.
 18 Q. On the screen, that's page 28. I think we'd got
 19 up to (d); is that right?
 20 A. Yes.
 21 Q. So in this chronological run of policy documents
 22 relevant to the issue of separation of functions
 23 and separation of decision making, you turn to
 24 the Royal Mail Group Prosecution Policy, which
 25 carries two dates, but is in the same terms, of

1 investigation team would be a party to decision
 2 making on whether the suspect should have
 3 proceedings commenced against them?
 4 A. Potentially, there's clearly no impediment to
 5 the Investigation team having an input into the
 6 process by which a decision is made. It would
 7 be entirely normal, for example, for the police
 8 to provide -- report and to provide their
 9 assessment to the CPS before the CPS then made
 10 the decision as to prosecution. So that
 11 wouldn't be a problem. But, here, it does read
 12 as if the decision to prosecute is a collegiate
 13 matter with three parties, one of which is the
 14 investigation team, one of which is the lawyer
 15 and one of which is HR, and that, certainly in
 16 my experience, is unusual.
 17 Then the further stage, the -- where there's
 18 disagreements, it's for the Criminal Law Team
 19 and the Investigation team heads to come to
 20 a decision as to what should be done.
 21 Q. I think 5.5 envisages that HR are taken out of
 22 the process?
 23 A. Yes.
 24 Q. Moving on to January 2011:

25 "... the Royal Mail Prosecution Decision

1 Procedure [provides] (at paragraph 4.4): 'the
2 Regional Human Resources Director, or in Post
3 Office cases the Senior Security Manager ...
4 will act as the "decision maker" in authorising
5 prosecutions or not. All decision makers will
6 be familiar with the evidential and public
7 interest test of the Code for Crown Prosecutors
8 and make decisions accordingly'."

9 So this seemed to suggest that it was the
10 Security Manager, in Post Office Limited cases,
11 who was the decision-maker.

12 **A.** Yes, and so, if I'm right in my reading of this
13 in conjunction with other policies, it would
14 therefore be the person with superintendence for
15 the investigation process who would then make
16 the prosecuting decision, and/or, depending on
17 the situation, the regional human resources
18 director. And, as I read it, they would be
19 tasked with understanding and applying the Code
20 for Crown Prosecutors, rather than being
21 an independent legal assessment and decision.

22 **Q.** The comments you made earlier, about assistance
23 being needed for non-lawyers with the terms of
24 and carrying into effect of the Code, apply
25 here, do they?

109

1 getting legal advice but the decision then being
2 made by someone else.

3 **Q.** (g):

4 "The Post Office Limited Criminal
5 Enforcement and Prosecution Policy, which [you]
6 understand can be dated to November 2012,
7 [provides] that 'decisions to proceed with
8 a prosecution will be taken by the Head of
9 Security of [Post office Limited], upon legal
10 advice'."

11 Was there any difficulty or concern with
12 that?

13 **A.** Only that, again, trying to rationalise these
14 policies with each other. The Head of Security
15 had earlier been identified as being the
16 superintendent of the investigation process.
17 So, again, it is the investigative arm that
18 makes the decision as to whether to prosecute or
19 not on advice, but an investigative,
20 effectively, decision.

21 **Q.** Thank you. Over the page to (h) please, moving
22 forward to November 2013, so coming towards the
23 end of the relevant period:

24 "The Post Office Prosecution Policy England
25 and Wales, dated November 2013, in contrast to

111

1 **A.** Yes.

2 **Q.** (f):

3 "The Royal Mail Prosecution Decision
4 Procedure [of] January 2011 ... at 5.1-2:
5 'A criminal lawyer will advise whether the case
6 papers meet the evidential test for prosecution
7 and provide advice on the most appropriate
8 action to be taken ... the PSO will forward the
9 relevant case papers to the appropriate Decision
10 Maker for a decision on whether it is in the
11 public interest to initiate a prosecution'."

12 What were the good or less than good points
13 about this iteration of the policy?

14 **A.** Well, clearly, it recognises the importance of
15 a lawyer providing advice. There isn't
16 a specific reference to the Code for Crown
17 Prosecutors but there is a reference to the test
18 from it, as to evidential sufficiency, as
19 opposed to the public interest test, and then
20 the decision is taken by the decision maker.
21 And this is 2011, so, if this is read in
22 conjunction with the policies above, then your
23 decision maker is again the -- either the person
24 with superintendence for the investigation
25 process or the Director for HR, so, again, it's

110

1 these earlier policies, stated that prosecution
2 decisions should be taken by a qualified lawyer
3 'independent of any Post Office Limited
4 Department having a direct financial or other
5 interest in prosecution'. It added in
6 a footnote that this was designed to mirror the
7 independence of CPS decisions."

8 **A.** And this is an important policy, this
9 November 2013 policy, first because of what
10 I highlight here, which is that it is -- I think
11 I'm right in saying -- the first policy that
12 I identified where it was a lawyer making the
13 decision on prosecution, as opposed to others
14 within the business. And, secondly, this
15 policy, in contrast to earlier policies, didn't
16 just refer to the Code for Crown Prosecutors but
17 set out in some detail, in the way that the Code
18 does, relevant factors, but Post Office specific
19 factors, that would inform both limbs of the
20 test for prosecution.

21 **Q.** We'll be coming back to look at the way it does
22 that when we come to charging decisions, which
23 is a subtopic --

24 **A.** Yes.

25 **Q.** -- probably tomorrow.

112

1 I'm not going to deal with (i) and (j)
 2 because they are policies or documents that are
 3 either towards the end or outside of our period.
 4 But, by this time, into 2014, did the Post
 5 Office policies change? So, for example, in the
 6 February 2014 policy, was it the case that,
 7 rather than responsibility or accountability
 8 being shared across a number of individuals,
 9 that policy proposed an individual within Post
 10 Office Limited to be appointed to take
 11 responsibility? Then in the December 2015
 12 proposed policy, essentially recommendations
 13 being made on whether the decision should be to
 14 prosecute or not, but the general counsel was
 15 the final decision-maker?
 16 **A.** Yes, so the -- I was a little concerned when
 17 I read the February 2014 discussion paper, that
 18 it either had appeared to me from the November
 19 2013 policy that the question of who would make
 20 the decisions had been resolved. It was going
 21 to be a qualified lawyer independent of the Post
 22 Office and then, in February 2014, there was
 23 discussion about there being an identified
 24 individual.
 25 Clearly, both were going in the right

113

1 Practice issued under the CPIA and the
 2 guidelines issued by [His Majesty's] Attorney
 3 General that similarly seek to divide
 4 responsibility, and create cross-referring
 5 superintendence of the disclosure regime,
 6 between investigative agency on the one hand and
 7 the prosecuting agency on the other. Where
 8 those agencies are in fact the same agency, the
 9 need to ensure that no blurring of lines of
 10 responsibility and review becomes all the more
 11 important."
 12 **A.** Yes.
 13 **Q.** You gave us an overview earlier on of this
 14 issue. Just to restate it, in relation to this
 15 point, the succession of policies which you
 16 examined and the absence of a distinction of
 17 roles, can you calibrate your level of concern?
 18 **A.** Certainly in the earlier part of the period for
 19 which I saw policies that identified who was
 20 responsible for making prosecution decisions, it
 21 was not clear that there was that independence
 22 and delineation of role, and that is -- if that
 23 is -- if I'm correct in that identification and
 24 understanding of the policy position, that is
 25 a serious shortcoming.

115

1 direction in terms of it being an independent
 2 decision of the business.

3 **Q.** Is your overarching conclusion set out at
 4 paragraph 56, at the foot of the page?

5 **A.** Yes.

6 **Q.** Namely:

7 "It follows that in the case of the Post
 8 Office, throughout the Inquiry's relevant
 9 period, there was no such distinction of roles
 10 of investigator and prosecutor being undertaken
 11 by separate agencies subject to separate
 12 oversight, governed by separate Codes of
 13 Practice and with an inevitable role the one
 14 keeping the other in check."

15 **A.** Yes, and again, as I think I said this morning,
 16 that doesn't have to be two entirely separate
 17 organisations but it does have to be clearly
 18 defined teams within organisation, where it is
 19 clear which of them is ultimately making the
 20 decision and, ideally, that ought to be
 21 an independent lawyer, as it ended up being in
 22 2013.

23 **Q.** You say:

24 "As will be seen, there are aspects of the
 25 structure for disclosure under the Code of

114

1 **Q.** Thank you. That can come down from the screen.
 2 Moving to a separate subtopic: the role of the
 3 prosecutor. You tell us in your report that the
 4 proper role of the prosecutor, in the decisions
 5 that they take as to whether to charge in
 6 ensuring fair and proper disclosure in the
 7 proceedings, and in the conduct of the
 8 proceedings more generally, emerge from
 9 a succession of decisions of the court, in
 10 particular the Court of Appeal, from the Bar
 11 Code of Conduct and from the recommendations of
 12 the Farquharson committee; is that right?

13 **A.** Yes.

14 **Q.** Dealing with that trilogy of sources, can we
 15 start with decisions of the court and I think
 16 we're at page 19 of your report on paragraph 37.

17 **A.** Yes.

18 **Q.** Page 19. Thank you. So this is the first set
 19 of sources that we're looking to, decision of
 20 the courts, as to the role of the prosecutor.
 21 You take us to the decision of a Court of Appeal
 22 in *Puddick* and I think that was a decision made
 23 in 1865; is that right?

24 **A.** It was, yes.

25 **Q.** So quite some vintage. Mr Justice Compton told

116

1 us that:

2 "... prosecution counsel 'are to regard
3 themselves as ministers of justice, and not to
4 struggle for a conviction'."

5 Then, moving on, the decision of again,
6 I think, a Court of Appeal in *Banks*, which
7 I think was a 1916 decision or at least reported
8 in that year, Mr Justice Avory made similar
9 observations:

10 "It is quite true that counsel for the
11 prosecution throughout a case ought not to
12 struggle for the verdict against a prisoner, but
13 that they ought to bear themselves rather in the
14 character of ministers of justice assisting in
15 the administration of justice."

16 In the remainder of that paragraph, you make
17 a point that, although the judges in one of
18 those cases was addressing how prosecution
19 counsel had expressed themselves in a closing
20 speech, I think, the point is a broader one. By
21 that, do you mean broader in that it involves
22 other stages of the prosecutorial enterprise,
23 charge, disclosure and the like, or that it
24 applied to individuals other than counsel, or
25 both?

117

1 right?

2 **A.** Yes.

3 **Q.** You address that in paragraph 38 of your report.

4 **A.** Yes.

5 **Q.** If we can just read that, please. The second
6 line you say:

7 "The introductory paragraphs of the
8 Farquharson report state: 'There is no doubt
9 that the obligations of prosecution are
10 different from those of counsel instructed for
11 the defence in a criminal case or of counsel
12 instructing in civil matters. His duties are
13 wider both to the court and to the public at
14 large. Furthermore, having regard to his duty
15 to present the case for the prosecution fairly
16 to the jury, he has a greater independence of
17 those instructing him than that enjoyed by other
18 counsel. It is well known to every practitioner
19 that counsel for the prosecution must conduct
20 his case moderately, albeit firmly. He must not
21 strive unfairly to obtain a conviction; he must
22 not press his case beyond the limits which the
23 evidence permits; he must not invite the jury to
24 convict on evidence which in his own judgement
25 no longer sustains the charge laid in the

119

1 **A.** It certainly applied to counsel in a broader
2 context just than the content of their closing
3 speech, the concept of the prosecutor as
4 a minister of justice, which has been developed
5 and developed since, those references at the end
6 of the 19th century and early into the 20th, in
7 terms of them being independent and seeking
8 always to put the proper administration of
9 justice at the forefront of what they do rather
10 than it being the winning that matters.

11 That is what those judges were talking about
12 in those cases and that is what that concept has
13 reflected since then, and with a wider
14 understanding, as things have developed, that
15 it's talking about the prosecution, rather than
16 just prosecution counsel, as it's gone on.

17 **Q.** So the answer is both: it's other parts of the
18 prosecutorial enterprise --

19 **A.** Yes.

20 **Q.** -- and it's not just prosecution counsel?

21 **A.** Yes.

22 **Q.** Thank you. The second source of the description
23 of the duty, acting as a minister of justice and
24 all that that involves, I think you say emerges
25 from the Farquharson committee of 1986; is that

118

1 indictment. If the evidence of a witness is
2 undermined or severely blemished in the course
3 of cross-examination, prosecution counsel must
4 not present him to the jury as worthy of
5 a credibility he no longer enjoys ... Great
6 responsibility is placed upon prosecution
7 counsel and although his description as
8 a 'minister of justice' may sound pompous to
9 modern ears, it accurately describes the way in
10 which he should discharge his function'."

11 **A.** Yes.

12 **Q.** I'm not going to read the summary of the
13 Farquharson committee's views in the
14 propositions that you set out in paragraph 39
15 but, instead, can we turn to paragraph 40 on
16 page 21. You tell us that:

17 "... these principles, in relation to the
18 duty of fairness and the application of the
19 interests of justice to the prosecution and the
20 prosecutor, equally apply in a private
21 prosecution ..."

22 That's the headline point, is it?

23 **A.** Yes.

24 **Q.** "... as was demonstrated, for example, in *Zinga*
25 ..."

120

1 I think that's a 2014 decision of the then
 2 Lord Chief Justice Lord Thomas --
 3 **A.** Yes.
 4 **Q.** -- Mr Justice Foskett and Mr Justice
 5 Hickinbottom. Lord Chief Justice Lord Thomas
 6 said at paragraph 61, he was speaking for the
 7 court:
 8 "... advocates and solicitors who have
 9 conduct of private prosecutions must observe the
 10 highest standards of integrity, of regard for
 11 the public interest, and duty to act as
 12 a minister of justice (as described by
 13 Farquharson J) in preference to the interests of
 14 the client who has instructed them to bring the
 15 prosecution. As Judge David QC, a most eminent
 16 criminal justice, rightly stated in [the *Maxwell*
 17 case], in respect of a private prosecution:
 18 'traditionally Crown counsel owes a duty to the
 19 public and to the court to ensure that the
 20 proceeding is fair and in the overall public
 21 interest. The duty transcends the duty owed to
 22 the person or body that has instituted the
 23 proceedings and which prosecutes the indictment
 24 ..."
 25 So in short the Farquharson principles

121

1 their Farquharson duties as independent
 2 ministers of justice?
 3 **A.** Yes.
 4 **Q.** Would you expect any such counsel instructed to
 5 prosecute to review the evidence in the case and
 6 advise if they felt the evidence did not support
 7 the charge or the prosecution more generally?
 8 **A.** Yes.
 9 **Q.** Would you agree that the Post Office was
 10 entitled to place reliance on the fact that the
 11 counsel that it instructed would exercise those
 12 degrees of independent scrutiny --
 13 **A.** Yes.
 14 **Q.** -- and advise accordingly?
 15 **A.** Yes.
 16 **Q.** Of course, that depends on, does it not, the
 17 revelation of the material to that counsel to
 18 allow them to perform that function?
 19 **A.** Yes.
 20 **Q.** Were you aware that the conduct of Post Office
 21 prosecutions was undertaken primarily by counsel
 22 instructed from the independent bar?
 23 **A.** Yes, and certainly I -- now that I'm up to my
 24 neck in Part 2, I see that a lot.
 25 **Q.** And would you accept the proposition that, given

123

1 encapsulated in that phrase, that a prosecutor
 2 must act as a minister of justice, are
 3 recognised to apply not just to public
 4 prosecutors but to private prosecutions and to
 5 advocates and solicitors conducting them?
 6 **A.** Yes, and, as with *Kay*, that we looked at this
 7 morning, Lord Thomas was not saying anything new
 8 in 2014 in that regard, as, for example, his
 9 reference to the 1980 decision of *Maxwell*
 10 underlines.
 11 **Q.** Yes. So that's not just a nice point being made
 12 that common law, when it's stated by a court,
 13 has always been the common law. It's
 14 a different point that you're making that this
 15 wasn't the first recognition of the application
 16 of the Farquharson principles to private
 17 prosecutors?
 18 **A.** Absolutely.
 19 **Q.** It had been established, including in *Maxwell*?
 20 **A.** Yes.
 21 **Q.** Can we turn to the role of independent counsel.
 22 That can come down from the screen. Thank you.
 23 Would you agree that any barrister
 24 practising in criminal law and particularly any
 25 barrister that prosecuted ought to be aware of

122

1 that role of counsel and their instruction to
 2 prosecute for the Post Office, that was
 3 independent oversight of the Post Office's
 4 prosecutorial decisions?
 5 **A.** It was a degree of independent oversight but it
 6 very much would always depend on what was
 7 disclosed to counsel as part of the process to
 8 enable them to undertake that oversight.
 9 **Q.** Do you want to explain that in any more detail?
 10 **A.** Well, clearly, if counsel were making the
 11 initial decision to whether a charge should be
 12 brought or not, then they had an independent
 13 role at that stage.
 14 I have to say that the cases I've been
 15 looking at for Volume 2, that doesn't appear to
 16 be what was happening, that decisions were made
 17 in-house and then counsel were then instructed.
 18 It would then be for counsel to advise on the
 19 evidence, as it was presented to them, which
 20 would often involve them looking at the
 21 investigation report and that -- an assessment
 22 from the investigation and the evidence that was
 23 served upon them.
 24 **Q.** Just stopping there, Mr Atkinson. Had you seen
 25 many formal instructions to counsel to advise on

124

1 evidence, and if that's a question too far at
2 the moment, then we'll come back to it in
3 Volume 2?

4 **A.** I can think of, off the top of my head, two of
5 the 20 that I've looked at so far, where I've
6 seen instructions at all, and I don't recall
7 there being a specific request for advice on
8 anything in particular. I have seen in some of
9 the cases I looked at a degree of advice from
10 counsel, based on what they had been given.

11 **Q.** Thank you. In terms of other forms of
12 oversight, would you regard the Magistrates
13 Court as providing scrutiny and oversight of the
14 Post Office's prosecutorial practices and
15 decision making because it could, in any
16 particular case refuse to issue a summons?

17 **A.** Clearly, the Magistrates Court can refuse to
18 issue a summons but that is why the duties of
19 candour to the Magistrates Court is so
20 important, because the Magistrates Court can
21 only fulfil that role properly if it is told not
22 only that which underpins the allegation but
23 also anything that may count against the
24 prosecution of that allegation.

25 So, for example, if that prosecution would
125

1 but it clearly depended on what they were told
2 in response.

3 **Q.** So there were occasions in the criminal process,
4 in the Crown Court, where opportunities arise to
5 test evidential sufficiency --

6 **A.** Yes.

7 **Q.** -- through an application to dismiss or
8 a half-time submission?

9 **A.** Yes.

10 **Q.** There are occasions that arise where
11 applications for disclosure can be made under
12 Section 8, as you've just described, of the
13 CPIA?

14 **A.** Yes.

15 **Q.** Do they provide oversight and scrutiny of
16 prosecutorial practices and prosecutorial
17 decision making?

18 **A.** Again, I think the answer is that they can do
19 but they very much depend on the prosecution
20 approaching its role with that "minister of
21 justice" hat squarely on, that the prosecution
22 are making the court aware of the shortcomings
23 of its case and the validity of any argument
24 raised against it, so that the court can
25 properly undertake its task. If the court is
127

1 represent an abuse of process, there is
2 a requirement that that is identified and, if
3 that doesn't happen, then it's rather difficult
4 to see how the Magistrates Court can carry out
5 any realistic oversight.

6 **Q.** Would you regard the Crown Court, for those
7 cases that reached the Crown Court, as providing
8 supervision and oversight of the Post Office's
9 prosecutorial practices and prosecution decision
10 making?

11 **A.** Again, it can fulfil that role but, again, it
12 depends on that court being seized of the
13 necessary information to undertake that process.
14 So for example, again in the 20 cases that I've
15 been looking at more recently, there was
16 certainly at least one where there was an abuse
17 of process application. There were a couple
18 where there were applications for further
19 disclosure, pursuant to section 8 of the CPIA,
20 and that's -- after the defence have set out
21 their case in the defence statement, they can
22 submit to the court that there hasn't been
23 proper disclosure to them as a result of that.

24 And so those were occasions on which the
25 Crown Court could have addressed those issues
126

1 not put in possession of the facts then it can't
2 carry out an oversight of that which it doesn't
3 know.

4 **Q.** To add to the obvious point that you just made,
5 courts are obviously only cited on a small part
6 of the information that a prosecutor may be in
7 possession of?

8 **A.** Yes, and so now we're -- as an illustration of
9 that, where cases are served in a digital format
10 and the court has access to the digital folder
11 for the case, it will not often have access to
12 the unused material sections of that, and the
13 same was the case, ordinarily, when things were
14 served on paper, that the court would have the
15 served case not the unused material, that which
16 had been disclosed but was not part of the
17 prosecution's evidence, and so wouldn't be able
18 to carry out that sort of exercise for itself.
19 It would need to be told that there was an issue
20 and what the material was.

21 **Q.** We're going to come to disclosure later but,
22 just for those that are watching or listening
23 that aren't aware of the distinction between the
24 served case and the unused material, can you in
25 a sentence or two explain what that is, please?
128

1 A. I'll give it a go. So the served cases is the
2 material that the prosecution rely on to prove
3 its case and to establish, if all goes its way,
4 the guilt of the accused.

5 Other material that is in the prosecution's
6 possession, which is acquired during the course
7 of the investigation and which may undermine its
8 case or assist that of the defendant, ought to
9 be disclosed to the defence, ought to be
10 recorded in schedules of unused material, so
11 it's wider material than that which is relied on
12 and would be called before a jury, but which is
13 nevertheless generated or acquired during the
14 investigation.

15 Q. To add two points to the limitation of the
16 oversight function, do courts proceed on the
17 basis that prosecutions are being pursued
18 competently and professionally in accordance
19 with the minister of justice duties?

20 A. Yes.

21 Q. Is there a limitation on oversight in cases
22 where guilty pleas are entered, in particular at
23 an early stage of the process?

24 A. Yes, and so, if there is a charge before the
25 court and the court is told the defendant is

129

1 accused in the particular circumstances of the
2 case'."

3 On to paragraph 45:

4 "However, [the court] went on to observe
5 that 'it is well established that a private
6 prosecutor can have another motive as well as
7 being motivated by a public interest factor.
8 Mixed motives are not of themselves a bar to
9 a private prosecution ... the question is where
10 the line is to be drawn between the public
11 interest motivation and the other "oblique"
12 motive'. [The court] cited in support of the
13 latter observation the earlier decision of
14 *Ex parte South Coast Shipping Limited*. In that
15 case challenge was unsuccessfully made to the
16 bringing of a private prosecution by the
17 bereaved family of one of those who died in the
18 Marchioness disaster. The fact that the family
19 also wanted a public inquiry did not prevent
20 such a prosecution."

21 Then on to 46:

22 "That approach was also adopted by the
23 Administrative Court in *R (Smith-Allison) v*
24 *Westminster Magistrates Court [2021] EWHC 221*
25 *Admin*, in which Mr Justice Eady observed at

131

1 pleading guilty to it, it's unlikely the court
2 would dig into the material to decide for itself
3 whether the defendant was right to be doing
4 that. They would rely on the parties to have
5 reached that position responsibly.

6 Q. Can we turn to motives for prosecuting, please,
7 and this is page 22 of your report at
8 paragraph 44. If we can just read that
9 together:

10 "In relation to the motivation of a private
11 prosecutor, the approach of the Court of Appeal
12 in *Asif v Ditta*, the decision's primary focus
13 was as to whether the Crown Court judge had been
14 entitled to stay proceedings brought by
15 a private prosecutor as an abuse of process
16 where satisfied that the proceedings were being
17 brought by a proxy for a person with
18 a significant background in fraud, for
19 collateral purposes and for an improper motive.
20 The Court of Appeal declined to interfere with
21 the decision, observing 'the court has the power
22 to stay proceedings ... where it will be
23 impossible to give the accused a fair trial, and
24 ... where it offends the court's sense of
25 justice and propriety to be asked to try the

130

1 paragraph 48: 'although a prosecution whether
2 public or private, must not be improperly
3 motivated, the courts have recognised that, in
4 any private prosecution, a prosecutor will have
5 a motive other than simply a desire that justice
6 be done and that a criminal offence, if proven,
7 should be punished'."

8 Mr Justice Eady carried on by citing from
9 *D Limited v A & others*, in which Lord Justice
10 Davis observed:

11 "... mixed motives may often be present in
12 many prosecutions. In a public prosecution, the
13 proceedings will be brought in the public
14 interest; but the actual complainant may often
15 be accused of (say) seeking revenge after
16 a relationship has failed, and so on. This may
17 sometimes indeed be the case but the true motive
18 of the complainant may still be to seek justice.
19 In a private prosecution, the complainant of
20 course is frequently the prosecutor. But there
21 too it is well established that mixed motives do
22 not of themselves vitiate the prosecution ...'."

23 So it's right, isn't it, that the law has
24 established that, whilst private prosecutors may
25 properly have a mixed motive for bringing

132

1 a prosecution, which won't vitiate their
 2 decision, that did not mean either that the Post
 3 Office was permitted to derogate from the need
 4 to make decisions on an objective basis or that
 5 they could make decisions on the basis only of
 6 such motives?
 7 **A.** No. Absolutely.
 8 **Q.** Was there any evidence in any policy documents
 9 that you've seen of the Criminal Law Team or its
 10 leadership being required to monitor
 11 prosecutions, for example by dip sampling, in
 12 order to ascertain whether prosecutors were
 13 meeting their legal duties?
 14 **A.** I can't think of any examples of that, no.
 15 **Q.** That prosecutors were applying the code test
 16 properly and diligently?
 17 **A.** Again, this is perhaps slightly more a Volume 2
 18 question, a question of whether the charging
 19 advices that I saw showed that. I think it
 20 would be difficult, looking at them on their
 21 own, to say that they did fully apply both limbs
 22 of the Code for Crown Prosecutors, particularly
 23 the public interest limb, which was regularly
 24 not addressed at all in the advices that I saw.
 25 **Q.** Just sticking at the moment, reigning ourselves
 133

1 a little earlier, that clearly came about as
 2 a result of work that was undertaken by
 3 Cartwright King and, from memory, at that stage,
 4 Brian Altman KC, as to their review of how
 5 prosecutions were being done and those policies
 6 were the result of that.
 7 So there was that independent involvement at
 8 that stage but I can't think of comparable
 9 evidence in relation to earlier policies.
 10 **Q.** Thank you. Can we turn, please, to the conduct
 11 of investigations?
 12 **A.** Yes.
 13 **Q.** You consider the conduct of investigations
 14 between paragraphs 57 to 117 of your report and
 15 you go back to it at 366 to 370 of your report.
 16 Can we start, please, page 31 at paragraph 59.
 17 You're here in paragraph 59, I think, referring
 18 to the power of the Secretary of State to issue
 19 Codes of Practice under the Police and Criminal
 20 Evidence Act, PACE, 1984, in relation to the six
 21 topics or activities that you mentioned in (a)
 22 to (f)?
 23 **A.** Yes.
 24 **Q.** These are all very well known, certainly to the
 25 Chair of the Inquiry. So I'm not going to look
 135

1 back in to Volumes 1 and 1A, in the policy
 2 documents that you saw, did you see any
 3 requirement of the Criminal Law Team leadership
 4 being required to monitor or oversee whether
 5 prosecutors were applying the Code tests
 6 properly?
 7 **A.** Again, I can't think of any.
 8 **Q.** For example, whether they were making
 9 appropriate decisions about disclosure or
 10 non-disclosure?
 11 **A.** In terms of monitoring that process?
 12 **Q.** Yes.
 13 **A.** Again, I can't think of examples of that.
 14 **Q.** To did you see any evidence on their face that
 15 the policies concerning the investigators'
 16 duties and the prosecutors' duties within the
 17 Post Office were themselves reviewed or audited
 18 by any external third parties, such as
 19 solicitors or barristers?
 20 **A.** Clearly, as my report highlights, the various
 21 policies were updated at intervals. In the
 22 main, I don't think I saw any evidence as to why
 23 they were updated or who updated them, or what
 24 had led them to do that. I think the difference
 25 is, I think the 2013 policy that we touched on
 134

1 too much at the terms of the codes nor to their
 2 statutory basis. Can we move on to paragraph
 3 60, please. You say:
 4 "In an approach similar to that intended to
 5 be achieved by Section 26 [of the] CPIA, which
 6 is considered in more detail below and which
 7 requires others involved in criminal
 8 investigations to have regard to the Code issued
 9 under the CPIA which sets out the manner in
 10 which investigators should 'record, retain and
 11 reveal to the prosecutor material obtained in
 12 a criminal investigation', application of these
 13 PACE codes [that's the six codes you've
 14 identified] to investigators beyond the
 15 immediate ambit of PACE is achieved by
 16 Section 67 [of] PACE."
 17 So here you're drawing attention to the fact
 18 that the PACE Codes of Practice apply primarily
 19 to the conduct of the relevant activities by
 20 police officers?
 21 **A.** Yes.
 22 **Q.** But by a statutory device, their reach is
 23 extended beyond the police officers?
 24 **A.** Yes.
 25 **Q.** This is achieved by Section 67(9) to (11) of
 136

1 PACE --

2 **A.** Yes.

3 **Q.** -- 67(9) providing:

4 "Persons other than police officers who are

5 charged with the duty of investigating offences

6 or charging offenders shall in the discharge of

7 that duty have regard to any relevant provision

8 of such a code."

9 That's any one of the six codes?

10 **A.** Yes.

11 **Q.** "A failure on the part of ... any person other

12 than a police officer who is charged with the

13 duty of investigating offences or charging

14 offenders to have regard to any relevant

15 provision of such a code in the discharge of

16 that duty, shall not of itself render him liable

17 to any criminal or civil proceedings."

18 But in (11):

19 "In all criminal and civil proceedings any

20 such code shall be permissible in evidence; and

21 if any provision of such a code appears to the

22 court or tribunal conducting the proceedings to

23 be relevant to any question arising in the

24 proceedings it shall be taken into account in

25 determining that question".

137

1 offenders with criminal offences --

2 **A.** Yes.

3 **Q.** -- and the Post Office recognised that too?

4 **A.** Yes.

5 **Q.** So that means that there was a duty on each

6 class of individual to have regard to any

7 relevant provision of a Code of Practice when

8 discharging those duties?

9 **A.** Yes. That they recognised that courts that they

10 would then be taking any such case to would be

11 looking to them for their compliance or

12 otherwise with those codes and the protections

13 that they were designed to give.

14 **Q.** So let's turn over the page to page 33, then,

15 and see what the Post Office policies tell us

16 about what needs to be done to comply with PACE

17 and, in particular, the Codes of Practice under

18 PACE. I think that's your subheading there --

19 **A.** Yes.

20 **Q.** -- "Post Office policies relating to PACE", and

21 paragraph 64 onwards. You say:

22 "In the Consignia Investigation Procedure of

23 January 2001, there are limited references to

24 PACE and the Codes ..."

25 Under "Enquiry methods":

139

1 So what's the importance of these provisions

2 in our present context?

3 **A.** It's recognised that whether a person other than

4 a police officer is charged with a duty of

5 investigating offences or charging offenders is

6 a question of fact, depending on the

7 circumstances but it seemed to me, when I first

8 started to approach this, that it was -- it

9 would be difficult for the Post Office to argue

10 that its Investigation Department was not

11 charged with a duty of investigating offences

12 and, therefore, that it did fall within this and

13 was therefore required to have regard to these

14 codes and, in fairness, it was clear to me when

15 I then looked at the Post Office policies that

16 they accepted that and they recognised that.

17 **Q.** They thought they did too?

18 **A.** Yes.

19 **Q.** So, in general terms, your view would be that

20 Post Office investigators were charged with the

21 duty of investigating offences and the Post

22 Office recognised that themselves?

23 **A.** Yes.

24 **Q.** It would be your view that Post Office employees

25 were charged with the responsibility of charging

138

1 "At 3.3.1 [the policy said] 'the

2 investigator should endeavour to ascertain the

3 facts in an effort to solve the case. There is

4 no compulsion to anyone involved unless it is

5 considered to be necessary or expedient.'"

6 Are there any difficulties or problems with

7 that?

8 **A.** It is largely a statement of the obvious. It

9 perhaps didn't assist as much as it could have

10 done as to identifying when it would be

11 necessary or expedient to question people but

12 that would be the only comment I'd make on that.

13 **Q.** So it's more what it doesn't say than what it

14 does?

15 **A.** Yes.

16 **Q.** "At 3.1.2 [the same document] states

17 'Investigations. Collection of facts in

18 accordance with the Police and Criminal Evidence

19 Act and the other legislation'."

20 You tell us there is no reference in the

21 document to the application or otherwise of the

22 Codes in relation to arrest, search, seizure or

23 interviews. Is that the problem you identified

24 with it?

25 **A.** Yes, the Police and Criminal Evidence Act is

140

1 a vast doorstop of a piece of legislation and it
 2 would not help someone looking at this on its
 3 own to know what that meant to them.

4 **Q.** You turn to a different policy but say that the
 5 same approach and the same comments apply,
 6 namely your (c), by your reference to the Post
 7 Office rules and standards policy issued in
 8 October 2000, which identifies the investigators
 9 are bound by PACE and the Codes without saying
 10 how?

11 **A.** Yes, so it was absolutely correct to identify
 12 that, by reference to section 67(9), that they
 13 were bound by them or that they were to have
 14 regard to them. They went further than that and
 15 that was a good thing. But then, stopping short
 16 of giving them the people who were going to be
 17 doing it, on the face of that policy, the
 18 necessary information as to what that meant to
 19 them, and it's of notable -- we'll come on to
 20 it -- that was something that the Post Office
 21 developed a lot in their policies going forward
 22 from there. So clearly there was, as I see it,
 23 a recognition by them, looking back, that this
 24 wasn't enough.

25 **Q.** So this is an example, an early example, of what
 141

1 materials did provide a good deal more
 2 information as to which codes applied and how
 3 they applied, and they were talking about the
 4 codes that were the logical ones for them to be
 5 talking about.

6 **Q.** However, in your paragraph 66, you identify
 7 three points for us through problems. Can you
 8 see first you say that:

9 "... [the] training notes do not amount to
 10 a 'comprehensive' guide to how those Codes
 11 should be applied in an investigation, by whom
 12 and to whom."

13 Do you want to explain what you meant by
 14 that, please?

15 **A.** So they identified what the code was, what its
 16 purpose was, but didn't, it seemed to me,
 17 provide sufficient guidance to someone who was
 18 going to benefit from that training as to what
 19 then they were to do, using that code, when they
 20 were to use it, and so it didn't, in and of
 21 itself, deal with the lack of information in the
 22 policies from that period of time as to how the
 23 codes were to be applied by investigators.

24 **Q.** You make a second point that it wasn't adequate
 25 to expect those undertaking criminal enquiries,
 143

1 you described earlier: essentially, name
 2 checking an Act of Parliament --

3 **A.** Yes.

4 **Q.** -- but not doing anything else?

5 **A.** Yes.

6 **Q.** In paragraph 65, you note that within the
 7 October 2000 policy there is a cross-reference
 8 to comprehensive training notes having been
 9 issued or to be issued. I think, by the time
 10 you wrote your report, you had been provided
 11 with the Security Foundation Programme "Open
 12 learning on PACE Codes of Practice" workbook --

13 **A.** Yes.

14 **Q.** -- which you thought might be the
 15 cross-reference --

16 **A.** Yes.

17 **Q.** -- to the comprehensive notes?

18 **A.** Yes.

19 **Q.** They set out the background to the Codes, the
 20 areas addressed by each code, and then in
 21 slightly more detail the relevance to a Post
 22 Office investigation of codes B, searching; C,
 23 detention and questioning; and E, tape recorded
 24 interviews.

25 **A.** Yes, and so it seems to me that those training
 142

1 criminal investigations, to rely on notes given
 2 during a training session because, as you'd made
 3 clear already, the statutory and policy
 4 framework inevitably alters and such notes will
 5 be rendered out of date?

6 **A.** Yes.

7 **Q.** You say in the last part of the paragraph there:
 8 "Further, it can be properly argued ..."
 9 You use that formulation a number of times
 10 in there. When I'm speaking with my children
 11 I sometimes use that formulation to make clear
 12 that I'm not entirely sure of my ground. Is
 13 that how I should read that or is there
 14 something more definitive in your mind?

15 **A.** I think my concern was that I was conscious that
 16 I had not seen the full range of training
 17 material that was available. I became aware,
 18 through my reading of what I was given, that
 19 there was a database in existence, which I had
 20 not seen -- the contents of which I had not
 21 seen.

22 **Q.** I think that remains the position for --

23 **A.** That remains the position --

24 **Q.** -- both you and the Inquiry?

25 **A.** -- yes. So it's difficult for me to be more
 144

1 clear-cut than that, not knowing what other
2 sources of material were available that could be
3 added to what I had seen in relation to, for
4 example, the application of the PACE Codes to
5 investigators.

6 **Q.** So it could be that the most up to date versions
7 of the CPIA Code or indeed the PACE Codes were
8 readily available in that database. You don't
9 know one way or the other?

10 **A.** And that -- I have seen very recently some
11 examples of circulars that appeared to have been
12 generated by or in conjunction with that
13 database, that did -- certainly from memory --
14 include at least one occasion when the circular
15 referred to an updated version of a particular
16 PACE Code, I think code G, and so, on the face
17 of that, there may be not only up-to-date
18 versions of the Code available to investigators,
19 but they were being told -- if they were the
20 ones who were receiving the circulars -- which,
21 again, I don't know -- may have been told that
22 there was an up-to-date version.

23 It has to be said that the circular that I'm
24 talking about just said there is a new version
25 of Code G; it didn't tell anyone anything more

145

1 **Q.** What about the point that the Codes of Practice
2 are generally drafted in a way that they make
3 clear what's required of an investigator or
4 a prosecutor on their face, that they're --
5 because they're written in that kind of
6 language, there was no need for such codes to be
7 more than referred to in the policies
8 themselves; they needn't be paraphrased or
9 summarised or carried into effect in the
10 policies? What do you say to that suggestion?

11 **A.** It's certainly right that the aim of the codes,
12 as drafted, is to make them as accessible as
13 possible. The difficulty with that though is
14 that the PACE Codes are primarily designed for
15 use by police officers, by reference to the
16 powers of police officers, which are different
17 in important respects from the powers of persons
18 who aren't police officers and, therefore, as in
19 fairness to the Post Office, recognised there
20 were powers available to police officers, duties
21 that flowed from those for police officers, that
22 did not apply to them.

23 And so simply to provide someone with
24 a code, however clearly written, parts of which
25 apply to them and parts of which didn't, parts

147

1 than that.

2 **Q.** Would you agree or disagree with the suggestion
3 that it's not enough to have up-to-date Codes of
4 Practice on a database but, instead, the Post
5 Office investigators and prosecutors needed to
6 know from a policy what they had to access and
7 how they should apply it in their circumstances?

8 **A.** It is a good thing, in my view, a good thing to
9 have a database that has the up-to-date versions
10 of applicable statutes, codes, guidelines,
11 available, but that is not a substitute for it
12 being clear to, for example, an investigator
13 that these are the things they have to apply,
14 how they have to apply them, when they have to
15 apply them, and how they can be satisfied that
16 they have applied them properly.

17 And so it's a part of the picture. It is
18 not, in my view, a substitute for there being
19 a policy that says these are the criteria you're
20 meant to be applying in this situation by
21 reference to Code C, and then they can
22 understand which bits of Code C apply to them
23 when, and they can check they're up to date then
24 by looking at the database informed by the
25 policy, but not one without the other.

146

1 of which applied as written, parts of which
2 applied in a slightly different anyway to them,
3 would not be enough. They needed to understand
4 the difference and the difference came from
5 policy being set out clearly for them against
6 the background of training.

7 It's the combination of the three that makes
8 sure that someone, particularly someone who is
9 not a police officer, knows how a police code
10 applies to them.

11 **MR BEER:** Thank you, Mr Atkinson.

12 Sir, it's 3.00, I wonder if we could take
13 now the afternoon break until 3.15?

14 **SIR WYN WILLIAMS:** Yes, that's fine, thank you.

15 **MR BEER:** Thank you very much.

16 (2.58 pm)

(A short break)

17 (3.15 pm)

18 **MR BEER:** Sir, good afternoon. Can you see and hear
19 me?

20 **SIR WYN WILLIAMS:** Yes, thank you.

21 **MR BEER:** Thank you very much.

22 Mr Atkinson, can we pick up a few questions
23 where I left off. Would you accept the idea
24 that there was an inherent value to the
25

148

1 simplicity of the Post Office policies that
 2 we've seen, with detail being contained in Acts
 3 of Parliament, codes of practice and other
 4 policy documents that were obtainable by
 5 investigators or prosecutors elsewhere?

6 **A.** No.

7 **Q.** Why is that?

8 **A.** For the reasons that we were discussing before
 9 the break. If the aim is to achieve correct and
 10 consistent application of the law, it is not
 11 enough to tell people where it is. You need to
 12 tell them how they are meant to apply it, and
 13 there are different ways of doing that: through
 14 training and making those sources of law
 15 available to them; but also by telling them what
 16 parts of, for example, a vast Act of Parliament
 17 they're meant to be looking at and how it
 18 applies to them and when it applies to them, and
 19 simply name checking is not going to do that, in
 20 my view.

21 **Q.** Would you accept that the Police and Criminal
 22 Evidence Act, the CPIA, and the Codes of
 23 Practice issued under each of those Acts were
 24 freely available online for anyone to go and
 25 look up?

149

1 could have looked at them as and when required?

2 **A.** There is, in my view, a significant difference
 3 on what I have seen between the degree of
 4 training in relation to the Codes under the
 5 Police and Criminal Evidence Act, on the one
 6 hand, and the CPIA and the Codes under the CPIA,
 7 on the other. I saw very limited material in
 8 relation to the latter.

9 In relation to PACE, again, the training
 10 was -- would clearly have been of value, having
 11 the material online would have been of value
 12 but, in my view, and as it seems to me was
 13 recognised ultimately, more was needed and,
 14 ultimately, more was given.

15 **Q.** Given, as you said today, that training
 16 materials would not necessarily reflect the
 17 up-to-date amendments to Codes and to guidance,
 18 wouldn't you, therefore, accept that there is
 19 great sense in not including the detail of the
 20 guidance in any of the policies but, instead, to
 21 have the most up-to-date sources of law
 22 available in either a database or online?

23 **A.** The better approach, it would seem to me, would
 24 be that when a new version of the Code came out,
 25 you updated your policy so that the two

151

1 **A.** Yes.

2 **Q.** Is that sufficient?

3 **A.** No, and on my reading of the policies in
 4 relation to PACE, the Post Office clearly did
 5 not think it was sufficient because they develop
 6 their policies in relation to, for example,
 7 interviewing, so that by the end of the
 8 Inquiry's period of particular concern, there
 9 was a raft of policies in relation to different
 10 contexts in which they might be interviewing
 11 different kinds of person about different things
 12 and how they were to do that.

13 So it was clearly recognised it was not
 14 enough to have a policy that says, "If you're
 15 interviewing somebody, this is the Code you need
 16 to read, and it's online". They recognised that
 17 and, in my view, they were right to recognise
 18 that.

19 **Q.** Given that you accept that Post Office
 20 investigators received some training in respect
 21 of the police and Criminal Evidence Act and the
 22 CPIA that may have been relevant to their work,
 23 would you accept that they would, therefore,
 24 have known of the existence of the Acts, the
 25 codes and the guidelines online and, therefore,

150

1 continued to run together. Just as, for
 2 example, the Attorney General updates the
 3 Attorney General's Guidelines in relation to
 4 disclosure when the CPIA Code changes, and just
 5 as the CPS has updated historically its
 6 disclosure manual, its Code for Crown
 7 Prosecutors and its other guidance, as the law
 8 has evolved, the law is never static, and policy
 9 needs to move with it, rather than be so bare in
 10 its detail that it doesn't have to be.

11 **Q.** Thank you. Can we turn to a new topical,
 12 please, the CPIA and the CPIA Code of Practice.

13 **A.** Yes.

14 **Q.** This is paragraph 76 of your report on page 39.

15 Firstly, and in very general terms, can you
 16 explain to us what the CPIA is?

17 **A.** The Criminal Procedure and Investigations Act is
 18 an Act that seeks to do a variety of things, but
 19 the key part of it, for present purposes, is
 20 that it sought to set out in statutory form the
 21 process and the stage process that was necessary
 22 in relation to disclosure in criminal
 23 proceedings. So, going back to what we were
 24 talking about earlier, in addition to the
 25 service of the material that the prosecution was

152

1 relying on as part of its case, what its duties
 2 were for the disclosure of wider material
 3 acquired during the investigation and how that
 4 process was to operate with the involvement at
 5 relevant stages of input from the defence.
 6 And so the key sections are the early
 7 sections of the Act which set out that stage
 8 disclosure process and then Section 23, which
 9 you can see referred to at paragraph 77 of my
 10 report, which was and is the key section that
 11 required the Secretary of State to prepare
 12 a Code of Practice for how that process was to
 13 be undertaken and what the interaction between
 14 investigator and prosecutor should be to ensure
 15 that process did happen and happened fairly.
 16 **Q.** Thank you. Is it right that some parts of the
 17 CPIA apply to proceedings commenced by the Post
 18 Office?
 19 **A.** Yes.
 20 **Q.** So that would include the disclosure obligations
 21 in Part 1 of the CPIA?
 22 **A.** Yes.
 23 **Q.** Other parts of the CPIA apply only directly to
 24 criminal investigations undertaken by the Police
 25 Service?

153

1 that. That is RLIT0000079, it's your tab C14.
 2 RLIT0000079. Perfect.
 3 If we can go to page -- I think it's 15.
 4 Thank you. It's an introductory section to
 5 Part II of the CPIA and, remember, I'd
 6 highlighted those words in 23(1)(a), a criminal
 7 investigation. 22 provides:
 8 "For the purposes of this Part a criminal
 9 investigation is an investigation conducted by
 10 police officers with a view to it being
 11 ascertained", et cetera.
 12 **A.** Yes.
 13 **Q.** So is that the first reason why the direct
 14 applicability of the Code issued under
 15 Section 23 is only in relation to criminal
 16 investigations being conducted by police
 17 officers?
 18 **A.** Yes, although interestingly, as we will see, the
 19 Post Office disclosure policies in 2001 and then
 20 in 2010 refer to that definition of a criminal
 21 investigation for the purposes of the Post
 22 Office as well.
 23 **Q.** Yes. Albeit that's not in fact the statutory
 24 route --
 25 **A.** No.

155

1 **A.** Yes, and that is clear, for example, because it
 2 refers to police officers in various sections,
 3 for that reason.
 4 **Q.** I am going to look at a more direct reason in
 5 a moment, just to nail that down as to why those
 6 parts only applied directly to police officers.
 7 Then we'll move on to how they apply indirectly
 8 to the Post Office. You set out for us, if we
 9 just scroll down, please, Section 23 which you
 10 said is of fundamental importance of the CPIA,
 11 and you can see that it says that:
 12 "The Secretary of State shall prepare a code
 13 of practice containing provisions designed to
 14 secure --
 15 "that where a criminal investigation is
 16 conducted ..."
 17 Then it continues.
 18 You'll see the words "where a criminal
 19 investigation is conducted" there, yes?
 20 **A.** Yes.
 21 **Q.** I just want to examine whether those words,
 22 "criminal investigation" are a term of art,
 23 a defined term. I think we have to look at
 24 section 22 of the CPIA to establish that and
 25 I think we'll have to look at the Act to find

154

1 **Q.** -- by which they were required to have regard to
 2 it?
 3 **A.** No, but it showed their recognition of what
 4 that -- what it was talking about.
 5 **Q.** Thank you. If we go back to your report,
 6 please, on page 40 at paragraph 78. Page 40,
 7 please, paragraph 78. You say:
 8 "[The] CPIA goes on to address matters that
 9 the Code may or may not address. The terms of
 10 the section make clear, in so doing, that the
 11 Code will only directly apply to the conduct of
 12 investigations by the police."
 13 **A.** Yes.
 14 **Q.** You picked up the reference to the police or
 15 police officers in other parts of section 23.
 16 So that's another reason making it clear --
 17 **A.** Yes.
 18 **Q.** -- of the direct application?
 19 You go on to say, if we go down to
 20 paragraph 80, that:
 21 "The application of the code issued under
 22 section 23 ... to the police is also made clear
 23 by the introduction to the Code itself."
 24 Then you cite it. It's introduction in
 25 paragraph 1.1-2. It:

156

1 "... applies in respect of criminal
2 investigations conducted by police officers
3 which begin on or after the day on which this
4 Code comes into effect."
5 But then this:
6 "Persons other than police officers who are
7 charged with the duty of conducting
8 an investigation as defined in the Act are to
9 have regard to the relevant provisions of the
10 Code, and should take these into account in
11 applying their own operating procedures. This
12 code does not apply to persons who are not
13 charged with the duty of conducting
14 an investigation as defined in the Act."
15 You say:
16 "This text appeared in the original 1997
17 version of the Code and has been unaltered ever
18 since."
19 **A.** Yes.
20 **Q.** I think we need to look at Section 69 -- sorry
21 Section 67(9) of the CPIA -- can we first look
22 at Section 76. That's paragraph 81.
23 **A.** Yes.
24 **Q.** If we just look, rather than going back to the
25 Act, the terms of the section, Section 26(1):
157

1 you say meant that the Code -- I'm going to use
2 the word "applied" to the Post Office --
3 **A.** Yes.
4 **Q.** -- and it's a "have regard to" duty?
5 **A.** Yes.
6 **Q.** Was there a different and more circuitous route
7 to this too? Section 67(9) of PACE required
8 investigators to have regard to note 11(b) of
9 Code C?
10 **A.** Yes.
11 **Q.** Note 11(b) of Code C says that:
12 "The CPIA Code of Practice states that, in
13 conducting an investigation the investigator
14 should pursue all reasonable lines of inquiry,
15 whether these point towards or away from the
16 suspect. What is reasonable will depend on the
17 particular circumstances. Interviewers should
18 keep this in mind when deciding what questions
19 to ask in an interview."
20 **A.** Yes.
21 **Q.** So summarising there, that's a more circuitous
22 route of the application to the Post Office of
23 the reasonable lines of inquiry duty at the
24 point of interview?
25 **A.** Yes.
159

1 "A person other than a police officer who is
2 charged with a duty of conducting investigation
3 with a view to it being ascertained -- whether
4 a person should be charged with an offence, or
5 whether a person charged with an offence is
6 guilty of it, shall in discharging that duty
7 have regard to any relevant provision of a code
8 which would apply if the investigation were
9 conducted by police officers."
10 So that's the application of the Code on
11 a 'have regard' basis to non-police officers
12 where they are charged with a duty of conducting
13 relevant investigations.
14 **A.** Yes, and so it's that same wording as we saw in
15 relation to section 67 of the Police and
16 Criminal Evidence Act, the same "have regard
17 to".
18 **Q.** So the same device is used?
19 **A.** Yes.
20 **Q.** Similarly, in Section 26(2), the breach not
21 rendering such a person reliable to criminal
22 civil proceedings. The same but admissibility
23 under Section 26(3) the same too?
24 **A.** Yes.
25 **Q.** So that's the provision, is this right, which
158

1 **Q.** Can we turn, please, to page 42 of your report.
2 Where you address the issue of the recognition
3 of the CPIA and its duties in Post Office
4 policies. In this paragraph and up to
5 paragraph 92 of your report, on page 45, you
6 identify the presence of bare references to the
7 CPIA and its Code of Practice in Post Office
8 policies; is that right?
9 **A.** Yes.
10 **Q.** You identify the absence of any reference at all
11 to the duty to pursue reasonable lines of
12 inquiry?
13 **A.** I think until 2010.
14 **Q.** You identify the absence of guidance on what the
15 duty means in practice and how it is to be
16 achieved?
17 **A.** Yes.
18 **Q.** You identify the limited reference in training
19 material to the fact of the CPIA and its Code?
20 **A.** Yes, and in that respect, there was a contrast
21 between the material I saw in relation to PACE
22 and the material I saw in relation to the CPIA.
23 There was a lot more on PACE than there was on
24 the CPIA.
25 **Q.** Was a lot of that on PACE about the treatment of
160

1 a suspect in interview?

2 **A.** Yes.

3 **Q.** Was that the overwhelming majority?

4 **A.** It was the major topic, yes.

5 **Q.** How to interview a suspect?

6 **A.** Yes, and in fairness, the other Codes, for
7 example, as to arrests and searches, the Post
8 Office recognised that, in that kind of area
9 there was a lot of overlap between what actually
10 they could or couldn't do and what the police
11 therefore had to do in conjunction with them,
12 and so that's -- whereas interviews very much
13 were something they were doing themselves so
14 that did make sense.

15 **Q.** Have you any views to offer as to the adequacy
16 or otherwise of the treatment of the CPIA and
17 the Code in these policies?

18 **A.** So the two disclosure policies that were
19 produced, the one in 2001 and the one in 2010,
20 did give, or particularly the 2010, did give
21 an overview structure of what the CPIA and its
22 Code required of an investigator and
23 a prosecutor. So there was that material but
24 the absence from both of any detailed analysis
25 of how other sources of information in relation

161

1 taken for the purposes of the investigation and
2 all reasonable lines of inquiry being pursued.

3 So it was identified from the outset, as
4 being a fundamentally important thing and so for
5 that to be a feature of the Act, a feature of
6 the Code, but not a feature of the policy that
7 was seeking to apply the Code to the Post
8 Office, is a real concern.

9 **Q.** If we just turn to page 45, please, and look at
10 paragraph 92. It's the last four lines. You
11 say:

12 "If it is proper to argue that the
13 limitations of PACE related policies had to be
14 balanced by the extent of PACE related training,
15 which is not an argument with which I agree for
16 reasons developed above, then the same argument
17 cannot be made in relation to the CPIA."

18 **A.** Yes.

19 **Q.** Can you just explain what you mean by that,
20 please?

21 **A.** Because, on the material I saw, there was so
22 little training material in relation to the CPIA
23 and its Code. If it were to be argued, well
24 what we did was we had a policy that identified
25 that the Act existed that it Code existed and

163

1 to disclosure, such as the Attorney General's
2 Guidelines was a concern, and we'll come back,
3 I know, to that -- the absence of a reference
4 until 2010 of the requirement that
5 an investigation pursue all reasonable lines of
6 inquiry, including those leading away from the
7 suspect was in my view a fundamental omission.

8 It is an important and, in some respects,
9 counterintuitive requirement of a fair and
10 proper investigation, that you don't just look
11 for the evidence to prove your case; you look
12 for the evidence that shows your case is wrong
13 and/or that will afford a defendant a fair
14 exploration of your case. And, for that not to
15 be mentioned for the majority of the Inquiry's
16 relevant period is a significant failure, in my
17 view.

18 **Q.** So the absence for a decade of a reference to
19 the core duty was, have I understood it
20 correctly, a particularly striking failure?

21 **A.** Yes, and it's telling, in my view, that where
22 one looks at section 23 and what it was the
23 Secretary of State was required to prepare
24 a Code to address, the first thing that it was
25 meant to address was reasonable steps being

162

1 that people needed to know that they existed, we
2 then provided them with training so they
3 understood how they applied to them, and we had
4 them online up to date. That was an argument
5 that you could make, but with the problems that
6 I've identified in relation to PACE. But you
7 can't make on what I have seen in relation to
8 the CPIA because the training just wasn't there
9 on what I saw. And, again, I haven't seen the
10 database and there is that qualification.

11 **Q.** Thank you. Can we turn, please, to paragraph
12 106 of your report on page 50. It's about
13 halfway down. Thank you. Under the
14 cross-heading "The application of the CPIA Code
15 by the Post Office". You tell us in 106 that:

16 "It is of not that the Post Office
17 'Disclosure of Unused Material -- Criminal
18 Procedure and Investigations Act 1996 Code of
19 Practice' policy, issued in May 2001, defines
20 a criminal investigation in line with the CPIA
21 definition."

22 Is that the point you were making just a few
23 minutes ago?

24 **A.** Yes.

25 **Q.** "It says at paragraph 3.1, it is

164

1 an investigation 'with a view to ascertaining
2 whether a person should be charged with
3 a criminal offence or if charged with an offence
4 is guilty of it'."

5 The same wording appeared in later policies
6 of 2009, 2011, 2012, 2013, and also appeared in
7 the policy on "Disclosure of Unused Material" in
8 July 2010.

9 So is the point that you're making in 106,
10 have I got it right, that these policies all
11 define a Post Office criminal investigation in
12 a way that triggers the duties in the way that
13 we've seen in Section 26 of the CPIA.

14 **A.** Yes.

15 **Q.** Good.

16 Paragraph 107, please. You tell us:
17 "The 'Disclosure of Unused Material --
18 Criminal Procedure and Investigations Act 1996
19 Codes of Practice' policy was issued in
20 May 2001. It addresses the roles of the
21 investigator and disclosure officer, without
22 specific cross-reference to the CPIA Code. It
23 is 3 pages long ...

24 "The essential points in terms of roles are
25 ..."

165

1 disclosure and the Code in relation to
2 disclosure set out. And so, for example, both
3 the Act and the Code focus very much on what
4 I've characterised as the three Rs, the duties
5 to record, retain and review (*sic*) information,
6 and it correctly set out those matters. It set
7 out what the roles were in relation to those.

8 It did so in a fairly bare-bones way but, in
9 relation to those areas it covered, it would
10 allow for a degree of interaction in a useful
11 way between someone reading the policy and
12 someone reading the code that underpinned the
13 policy. It gave them steers on most but
14 unfortunately not all the key areas that applied
15 to them.

16 **Q.** Just on the three Rs, is the third R "review" or
17 "reveal"?

18 **A.** It's "reveal". You're quite right, yes.

19 **Q.** Any other issues arising from paragraph 107?

20 **A.** The other area in relation to that is that the
21 Code and the Act identify as separate roles that
22 of investigator and disclosure officer, and they
23 are identified as separate roles because they
24 are separates jobs with separate
25 responsibilities. It's recognised in the Codes

167

1 Then you set out the role, over the page, of
2 an investigator being someone involved in the
3 conduct of a criminal investigation who has
4 a duty in particular to record and retain
5 information:

6 "They share a duty with the disclosure
7 officer to 'be fair and objective and must work
8 together with prosecutors to ensure that
9 disclosure obligations are met'.

10 "The disclosure officer is the person
11 'responsible for examining material retained
12 during an investigation, revealing material to
13 Legal Services during the investigation and ...
14 certifying to Legal Services that he has done
15 this'. In contrast, arguably, to the CPIA Code,
16 the policy proceeds on the basis that the
17 investigator and disclosure officer will
18 'normally' be the same person."

19 So in paragraph 107, more generally, what
20 are the points that you were making as to the
21 existence of satisfactory provisions and
22 unsatisfactory provisions?

23 **A.** So the -- this 2001 policy had the basic
24 structure and the -- with one obvious exception:
25 that -- the key areas of the CPIA in relation to

166

1 that those can be undertaken by the same person
2 and I am aware that, particularly in smaller
3 police investigations, they are undertaken by
4 the same person, but there was a difference
5 which I therefore highlighted, that the Post
6 Office policy identified that they would
7 normally be undertaken by the same person,
8 rather than that they could be undertaken by the
9 same person.

10 **Q.** Thank you. Paragraph 108, please. This is
11 another in the line of Post Office policies that
12 fails, is this right, to identify what needs to
13 be done?

14 **A.** It again identified the roles, it again
15 identified that they would normally be
16 undertaken by the same person but without any of
17 the surrounding detail as to what that actually
18 meant and, if the same person is to undertake
19 both roles, there's perhaps a greater need for
20 exactly what that meant and how it was to be
21 done, to be spelt out.

22 **Q.** "The Consignia Investigation Procedure of
23 January 2001 [you tell us in paragraph 109],
24 makes limited references to the CPIA and the
25 Codes issued thereunder. It refers to

168

1 circumstances in which records relating to
2 surveillance equipment should be retained (see
3 paragraph 3.2), and the retention of notebooks
4 in compliance with CPIA retention periods (see
5 paragraph 3.3). It does not seek explicitly to
6 mesh with the 'Disclosure of Unused Material --
7 Criminal Procedure and Investigations Act 1996
8 Codes of Practice' policy ..."

9 You say:

10 "It is of note that the training materials
11 relating to notebooks that appears to have been
12 in use at this period of time (by reference to
13 its copyright date of 2000) do not refer to the
14 duty of retention, the CPIA, or [even] this 2001
15 policy document."

16 **A.** Yes, so really the point I make there is the
17 lack of cross-reference and someone charged with
18 an investigative duty reading the investigative
19 procedure is not being told in that procedure
20 that they have also to apply a separate policy
21 and, which has wider ambit of implications for
22 them as an investigator than the investigation
23 procedure alone would have told them.

24 **Q.** If we can read through paragraph 110 together,
25 please. You, tell us that:

169

1 suspect as to well as to implicate them."

2 **A.** Yes.

3 **Q.** I think you've, in explaining the policy, set
4 out the problems with them, as you've gone along
5 there; is that right?

6 **A.** Yes.

7 **Q.** Is there anything you want to add to --

8 **A.** No, thank you.

9 **Q.** -- 110?

10 At paragraph 111, you tell us that:

11 "There are some acknowledgements of the 3Rs
12 [you've just explained those to us] to be found
13 in the Post Office policies that [you] have
14 considered, albeit they are limited and far from
15 comprehensive. In the Investigation Procedures
16 [of January 2001] it states (at paragraph 3.2)
17 'local records may be required as evidence or
18 unused material. If so, they must be kept in
19 connection with the Post Office Codes of
20 Practice under the CPIA' and in relation to
21 notebooks (at paragraph 3.3) 'where used in
22 evidence, notebooks must be retained in
23 compliance with the retention periods set out in
24 the Post Office Code of Practice under the
25 CPIA'."

171

1 "The Post Office Limited Financial
2 Investigation Policy, in its May 2010 version
3 made no specific reference to the CPIA or the
4 Code issued thereunder, although it did identify
5 as an aim (see paragraph 3.1) adherence to UK
6 and EU legislation."

7 Is that sufficient to say we must adhere to
8 UK and EU legislation in a policy of this kind?

9 **A.** It's a commendable aim but there's an awful lot
10 of it and it might have helped more if they'd
11 specified which bits they had in mind for
12 adherence in this context.

13 **Q.** You continue:

14 "The revision to this policy in February
15 2011 added a procedures and standards section
16 which identified adherence with the CPIA. It
17 was silent as to the manner in which this was to
18 be achieved, save for adding that financial
19 investigators should 'ensure that all
20 investigations are recorded correctly and in
21 a timely manner'. Similarly, the casework
22 management policy at 3.3 enjoined 'team leaders
23 should ensure all avenues of enquiry have been
24 exhausted', but it does not spell out that this
25 involves lines of inquiry leading away from the

170

1 You say:

2 "I have not seen the Code to which this
3 refers, but the Post Office [Code of] Conduct of
4 Criminal Investigations Policy [of] August 2013,
5 states in relation to the duty to record ... 'it
6 is important to document every action, decision
7 and reason for decisions being made during the
8 course of [an] investigation'. That policy also
9 noted ... that 'all activities undertaken during
10 an investigation should be recorded on the event
11 log'."

12 So here you're addressing the extent to
13 which Post Office policies over the years
14 acknowledged or even referred to the three Rs.

15 **A.** Yes.

16 **Q.** You say they're limited and far from
17 comprehensive. Again, could you help us by
18 calibrating the level of concern, if any, that
19 you have about this?

20 **A.** Well, it -- my level of concern may rather
21 depend on what the Post Office Code of Practice
22 under the CPIA was. If it was the disclosure of
23 unused material, Criminal Procedure and
24 Investigations Act 1996 Codes of Practice that
25 was issued in May 2001, then that would, by the

172

1 cross-reference, ensure that someone approaching
 2 their duty to record the various matters set out
 3 here would also have understood how that meshed
 4 with the CPIA. If it's not that, then I haven't
 5 seen it, it's certainly not got the same name as
 6 the document I've just referred to, which may
 7 not help.

8 **Q.** No.

9 **A.** But so my level of concern would very much
 10 depend on whether they're talking about
 11 a cross-reference to the CPIA procedure or not.
 12 If they are, then the position is perhaps less
 13 concerning than it would be otherwise. But,
 14 really, what I've done here is identify
 15 occasions when the duty to record is given in
 16 specific examples, giving the specific examples
 17 is a good thing but helping people to understand
 18 why they're meant to be doing it and what
 19 they're going to do with it later, in terms of
 20 disclosure and revelation to the prosecutor,
 21 would make it a more effective process.

22 **Q.** If it assists, I don't think we still have
 23 a document that's entitled "Post Office Code of
 24 Practice under the CPIA".

25 Moving on to paragraph 112, you tell us
 173

1 Security Manager is required to "prepare
 2 an investigation plan which will outline the
 3 terms of reference in the way the investigation
 4 will be conducted". It ... made reference ...
 5 to the standard of proof [which] was necessary
 6 in criminal investigations including those which
 7 involved material from the Horizon System. It
 8 stated "The security manager has been tasked to
 9 prove or dispel the allegation. In criminal
 10 cases where the burden of proof is beyond all
 11 reasonable doubt, it is necessary to draw on all
 12 available evidence which is likely to
 13 substantiate the allegation. In cases
 14 concerning the Horizon System, it is important
 15 to establish of the level of training the
 16 suspect received, when this was received and
 17 action the subject took to remedy any identified
 18 faults. A key point to cover template has been
 19 produced to ensure that security managers
 20 establish these facts during the interview
 21 process ...' Sources of evidence to be collated
 22 were then identified."

23 You make a number of points on this even
 24 August 2013 policy, right at the end of the --

25 **A.** Yes.

175

1 that:

2 "That 2013 policy ..."

3 That's the Post Office Conduct of Criminal
 4 Investigations Policy of August 2013; is that
 5 right?

6 **A.** Yes.

7 **Q.** "... did also address the supervision and
 8 conduct of a criminal investigation. Under
 9 [a heading it said] 'the decided course of
 10 action needs to be proportionate and necessary.
 11 It may, if the circumstances warrant be more
 12 appropriate to consider other actions that could
 13 be done and don't necessarily lead to a criminal
 14 investigation ... proper consistent supervision
 15 is vital to ensure that cases are thoroughly
 16 investigated and submitted in a timely manner.
 17 Team leaders with the support of financial
 18 investigators need to quality assure the
 19 investigation [to make] sure prior to initial
 20 submission that all available evidence has been
 21 gathered'."

22 Then it continued. If we scroll down to
 23 113, please, it continued:

24 "... 'it is important to consider the aims,
 25 objectives and scope of the investigation. The
 174

1 **Q.** -- relevant period, in your paragraph 114. You
 2 tell us that:

3 "There was [some] recognition ... looking at
 4 material that led away from the suspect ..."

5 **A.** Yes.

6 **Q.** Is that the line, "It may, if the circumstances
 7 warrant, be more appropriate to consider other
 8 actions that could be done and don't necessarily
 9 lead to a criminal investigation"?

10 **A.** It's also the reference to the Security Manager
 11 being tasked to prove or dispel the allegations,
 12 so looking both at that which helps establish
 13 a case and that which undermines it.

14 **Q.** But you say, that was only a passing
 15 observation --

16 **A.** Yes.

17 **Q.** -- it was "without explanation as to the
 18 implications". What do you mean, "without
 19 explanation to the implications"?

20 **A.** It was just those words: that the Security
 21 Manager has been tasked to prove or dispel the
 22 allegation. It would, in my view, have made
 23 that clearer, if they were referred to the words
 24 of the CPIA Code test, namely that they should
 25 pursue all reasonable lines of inquiry that lead

176

1 towards or away from the suspect -- or the
2 wording of the CPIA, in that respect -- so it is
3 clearer what that involves them doing.

4 **Q.** You say that you're going to consider
5 paragraph 5.5.9 "in a moment", which we will,
6 but you say:

7 "... the focus [of] 5.5.7 was on the
8 strengthening of the case against a suspect,
9 rather than identifying whether he might not be
10 correctly suspected."

11 **A.** Yes, so having said "prove or dispel the
12 allegation". It then goes on to talk about all
13 available evidence, which is necessary to
14 substantiate the allegation.

15 **Q.** So giving with one hand but taking away with the
16 other?

17 **A.** Yes.

18 **Q.** Then when it mentions Horizon, is it right that
19 the policy said that in cases concerning
20 Horizon, one must refocus one's attention on the
21 training given to the suspect --

22 **A.** Yes.

23 **Q.** -- and that what he, the suspect, did to remedy
24 a fault?

25 **A.** Yes.

177

1 therefore should have been able to operate it
2 correctly, rather than any consideration of
3 whether, despite their training, there was
4 an issue that was beyond their control in
5 relation to the reliability of the evidence from
6 the system.

7 So it rather was borne out in some of the
8 material I saw for the purposes of Volume 2 that
9 there was questioning in interview about
10 training, there was the obtaining of evidence in
11 relation to training in relation to Horizon,
12 with a view to establishing that they should
13 have been able to work the system properly with
14 the then conclusion, potentially being drawn,
15 that therefore it couldn't have been a user
16 error; it must have been a deliberate action by
17 the user that something had gone wrong, but
18 without considering the other possibility that
19 was always potentially there: namely, that there
20 was a problem with the system, not them.

21 **Q.** Are you aware of any high-profile cases
22 concerning prosecutions by the CPS, where it
23 transpires that information contained on the
24 Police National Computer, the PNC, had been used
25 in support of prosecutions but was incorrect?

179

1 **Q.** You tell us in (b) that:

2 "... there was no reference to the
3 consideration of, or ... investigation of or
4 disclosure of, anything that might suggest
5 a failure in the operation of the system, as
6 opposed to failure by the suspect ..."

7 **A.** Yes, so it was focused on the operator, not the
8 system that they were seeking to operate.

9 **Q.** Did that remain the case in the 2014 issue?

10 **A.** Yes.

11 **Q.** Did that remain the case in the 2018 edition?

12 **A.** Yes.

13 **Q.** Albeit that I think you tell us that Horizon was
14 identified as a specific interview topic?

15 **A.** Yes.

16 **Q.** So did you have any concerns or observations on
17 this, the specific mention of what's called
18 a Horizon-related investigation or cases
19 concerning the Horizon System, but focusing
20 attention back on the suspect?

21 **A.** The potential concern there was that, in a case
22 where the evidence was Horizon dependent, the
23 focus would still be on whether the person
24 operating the system had had the training to use
25 it with a view to establishing that they

178

1 **A.** No. That's not to say that there weren't any,
2 but I'm not aware of them.

3 **Q.** Thank you.

4 **A.** There certainly weren't any cases prosecuted by
5 me.

6 **Q.** Yes, very good.

7 Can we turn to paragraph 115, please, which
8 is on page 54 --

9 **A.** Yes, thank you.

10 **Q.** -- which you promised to come back to in
11 a moment, earlier in your report. You say that
12 5.5.9, this is again still the August 2013
13 policy states:

14 "... 'The security manager must not overlook
15 the fact that a fair investigation is there to
16 establish the truth as well as substantiate the
17 allegation, so it is important that any evidence
18 uncovered that may support the subject's
19 position is also recovered. It is important to
20 document every action, decision and reason for
21 decisions being made during the course of the
22 investigation'."

23 You say that paragraph reflects
24 paragraph 3.4 of the CPIA Code and "the need to
25 consider evidence that exonerates as well as

180

1 implicates". You say:

2 "It is of note that it was in what appears
3 to be the 2018 reviewed and amended version of
4 this policy that the need for schedules of
5 unused material was addressed."

6 **A.** Yes. And so the point I'm making is that,
7 whilst I had identified limitations to the
8 references to the duty to pursue all reasonable
9 lines of inquiry, including those leading away
10 from the suspect at paragraph 5.5.7 of this
11 policy, that that balance was moved back towards
12 a proper appreciation of what that duty was by
13 paragraph 5.5.9. So someone reading the two
14 would be in a better position to understand what
15 was required of them than someone just reading
16 the first of those.

17 **Q.** You say:

18 "Similarly [in paragraph 116], the July 2010
19 revision of the Royal Mail 'Disclosure of Unused
20 Material' policy did expressly state, under the
21 heading of duties of investigators and
22 disclosure officers, at para 3.2:

23 ""Investigators must pursue all reasonable
24 lines of inquiry, whether these point towards or
25 away from the suspect."

181

1 in relation to the quality and extent of that
2 guidance, in cases which are founded upon data
3 produced by a computer?

4 **A.** What I think that sentence is intended to
5 replicate, because the 2010 policy was designed
6 to give effect to the 2005 Attorney General's
7 Guidelines, amongst other things, was the
8 recognition that disclosure obligations in
9 relation to a -- the content of a computer did
10 require an assessment of what was proportionate
11 to identify, in interrogating the computer and
12 how you were going to do that and what
13 involvement there would be from the defence,
14 which was something that was built on by
15 subsequent Attorney General's Guidelines in 2011
16 and 2013.

17 So I think that's the context there for that
18 that, rather than it having any reference to the
19 assessment of the reliability of computer data
20 as a potential line of enquiry.

21 **Q.** Thank you. Moving on to paragraph 117, you say
22 that:

23 "The Post Office Prosecution Policy England
24 and Wales, dated November 2013 ... addressed
25 disclosure in a more detailed manner more akin

183

1 **A.** Yes.

2 **Q.** Is that the anchoring of the point you've
3 already made a couple of times already, it's not
4 until July 2010 --

5 **A.** Yes.

6 **Q.** -- that we actually see the core duty
7 reflected --

8 **A.** Yes.

9 **Q.** -- in the documents you've seen?

10 **A.** Yes, absolutely.

11 **Q.** "What is reasonable in each case will depend on
12 the particular circumstances. For example where
13 material is held on a computer, it is a matter
14 for the Investigator to decide which material on
15 the computer it is reasonable to enquire into
16 and in what manner'. That policy replicates the
17 definitions of material and relevance set out in
18 the Code ... and then addresses the 3Rs ...
19 retention, record and revelation."

20 **A.** Yes.

21 **Q.** Just in terms of the reference to material being
22 held on a computer, it's a matter for the
23 investigator to decide what material on that
24 computer is reasonable to enquire into and in
25 what manner. Have you any observation to make

182

1 to comparable CPS documents."

2 So it is, by this time, the end of the
3 period we're looking at, that one sees some
4 convergence; is that right?

5 **A.** Yes.

6 **Q.** "It states (at paragraph 6.2): 'Post Office
7 Limited will take all reasonable steps to
8 identify and record material which may meet the
9 test for disclosure [making specific reference
10 to CPIA section 3 in a footnote] ... in doing so
11 the Post Office will operate a continuous
12 process designing to identify any material
13 whether the subject of a criminal investigation
14 or not which may relate to the integrity and
15 reliability of Post Office Limited's IT and data
16 systems'."

17 Is that the first reference you've seen in
18 policies which recognises the need to identify
19 material that concerns the integrity and
20 reliability of the Post Office's data systems?

21 **A.** Yes, certainly from my recollection, I think
22 that's right.

23 **Q.** That's November 2013?

24 **A.** Yes.

25 **Q.** "In keeping with this more detailed

184

1 consideration of disclosure in 2013, there is
 2 evidence of training that specifically addressed
 3 disclosure in November 2012, which included
 4 an 'introduction' to the 'Principles of
 5 Disclosure', the role of the disclosure officer,
 6 the types of material that fell to be considered
 7 and the schedules that were required to address
 8 the disclosure exercise. Thereafter, a set of
 9 training slides for a Presentation on Principles
 10 of Disclosure were prepared in February 2015 in
 11 similar terms."

12 However, you point out:

13 "Neither could be described as comprehensive
 14 or sufficient in [themselves] to ensure CPIA
 15 compliance."

16 **A.** Yes.

17 **Q.** Why do you say that?

18 **A.** As with other training material that I've seen,
 19 they are clearly useful and they clearly will
 20 help but it wouldn't be enough to provide
 21 someone with a set of training slides. Going
 22 forward they would need to have a more
 23 comprehensive policy of the kind that the 2013
 24 policy in many respects was, and so I -- the
 25 point I'm making is the training in and of

185

1 were in the fundamental respect of looking for
 2 material that exonerated as well as implicated
 3 a suspect.

4 **Q.** On the core duty, the reasonable lines of
 5 inquiry duty, given the centrality of it in
 6 Section 23(1), do you think it can be said that
 7 because it was so obvious, from Section 23(1),
 8 that it follows that investigators must have
 9 known about it?

10 **A.** That would -- I suppose the process would then
 11 be that they received their training -- although
 12 I've seen very limited material in relation to
 13 what that training would have covered or not,
 14 and so whether it would have covered that
 15 fundamental duty or not -- they would have
 16 received the 2001 policy that made no reference
 17 to it, and would have not led them to consider
 18 that aspect of the Code as necessarily being one
 19 that applied to them, and so it would have
 20 required them to then look beyond the policy,
 21 identify there was something in the Code that
 22 was not addressed in the policy, identify that,
 23 despite that, it applied to them, and to have
 24 applied it -- rather than to have considered
 25 that the policy told them which bits of the CPIA

187

1 itself was not enough. You needed the policy as
 2 well.

3 That was a position that was achieved in
 4 a much more thorough and satisfactory way from
 5 2013 onwards and in stark contrast to the
 6 position before that.

7 **Q.** Standing back, what are your views on the
 8 adequacy or otherwise of this suite of policies,
 9 insofar as the CPIA and the Code issued under it
 10 are concerned, from an investigator's
 11 perspective?

12 **A.** The policy from 2001 onwards did give a correct
 13 and, in many respects, helpful overview of what
 14 was required and who it was requiring to do
 15 what, but the omission of the duty in relation
 16 to all reasonable lines of inquiry was
 17 an important omission. The lack of reference to
 18 the types of lines of inquiry that ought to be
 19 considered, like that of the integrity and
 20 reliability of data systems, which finally found
 21 its place in 2013, again, was an omission.

22 So they were -- the earlier policy documents
 23 were helpful, insofar as they went, but they did
 24 not, in my view, equip investigators properly to
 25 appreciate what their duties as investigators

186

1 and its Code applied to them, and just look at
 2 those.

3 **Q.** Was there anything in any of the policy
 4 documents that you have read that suggested to
 5 an investigator what they should do if a suspect
 6 raised the operation of the Horizon System as
 7 a possible explanation for losses during their
 8 interview under caution?

9 **A.** I think the short answer to that question is no.
 10 They could have understood from the policy that
 11 they were required to disclose material that
 12 undermined the prosecution case and, therefore,
 13 if they had ready access to that, to material
 14 that did that, and supported the defence case in
 15 that respect, then they ought to have disclosed
 16 it. Given the lack of more than the barest of
 17 reference in the 2001 policy to the Attorney
 18 General's Guideline, they may not have
 19 appreciated, just by reference to that, that
 20 they were under a duty to address that
 21 third-party material in relation to that topic.
 22 And so there's an outside chance that they might
 23 have realised that they needed to pursue that,
 24 if it was raised by someone in interview, but
 25 equally, a chance that they wouldn't.

188

1 Q. If they had failed to do so, would you consider
 2 that the prosecutor -- and by that I mean
 3 a lawyer reviewing whether there was sufficient
 4 evidence to charge or not -- or a lawyer in fact
 5 having conduct of a prosecution post-charge, to
 6 have advised that lines of inquiry should be
 7 pursued if a suspect had raised the operation of
 8 the Horizon System as being an explanation for
 9 shortfalls shown in their accounts?
 10 A. So a prosecutor reading and understanding the
 11 CPIA Code and the Code for Crown Prosecutors in
 12 each of the various iterations of both of those
 13 would have understood, or should have
 14 understood, that they were under an obligation
 15 to consider whether there were lines of inquiry
 16 that ought to be pursued, that the content of
 17 a suspect's interview would highlight such lines
 18 of inquiry. And so applying those, they should
 19 have, where it was raised in interview, raised
 20 the question as to whether -- and that had been
 21 investigated or not, and if not, that it should
 22 be.
 23 But that would require them to be looking at
 24 those Codes, rather than at any Post Office
 25 policy that specifically was telling them that

1 Q. -- of the Code of Practice?
 2 A. Yes.
 3 Q. Similarly, if we look at paragraph 146 of your
 4 report, which is at the foot of page 68, you
 5 cite paragraph 4.8 of the Code for Crown
 6 Prosecutors, and you say:
 7 "It follows that the reliability of the
 8 evidence is identified as being a central
 9 consideration ... together with the question of
 10 'whether there is any material that may affect
 11 the assessment of the sufficiency of evidence,
 12 including examined and unexamined material in
 13 the possession of the police, and material that
 14 may be obtained through further reasonable lines
 15 of inquiry'. "
 16 Is that an addition?
 17 A. That wording is, yes, in 2018. It's right to
 18 say that the requirement for the reviewing
 19 lawyer to provide advice as to lines of inquiry
 20 and the need for further evidence was always,
 21 and had been, for certainly throughout the
 22 Inquiry's period, had always been an aspect of
 23 the Code. So that wording was new in 2018. The
 24 role of a prosecutor in identifying evidential
 25 deficiencies, lines of inquiry that should be

1 that's what they ought to do.
 2 Q. Can we turn to paragraph 141 of your report,
 3 please, which is on page 67.
 4 A. Thank you.
 5 Q. I'm taking things slightly out of order here
 6 because we're going to come back to charging
 7 decisions tomorrow. It's just a point on the
 8 contents of the October 2018 iteration --
 9 A. Yes.
 10 Q. -- of the Code for Crown Prosecutors. In the
 11 third sentence or third line you say:
 12 "The Full Code Test should be applied
 13 (paragraph 4.3): 'when all outstanding
 14 reasonable lines of inquiry have been pursued;
 15 or prior to the investigation being completed,
 16 if the prosecutor is satisfied that any further
 17 evidence or material is unlikely to affect the
 18 application of the Full Code Test, whether in
 19 favour of or against a prosecution'. "
 20 Is it right that those qualifications there,
 21 the introduction of the cross-reference to "all
 22 outstanding reasonable lines of inquiry have
 23 been pursued" appeared for the first time in the
 24 2018 edition --
 25 A. Yes.

1 pursued, was not new in 2018 and certainly had
 2 appeared in the versions of the Code that I have
 3 identified from 2004 onwards.
 4 Q. Thank you. Then lastly, before we break, if we
 5 just turn to paragraph 151 on page 70.
 6 You cite paragraph 3.6 of the Code:
 7 "... 'Review is a continuing process and
 8 prosecutors must take account of any change in
 9 circumstances that occurs as the case develops.
 10 This includes what becomes known of the defence
 11 case, any further reasonable lines of inquiry
 12 that should be pursued, and receipt of any
 13 unused material that may undermine the
 14 prosecution case or assist the defence case, to
 15 the extent that charges should be altered or
 16 discontinued or the prosecution should not
 17 proceed'. "
 18 Is that also a 2018 addition?
 19 A. Yes and no, is the answer to that. "The
 20 continuing process of review and the need to
 21 take account of changes in circumstances as the
 22 case develops" is a wording that did appear in
 23 the earlier versions of the Code. The further
 24 specific reference to the defence case, and what
 25 that gave rise to, that was the new bit.

1 **MR BEER:** Thank you very much. 1
2 Sir, if it's convenient to you, it's 2
3 convenient to me, that's a break. We move next 3
4 to charging decisions. 4
5 **SIR WYN WILLIAMS:** Yes, that's fine, Mr Beer. 5
6 It's been a long and interesting, from my 6
7 point of view, day. Thank you very much, 7
8 Mr Atkinson, for the clarity of your answers and 8
9 the economy of words used. 9
10 I take it you won't want to be told not to 10
11 speak to anyone about your evidence, since 11
12 I can't imagine you will want to. But if, by 12
13 chance, there is any reason why you should speak 13
14 to anyone, then let Mr Beer know, who will 14
15 consult with his colleagues about what would be 15
16 appropriate for you to do, all right? 16
17 **THE WITNESS:** Yes. Thank you very much, sir. 17
18 **MR BEER:** So it's 10.00 tomorrow, please. 18
19 **SIR WYN WILLIAMS:** Fine. Thank you. 19
20 (4.17 pm) 20
21 (The hearing adjourned until 10.00 am 21
22 the following day) 22
23 23
24 24
25 25

I N D E X

RICHARD DUNCAN ATKINSON KC (sworn) 1
Questioned by MR BEER 1

| | | | | |
|--|---|---|--|---|
| MR BEER: [20] 1/3 1/6 1/11 62/24 63/4 63/8 63/11 70/20 71/2 71/7 106/3 106/7 106/11 106/14 148/11 148/15 148/19 148/22 193/1 193/18 | 'What [1] 182/11 'when [1] 190/13 'where [1] 171/21 'whether [1] 191/10 'with [1] 165/1 | 173 [1] 11/24 179 [2] 11/24 12/17 18 [1] 76/22 181 [1] 12/18 181 pages [1] 3/15 1865 [1] 116/23 188 [1] 29/17 19 [2] 116/16 116/18 1916 [1] 117/7 1971 [1] 57/19 1980 [2] 29/24 122/9 1984 [2] 11/15 135/20 1985 [4] 53/10 72/16 73/18 85/23 1986 [1] 118/25 1992 [2] 29/16 29/16 1995 [1] 5/18 1996 [5] 79/21 164/18 165/18 169/7 172/24 1997 [1] 157/16 1999 [3] 11/16 29/11 29/17 19th century [1] 118/6 1A [7] 3/5 4/9 4/11 12/6 12/14 13/9 134/1 | 170/2 181/18 182/4 183/5 2011 [8] 91/13 107/1 108/24 110/4 110/21 165/6 170/15 183/15 2012 [5] 20/14 37/17 111/6 165/6 185/3 2013 [32] 1/23 6/20 14/2 17/22 18/22 21/8 30/14 57/18 57/23 57/24 70/15 71/15 78/21 111/22 111/25 112/9 113/19 114/22 134/25 165/6 172/4 174/2 174/4 175/24 180/12 183/16 183/24 184/23 185/1 185/23 186/5 186/21 2014 [7] 113/4 113/6 113/17 113/22 121/1 122/8 178/9 2015 [4] 5/19 5/25 113/11 185/10 2016 [2] 58/2 58/24 2018 [19] 19/25 26/3 26/12 27/6 28/22 28/24 30/1 30/10 31/1 86/21 87/4 178/11 181/3 190/8 190/24 191/17 191/23 192/1 192/18 2021 [1] 131/24 2022 [1] 5/22 2023 [1] 1/1 20th [1] 118/6 21 [1] 120/16 22 [5] 29/10 78/1 130/7 154/24 155/7 221 [1] 131/24 23 [14] 26/4 27/17 30/22 82/20 85/3 153/8 154/9 155/6 155/15 156/15 156/22 162/22 187/6 187/7 23 May 2018 [1] 27/6 25 [1] 86/17 26 [6] 80/16 136/5 157/25 158/20 158/23 165/13 27 [2] 92/4 103/10 28 [3] 103/22 106/16 106/18 29 [2] 82/6 82/8 2CrAppR [1] 29/17 | 148/18 3.2 [3] 169/3 171/16 181/22 3.2.10 [1] 101/24 3.2.8 [1] 98/11 3.2.9 [3] 95/2 98/10 99/14 3.3 [3] 169/5 170/22 171/21 3.3.1 [1] 140/1 3.4 [1] 180/24 3.6 [1] 192/6 30 [1] 91/23 31 [1] 135/16 33 [1] 139/14 334 [1] 25/17 335 [3] 25/15 25/21 32/10 34 [2] 15/12 93/4 35 [1] 80/16 366 [1] 135/15 37 [2] 95/12 116/16 370 [1] 135/15 38 [1] 119/3 39 [2] 120/14 152/14 3A [1] 9/21 3Rs [2] 171/11 182/18 |
| SIR WYN WILLIAMS: [11] 1/5 1/8 63/2 63/10 70/24 106/5 106/13 148/14 148/21 193/5 193/19 THE WITNESS: [1] 193/17 | 1 1.00 [1] 106/3 1.00pm [1] 106/8 1.1 [1] 71/20 1.2 [1] 71/20 10 [3] 37/2 69/15 69/18 10.00 [3] 1/2 193/18 193/21 106 [3] 164/12 164/15 165/9 107 [3] 165/16 166/19 167/19 108 [1] 168/10 109 [1] 168/23 11 [6] 4/19 41/2 136/25 137/18 159/8 159/11 11 paragraphs [1] 4/5 11.26 [1] 63/5 11.45 [2] 63/1 63/7 11.58 [1] 71/4 110 [2] 169/24 171/9 111 [1] 171/10 112 [1] 173/25 113 [1] 174/23 114 [1] 176/1 115 [1] 180/7 116 [1] 181/18 117 [2] 135/14 183/21 12 [1] 48/21 12.09 [1] 71/6 1233 [1] 26/3 13 [3] 15/15 53/3 77/19 13-year [2] 18/3 21/16 14 [1] 56/10 141 [1] 190/2 145 [1] 25/14 146 [1] 191/3 15 [5] 27/15 69/19 69/20 82/7 155/3 15 pages [1] 4/14 151 [1] 192/5 16 [2] 69/19 69/20 167 [1] 3/24 169 [1] 5/15 17 [3] 76/22 82/5 82/7 171 [2] 5/15 13/13 172 [1] 13/14 | 2 2.00 [2] 106/4 106/10 2.1 [1] 13/20 2.2 [1] 71/24 2.4 [1] 75/11 2.5 [1] 72/3 2.58 [1] 148/16 20 [2] 125/5 126/14 2000 [15] 1/23 6/20 14/2 17/21 18/22 21/8 34/12 44/5 78/21 92/16 93/22 93/24 141/8 142/7 169/13 2001 [18] 41/18 43/19 45/7 52/10 82/17 139/23 155/19 161/19 164/19 165/20 166/23 168/23 169/14 171/16 172/25 186/12 187/16 188/17 2002 [1] 93/4 2004 [3] 20/8 20/10 192/3 2005 [1] 183/6 2007 [6] 32/3 94/15 95/11 95/17 100/2 100/24 2009 [6] 5/21 20/6 20/7 20/11 107/1 165/6 2010 [18] 20/16 43/8 43/15 45/11 95/8 95/12 103/22 105/4 155/20 160/13 161/19 161/20 162/4 165/8 | 3 3.00 [1] 148/12 3.1 [2] 164/25 170/5 3.1.1 [2] 97/2 97/11 3.1.2 [3] 97/3 97/11 140/16 3.1.3 [2] 94/23 96/3 3.1.4 [2] 94/15 96/11 3.15 [3] 104/3 148/13 | 4 4.17 [1] 193/20 4.3 [1] 190/13 4.4 [1] 109/1 4.8 [1] 191/5 40 [3] 120/15 156/6 156/6 42 [1] 160/1 44 [1] 130/8 45 [3] 131/3 160/5 163/9 46 [1] 131/21 48 [4] 85/4 85/12 85/21 132/1 49 [2] 86/9 86/12 |
| 'a [2] 26/5 110/5 'A criminal [1] 110/5 'a private [1] 26/5 'all [1] 172/9 'although [1] 132/1 'are [1] 117/2 'be [1] 166/7 'comprehensive' [1] 143/10 'decisions [3] 95/3 104/3 111/7 'Disclosure [4] 164/17 165/17 169/6 181/19 'ensure [1] 170/19 'have [1] 158/11 'In [1] 42/2 'independent [1] 112/3 'introduction' [1] 185/4 'Investigations [1] 140/17 'Investigators [1] 181/23 'it [3] 131/5 172/5 174/24 'local [1] 171/17 'minister [1] 120/8 'normally' [1] 166/18 'plea [1] 11/8 'Post [2] 76/5 184/6 'Principles [1] 185/4 'private' [1] 72/14 'record [1] 136/10 'responsible [1] 166/11 'Review [1] 192/7 'SIS' [1] 92/20 'team [1] 170/22 'The [7] 94/16 109/1 130/21 140/1 174/9 175/8 180/14 'There [1] 119/8 'traditionally [1] 121/18 | 1 1.00 [1] 106/3 1.00pm [1] 106/8 1.1 [1] 71/20 1.2 [1] 71/20 10 [3] 37/2 69/15 69/18 10.00 [3] 1/2 193/18 193/21 106 [3] 164/12 164/15 165/9 107 [3] 165/16 166/19 167/19 108 [1] 168/10 109 [1] 168/23 11 [6] 4/19 41/2 136/25 137/18 159/8 159/11 11 paragraphs [1] 4/5 11.26 [1] 63/5 11.45 [2] 63/1 63/7 11.58 [1] 71/4 110 [2] 169/24 171/9 111 [1] 171/10 112 [1] 173/25 113 [1] 174/23 114 [1] 176/1 115 [1] 180/7 116 [1] 181/18 117 [2] 135/14 183/21 12 [1] 48/21 12.09 [1] 71/6 1233 [1] 26/3 13 [3] 15/15 53/3 77/19 13-year [2] 18/3 21/16 14 [1] 56/10 141 [1] 190/2 145 [1] 25/14 146 [1] 191/3 15 [5] 27/15 69/19 69/20 82/7 155/3 15 pages [1] 4/14 151 [1] 192/5 16 [2] 69/19 69/20 167 [1] 3/24 169 [1] 5/15 17 [3] 76/22 82/5 82/7 171 [2] 5/15 13/13 172 [1] 13/14 | 2 2.00 [2] 106/4 106/10 2.1 [1] 13/20 2.2 [1] 71/24 2.4 [1] 75/11 2.5 [1] 72/3 2.58 [1] 148/16 20 [2] 125/5 126/14 2000 [15] 1/23 6/20 14/2 17/21 18/22 21/8 34/12 44/5 78/21 92/16 93/22 93/24 141/8 142/7 169/13 2001 [18] 41/18 43/19 45/7 52/10 82/17 139/23 155/19 161/19 164/19 165/20 166/23 168/23 169/14 171/16 172/25 186/12 187/16 188/17 2002 [1] 93/4 2004 [3] 20/8 20/10 192/3 2005 [1] 183/6 2007 [6] 32/3 94/15 95/11 95/17 100/2 100/24 2009 [6] 5/21 20/6 20/7 20/11 107/1 165/6 2010 [18] 20/16 43/8 43/15 45/11 95/8 95/12 103/22 105/4 155/20 160/13 161/19 161/20 162/4 165/8 | 3 3.00 [1] 148/12 3.1 [2] 164/25 170/5 3.1.1 [2] 97/2 97/11 3.1.2 [3] 97/3 97/11 140/16 3.1.3 [2] 94/23 96/3 3.1.4 [2] 94/15 96/11 3.15 [3] 104/3 148/13 | 5 5 October 2023 [1] 1/1 5.1-2 [1] 110/4 5.5 [2] 107/9 108/21 5.5.7 [2] 177/7 181/10 5.5.9 [3] 177/5 180/12 181/13 50 [2] 86/18 164/12 54 [1] 180/8 55 [5] 80/16 91/24 92/5 92/15 94/11 56 [1] 114/4 57 [1] 135/14 59 [2] 135/16 135/17 5th [1] 20/8 |

| | | | | |
|------------------------------|-------------------------------|-------------------------------|------------------------------|------------------------------|
| 6 | 133/7 141/11 182/10 | 81/10 85/22 88/13 | addressing [4] 39/2 | 126/14 127/18 133/17 |
| 60 [1] 136/3 | abuse [4] 60/1 126/1 | 89/1 89/4 89/21 98/25 | 101/7 117/18 172/12 | 134/7 134/13 145/21 |
| 61 [1] 121/6 | 126/16 130/15 | 99/4 99/11 109/4 | adequacy [8] 8/5 | 151/9 164/9 168/14 |
| 64 [1] 139/21 | accept [8] 58/9 58/12 | 121/11 122/2 135/20 | 10/19 34/7 34/20 53/5 | 168/14 172/17 180/12 |
| 65 [1] 142/6 | 123/25 148/24 149/21 | 140/19 140/25 142/2 | 53/23 161/15 186/8 | 186/21 |
| 66 [1] 143/6 | 150/19 150/23 151/18 | 149/16 149/22 150/21 | adequate [2] 42/11 | against [10] 32/23 |
| 67 [8] 136/16 136/25 | Acceptance [1] 58/2 | 151/5 152/17 152/18 | 143/24 | 78/19 80/3 108/3 |
| 137/3 141/12 157/21 | accepted [1] 138/16 | 153/7 154/25 157/8 | adhere [1] 170/7 | 117/12 125/23 127/24 |
| 158/15 159/7 190/3 | access [5] 19/1 | 157/14 157/25 158/16 | adherence [4] 102/9 | 148/5 177/8 190/19 |
| 68 [1] 191/4 | 128/10 128/11 146/6 | 163/5 163/25 164/18 | 170/5 170/12 170/16 | agencies [16] 16/20 |
| 69 [6] 11/14 60/23 | 188/13 | 165/18 167/3 167/21 | adjourned [1] 193/21 | 18/8 22/11 22/13 |
| 61/7 61/11 62/14 | accessibility [1] 33/8 | 169/7 172/24 | Adjournment [1] | 22/17 22/21 32/8 |
| 157/20 | accessible [1] | Act 1984 [1] 11/15 | 106/9 | 36/14 48/4 75/6 77/4 |
| 6th [1] 20/16 | 147/12 | acting [4] 14/8 14/11 | Admin [1] 131/25 | 78/5 86/5 88/1 114/11 |
| 7 | accordance [6] | 79/25 118/23 | administration [2] | 115/8 |
| 70 [1] 192/5 | 43/21 98/14 99/17 | action [6] 110/8 | 117/15 118/8 | agency [17] 6/13 |
| 76 [2] 152/14 157/22 | 101/1 129/18 140/18 | 172/6 174/10 175/17 | Administrative [1] | 15/19 16/23 17/6 21/3 |
| 77 [1] 153/9 | accorded [1] 24/21 | 179/16 180/20 | 131/23 | 25/25 32/9 32/25 |
| 78 [2] 156/6 156/7 | accordingly [1] | actions [2] 174/12 | admissibility [1] | 33/12 36/13 48/16 |
| 8 | 123/14 | 176/8 | 158/22 | 58/7 78/4 86/6 115/6 |
| 8 November [1] | accordingly' [1] | activities [8] 16/2 | adopted [1] 131/22 | 115/7 115/8 |
| 71/15 | 109/8 | 23/5 83/6 84/3 84/18 | advice [20] 51/6 | aggrieved [6] 64/9 |
| 8 November 2013 [1] | account [4] 137/24 | 135/21 136/19 172/9 | 54/15 54/24 55/11 | 64/16 64/23 64/24 |
| 70/15 | 157/10 192/8 192/21 | activity [1] 38/10 | 95/5 99/21 100/11 | 66/12 67/4 |
| 80 [1] 156/20 | accountability [3] | acts [6] 15/3 34/15 | 100/14 100/17 103/6 | ago [2] 85/24 164/23 |
| 81 [1] 157/22 | 53/8 53/24 113/7 | 36/17 149/2 149/23 | 104/6 104/18 107/22 | agree [13] 5/17 14/6 |
| 8th [3] 19/21 19/24 | accountable [1] | 150/24 | 110/7 110/15 111/1 | 15/20 23/13 31/2 64/5 |
| 87/5 | 54/11 | actual [4] 10/1 21/14 | 111/19 125/7 125/9 | 65/19 73/6 77/16 |
| 9 | accounting [8] 8/15 | 22/2 132/14 | 191/19 | 122/23 123/9 146/2 |
| 92 [2] 160/5 163/10 | 9/10 9/13 11/10 56/24 | actually [11] 9/25 | advice' [1] 111/10 | 163/15 |
| A | 57/8 58/12 58/17 | 17/18 29/16 50/21 | advices [3] 51/7 | agreement [2] 107/4 |
| able [13] 12/3 13/16 | accounts [1] 189/9 | 51/9 57/5 61/18 100/6 | 133/19 133/24 | 107/10 |
| 30/12 33/1 33/18 | accurate [1] 73/9 | 161/9 168/17 182/6 | advise [6] 90/11 | agrees [1] 27/12 |
| 38/20 90/3 90/23 | accurately [1] 120/9 | add [4] 83/6 128/4 | 110/5 123/6 123/14 | aim [4] 147/11 149/9 |
| 91/14 100/22 128/17 | accused [4] 129/4 | 129/15 171/7 | 124/18 124/25 | 170/5 170/9 |
| 179/1 179/13 | 130/23 131/1 132/15 | added [3] 112/5 | advised [1] 189/6 | aims [2] 25/6 174/24 |
| about [45] 18/9 50/18 | achieve [6] 25/6 34/7 | 145/3 170/15 | advising [1] 107/8 | akin [1] 183/25 |
| 53/5 53/22 55/7 60/6 | 53/6 53/7 53/23 149/9 | addendum [1] 19/5 | advocates [3] 28/13 | albeit [7] 51/7 55/11 |
| 61/7 62/22 62/22 67/4 | achieved [8] 53/21 | adding [1] 170/18 | 121/8 122/5 | 76/9 119/20 155/23 |
| 69/24 71/21 73/23 | 55/5 136/5 136/15 | addition [4] 103/5 | advocating [1] 98/6 | 171/14 178/13 |
| 76/1 88/20 91/7 96/17 | 136/25 160/16 170/18 | 152/24 191/16 192/18 | affect [2] 190/17 | alive [1] 50/3 |
| 96/18 97/8 97/22 99/3 | 186/3 | additional [1] 26/18 | 191/10 | all [52] 3/18 4/3 |
| 109/22 110/13 113/23 | achieving [2] 42/11 | additionally [2] 11/25 | affected [2] 51/1 | 12/14 19/19 21/7 26/8 |
| 118/11 118/15 134/9 | 61/18 | 12/19 | 107/5 | 27/22 28/6 29/14 |
| 135/1 139/16 143/3 | acknowledge [1] | address [28] 8/1 8/4 | afford [1] 162/13 | 30/11 38/2 41/22 42/3 |
| 143/5 145/24 147/1 | 35/1 | 8/19 9/2 9/15 10/15 | afraid [3] 3/17 19/17 | 42/25 52/2 55/12 60/6 |
| 150/11 152/24 156/4 | acknowledged [4] | 11/3 13/22 19/4 33/25 | 70/20 | 65/16 72/16 88/20 |
| 160/25 164/12 172/19 | 45/8 55/21 57/15 | 37/5 38/5 43/20 44/13 | after [6] 26/18 65/24 | 89/25 96/7 98/7 105/7 |
| 173/10 177/12 179/9 | 172/14 | 60/16 62/10 64/10 | 73/4 126/20 132/15 | 109/5 115/10 118/24 |
| 187/9 193/11 193/15 | acknowledgement | 65/24 88/15 119/3 | 157/3 | 125/6 129/3 133/24 |
| above [3] 102/12 | [1] 35/17 | 156/8 156/9 160/2 | afternoon [4] 106/11 | 135/24 137/19 159/14 |
| 110/22 163/16 | acknowledgements | 162/24 162/25 174/7 | 106/15 148/13 148/19 | 160/10 162/5 163/2 |
| absence [7] 40/10 | [1] 171/11 | 185/7 188/20 | AG's [3] 43/25 44/2 | 165/10 167/14 170/19 |
| 115/16 160/10 160/14 | acquired [3] 129/6 | addressed [21] 3/5 | 58/3 | 170/23 174/20 175/10 |
| 161/24 162/3 162/18 | 129/13 153/3 | 8/8 22/10 22/16 40/6 | again [43] 10/10 | 175/11 176/25 177/12 |
| absolute [2] 102/6 | across [3] 22/25 | 41/21 41/22 44/19 | 10/20 27/16 40/13 | 181/8 181/23 184/7 |
| 102/16 | 66/18 113/8 | 46/13 50/6 62/16 | 42/12 45/3 46/20 | 186/16 190/13 190/21 |
| absolutely [7] 10/17 | act [59] 11/15 11/15 | 79/11 88/16 99/9 | 46/22 49/25 51/18 | 193/16 |
| 14/23 82/2 122/18 | 15/6 15/11 16/22 | 126/25 133/24 142/20 | 53/25 55/6 55/8 58/3 | allayed [2] 50/20 |
| | 28/16 34/11 34/25 | 181/5 183/24 185/2 | 58/5 59/6 64/22 76/21 | 50/25 |
| | 35/10 35/11 36/7 36/8 | 187/22 | 84/19 86/22 104/16 | allegation [12] 57/4 |
| | 38/5 39/24 40/6 43/22 | addresses [7] 3/18 | 107/21 110/23 110/25 | 57/6 57/7 57/7 125/22 |
| | 49/7 53/10 54/4 61/11 | 86/21 98/20 98/22 | 111/13 111/17 114/15 | 125/24 175/9 175/13 |
| | 72/15 73/17 74/25 | 107/9 165/20 182/18 | 117/5 126/11 126/11 | 176/22 177/12 177/14 |

| | | | | |
|---|---|---|--|--|
| A | 143/9 | apart [2] 3/19 76/9 | 16/10 28/2 31/13 32/5 | 71/1 72/25 74/14 |
| allegation... [1] 180/17 | anachronistic [2] 76/7 76/16 | apologies [2] 71/8 71/9 | 37/6 38/12 40/22 | 79/21 80/16 82/23 |
| allegations [1] 176/11 | analyse [2] 92/7 92/11 | Appeal [13] 9/11 15/24 56/14 56/20 | 59/14 74/13 97/18 | 83/7 83/9 85/16 87/19 |
| alleged [1] 55/19 | analysis [4] 8/22 38/20 76/23 161/24 | 56/21 57/2 57/9 57/15 | 101/14 105/5 105/9 | 89/9 90/3 90/23 92/25 |
| Allison [1] 131/23 | anchoring [1] 182/2 | 116/10 116/21 117/6 | 109/24 120/20 122/3 | 93/2 93/8 93/14 93/18 |
| allow [2] 123/18 167/10 | another [7] 17/8 68/19 91/7 94/9 131/6 | 130/11 130/20 | 133/21 136/18 141/5 | 93/25 94/8 94/23 |
| allowed [2] 80/24 88/13 | 156/16 168/11 | appear [4] 9/7 57/19 124/15 192/22 | 146/7 146/13 146/14 | 94/24 96/6 96/23 97/2 |
| almost [2] 41/13 44/24 | answer [12] 1/16 16/11 30/12 57/18 | appeared [9] 57/17 107/16 113/18 145/11 | 146/15 146/22 147/22 | 97/14 97/15 98/6 98/6 |
| alone [1] 169/23 | 66/10 69/2 81/24 98/5 | 157/16 165/5 165/6 | 147/25 149/12 153/17 | 99/8 101/4 101/20 |
| along [4] 65/5 88/17 102/10 171/4 | 118/17 127/18 188/9 | 190/23 192/2 | 153/23 154/7 156/11 | 101/20 101/21 102/22 |
| already [10] 5/5 7/11 44/13 52/20 88/15 | 192/19 | appears [3] 137/21 169/11 181/2 | 157/12 158/8 163/7 | 103/2 104/15 104/16 |
| 88/16 89/3 144/3 | answerable [3] 83/2 83/18 104/1 | appendices [2] 3/16 4/14 | 169/20 | 105/22 105/22 105/25 |
| 182/3 182/3 | answers [1] 193/8 | Appendix [4] 3/25 5/14 11/22 12/15 | applying [13] 9/18 32/21 35/5 35/6 50/11 | 108/21 113/2 113/2 |
| also [34] 6/9 7/6 7/7 8/13 13/4 22/10 32/10 | anticipate [2] 45/7 45/25 | Appendix 1 [1] 3/25 | 59/2 105/7 109/19 | 114/24 115/8 119/9 |
| 37/13 44/23 54/20 | any [95] 6/18 7/22 8/24 10/8 16/16 19/1 | Appendix 2 [1] 5/14 | 133/15 134/5 146/20 | 119/12 122/2 127/10 |
| 56/1 59/25 67/13 | 20/19 21/24 23/9 | Appendix 3 [2] 11/22 12/15 | 157/11 189/18 | 127/22 128/5 128/9 |
| 68/16 77/12 78/15 | 30/13 36/11 38/1 43/4 | applicability [1] 155/14 | appointed [1] 113/10 | 128/22 129/17 129/22 |
| 78/21 79/11 82/21 | 43/4 57/19 58/7 59/1 | applicable [7] 2/13 19/10 24/17 79/19 | appreciate [2] 38/17 186/25 | 131/8 135/24 137/4 |
| 90/20 98/22 125/23 | 59/4 59/21 65/4 66/22 | 79/22 80/2 146/10 | 49/12 52/19 188/19 | 139/23 140/6 141/9 |
| 131/19 131/22 149/15 | 68/6 68/25 72/7 72/22 | application [29] 9/16 14/2 14/3 18/21 23/20 | appreciated [3] 49/12 52/19 188/19 | 146/13 146/19 147/2 |
| 156/22 165/6 169/20 | 72/25 74/5 74/6 74/7 | 25/7 35/23 37/10 | appreciation [2] 61/1 181/12 | 147/14 147/16 149/12 |
| 172/8 173/3 174/7 | 74/17 76/18 77/17 | 37/12 37/21 38/21 | approach [15] 9/8 11/12 15/23 31/16 | 149/13 153/6 154/22 |
| 176/10 180/19 192/18 | 80/7 84/14 84/16 | 53/17 56/14 78/14 | 36/11 36/16 58/9 79/1 | 157/6 157/8 157/12 |
| altered [1] 192/15 | 90/25 94/2 99/4 | 96/24 120/18 122/15 | 79/4 130/11 131/22 | 158/12 165/24 166/9 |
| alternative [4] 37/8 37/19 39/8 58/13 | 104/10 107/25 111/11 | 126/17 127/7 136/12 | 136/4 138/8 141/5 | 166/20 167/23 167/24 |
| alters [1] 144/4 | 112/3 122/23 122/24 | 140/21 145/4 149/10 | 151/23 | 168/3 170/20 171/11 |
| although [12] 26/12 28/21 29/25 39/10 | 123/4 124/9 125/15 | 156/18 156/21 158/10 | approached [2] 16/3 22/13 | 171/14 173/12 174/15 |
| 54/15 55/1 105/21 | 126/5 127/23 132/4 | 159/22 164/14 190/18 | approaching [2] 127/20 173/1 | 179/21 183/2 185/19 |
| 117/17 120/7 155/18 | 133/8 133/8 133/14 | applications [2] 126/18 127/11 | appropriate [9] 58/11 78/9 106/4 110/7 | 186/7 186/10 |
| 170/4 187/11 | 134/2 134/7 134/14 | applied [51] 2/22 8/21 8/22 17/17 25/23 | 110/9 134/9 174/12 | area [4] 49/12 51/10 161/8 167/20 |
| Altman [5] 72/1 72/5 75/17 76/14 135/4 | 134/18 134/22 137/7 | 31/20 33/2 34/15 36/4 | 176/7 193/16 | areas [14] 34/6 41/15 41/23 50/3 50/4 53/9 |
| Altman's [1] 75/16 | 137/9 137/11 137/14 | 36/20 40/3 40/4 40/4 | appropriately [1] 69/8 | 79/4 97/25 98/22 |
| altogether [1] 98/18 | 137/17 137/19 137/21 | 43/17 47/5 55/4 55/22 | approval [1] 91/15 | 107/24 142/20 166/25 |
| always [14] 18/22 19/11 46/8 62/7 74/24 | 137/23 139/6 139/10 | 55/23 56/7 57/15 65/4 | April [3] 103/22 105/4 107/1 | 167/9 167/14 |
| 78/4 81/22 87/10 | 140/6 151/20 158/7 | 65/5 69/5 78/16 93/1 | April 2010 [2] 103/22 105/4 | aren't [2] 128/23 147/18 |
| 118/8 122/13 124/6 | 160/10 161/15 161/24 | 93/2 93/14 93/18 | April 2011 [1] 107/1 | arguably [2] 17/8 166/15 |
| 179/19 191/20 191/22 | 167/19 168/16 172/18 | 99/12 100/5 101/17 | arbitrarily [1] 33/15 | argue [2] 138/9 163/12 |
| am [12] 1/2 13/22 18/25 19/3 19/15 63/5 | 175/17 178/16 179/2 | 103/1 103/4 117/24 | are [147] 3/21 4/6 4/15 4/17 4/22 6/2 | argued [2] 144/8 163/23 |
| 63/7 66/14 71/4 154/4 | 179/21 180/1 180/4 | 118/1 143/2 143/3 | 6/25 7/1 7/2 7/6 12/8 | argument [4] 127/23 163/15 163/16 164/4 |
| 168/2 193/21 | 180/17 182/25 183/18 | 143/11 143/23 146/16 | 13/14 13/17 15/8 | arise [6] 7/22 63/15 63/17 96/23 127/4 |
| ambit [2] 136/15 169/21 | 184/12 188/3 189/24 | 148/1 148/2 154/6 | 15/10 15/20 20/19 | 127/10 |
| amended [1] 181/3 | 190/16 191/10 192/8 | 159/2 164/3 167/14 | 21/3 23/2 26/6 27/22 | arises [1] 11/1 |
| amendments [1] 151/17 | 192/11 192/12 193/13 | 187/19 187/23 187/24 | 28/4 30/12 30/22 31/3 | arising [2] 137/23 167/19 |
| amongst [8] 6/25 15/5 61/22 70/11 | anyone [8] 48/10 59/19 88/25 140/4 | 188/1 190/12 | 32/14 32/19 32/21 | arm [1] 111/17 |
| 84/14 85/14 107/21 | 145/25 149/24 193/11 | applies [14] 35/10 35/11 35/12 35/24 | 32/21 34/25 35/4 | arrangement [1] 64/25 |
| 183/7 | 193/14 | 35/25 38/10 38/25 | 35/12 35/19 36/24 | arrest [1] 140/22 |
| amount [2] 41/11 | anything [17] 31/1 51/25 59/21 75/20 | 40/20 40/22 59/7 | 38/5 38/6 38/7 38/11 | arrests [1] 161/7 |
| | 83/7 84/24 99/24 | 148/10 149/18 149/18 | 39/24 40/21 43/2 | art [1] 154/22 |
| | 99/25 102/13 122/7 | 157/1 | 43/11 47/6 47/16 | as [267] |
| | 125/8 125/23 142/4 | apply [37] 4/19 16/8 | 48/14 54/5 55/14 | ascertain [3] 105/16 133/12 140/2 |
| | 145/25 171/7 178/4 | | 55/18 55/19 56/25 | ascertained [2] 155/11 158/3 |
| | 188/3 | | 57/11 64/2 64/11 | ascertaining [1] |
| | anyway [2] 84/11 148/2 | | 64/13 66/23 68/22 | |

| | | | | |
|---|--|---|---|--|
| A | 134/17 | Barry [1] 27/23 | beginning [4] 24/4 29/10 87/7 87/8 | Blackstone's [6] 7/3 7/6 19/19 20/7 20/11 20/15 |
| ascertaining... [1] 165/1 | August [4] 172/4 174/4 175/24 180/12 | based [5] 8/25 22/2 26/16 80/20 125/10 | behalf [5] 1/13 14/8 14/11 15/3 102/3 | blemished [1] 120/2 |
| ascribed [1] 14/14 | August 2013 [2] 172/4 180/12 | basic [1] 166/23 | being [66] 16/1 22/18 31/1 31/20 39/25 | blue [1] 30/10 |
| Asif [1] 130/12 | Aujard [4] 70/15 71/14 75/10 76/21 | basis [16] 15/23 16/2 17/9 33/19 51/10 | 40/20 50/13 54/16 | blurring [1] 115/9 |
| ask [8] 1/12 4/3 26/19 47/8 69/23 76/1 80/15 159/19 | author [1] 7/2 | 59/24 64/19 64/20 | 58/16 63/25 74/9 | board [2] 84/16 84/25 |
| asked [13] 7/16 7/21 8/4 8/10 8/19 9/15 10/4 10/18 13/22 22/18 22/24 23/5 130/25 | authored [1] 71/14 | 65/14 70/3 129/17 | 76/24 77/13 79/11 | bodies [2] 15/8 24/20 |
| aspect [2] 187/18 191/22 | authorising [1] 109/4 | 133/4 133/5 136/2 158/11 166/16 | 93/18 97/10 100/5 100/10 101/16 103/4 103/25 105/23 107/15 | body [3] 7/23 13/4 121/22 |
| aspects [6] 34/15 41/19 49/6 98/20 98/21 114/24 | authorities [8] 2/9 26/7 27/20 28/5 28/11 29/3 30/13 86/23 | be [282] | 109/20 109/23 111/1 111/15 113/8 113/13 113/23 114/1 114/10 114/21 118/7 118/10 | bones [1] 167/8 |
| asserts [1] 8/13 | authority [4] 14/10 14/13 14/16 88/23 | bear [2] 68/9 117/13 | 122/11 125/7 126/12 129/17 130/16 131/7 | borne [1] 179/7 |
| assess [2] 2/20 78/19 | available [19] 12/1 12/7 19/13 19/14 21/11 26/9 28/7 144/17 145/2 145/8 145/18 146/11 147/20 149/15 149/24 151/22 174/20 175/12 177/13 | became [3] 62/7 66/19 144/17 | 133/10 134/4 135/5 145/19 146/12 146/18 148/5 149/2 155/10 155/16 158/3 162/25 163/2 163/4 166/2 169/19 172/7 176/11 179/14 180/21 182/21 187/18 189/8 190/15 191/8 | both [35] 2/7 6/3 6/23 6/24 9/12 21/18 26/9 28/7 30/7 30/8 31/4 40/10 42/21 57/2 57/5 62/11 64/11 65/23 67/2 67/7 68/15 78/18 81/4 112/19 113/25 117/25 118/17 119/13 133/21 144/24 161/24 167/2 168/19 176/12 189/12 |
| assessed [1] 104/15 | avenues [1] 170/23 | 59/13 59/14 61/16 78/21 88/22 89/16 91/1 96/25 112/9 113/2 125/15 125/20 144/2 147/5 150/5 154/1 163/21 164/8 167/23 183/5 187/7 190/6 | 187/18 189/8 190/15 191/8 | bottom [3] 25/15 82/8 85/4 |
| assessing [1] 46/24 | Avory [1] 117/8 | become [1] 63/23 | belief [2] 3/22 4/16 | bought [1] 87/12 |
| assessment [10] 76/2 76/3 105/23 105/25 108/9 109/21 124/21 183/10 183/19 191/11 | aware [11] 23/2 56/24 87/19 122/25 123/20 127/22 128/23 144/17 168/2 179/21 180/2 | becomes [2] 115/10 192/10 | believe [1] 70/2 | bound [2] 141/9 141/13 |
| assimilation [1] 13/7 | away [13] 42/4 42/17 43/1 89/4 90/2 159/15 162/6 170/25 176/4 177/1 177/15 181/9 181/25 | bedrock [1] 16/22 | believed [1] 8/14 | box [1] 97/1 |
| assist [4] 1/18 129/8 140/9 192/14 | awful [1] 170/9 | been [69] 1/17 6/15 9/8 11/7 17/3 18/23 18/25 21/8 21/15 22/10 24/14 26/13 28/23 30/2 33/1 33/4 40/5 51/8 56/23 57/11 57/15 58/20 59/5 62/7 65/5 67/16 70/23 77/21 81/22 91/2 100/22 104/23 107/18 111/15 113/20 118/4 122/13 122/19 124/14 125/10 126/15 126/22 128/16 130/13 142/8 142/10 145/11 145/21 150/22 151/10 151/11 157/17 169/11 170/23 174/20 175/8 175/18 176/21 179/1 179/13 179/15 179/16 179/24 189/20 190/14 190/23 191/21 191/22 193/6 | below [3] 19/3 74/4 136/6 | boxes [1] 104/16 |
| assistance [2] 18/16 109/22 | back [34] 19/18 20/21 21/1 21/7 33/20 42/12 43/12 44/1 50/5 65/13 70/22 71/16 75/8 76/2 77/19 95/22 101/3 103/9 103/12 106/15 112/21 125/2 134/1 135/15 141/23 152/23 156/5 157/24 162/2 178/20 180/10 181/11 186/7 190/6 | benchmark [1] 80/3 | bench [1] 78/18 | branch [1] 47/11 |
| assisted [2] 5/7 13/7 | background [4] 5/12 130/18 142/19 148/6 | benefit [1] 143/18 | benchmark [1] 80/3 | branches [1] 47/12 |
| assisting [1] 117/14 | balance [1] 181/11 | bereaved [1] 131/17 | benefit [1] 143/18 | breach [1] 158/20 |
| assists [1] 173/22 | balanced [1] 163/14 | best [6] 3/21 4/15 36/10 56/4 57/16 65/9 | bereaved [1] 131/17 | break [11] 56/10 63/1 63/6 70/21 71/5 106/4 148/13 148/17 149/9 192/4 193/3 |
| assume [1] 73/3 | Banks [1] 117/6 | better [2] 151/23 181/14 | between [29] 1/22 5/21 7/17 14/1 17/21 21/24 22/12 25/11 64/3 67/14 78/21 80/18 85/7 86/3 86/23 88/5 90/6 92/1 107/4 107/10 115/6 128/23 131/10 135/14 151/3 153/13 160/21 161/9 167/11 | break [11] 56/10 63/1 63/6 70/21 71/5 106/4 148/13 148/17 149/9 192/4 193/3 |
| assure [1] 174/18 | bar [4] 5/18 116/10 123/22 131/8 | beer [5] 1/10 1/12 193/5 193/14 194/3 | below [3] 19/3 74/4 136/6 | Brian [3] 71/25 75/17 135/4 |
| at [197] | bare [5] 35/22 36/22 152/9 160/6 167/8 | BEER [5] 1/10 1/12 193/5 193/14 194/3 | bench [1] 78/18 | brief [1] 51/8 |
| at page 17 [1] 82/5 | bare-bones [1] 167/8 | before [17] 23/13 24/13 26/14 28/24 30/3 30/14 31/18 33/23 56/9 56/18 103/16 108/9 129/12 129/24 149/8 186/6 192/4 | benchmark [1] 80/3 | briefly [3] 34/1 56/16 63/14 |
| at page 23 [1] 85/3 | barest [1] 188/16 | begin [2] 66/2 157/3 | benefit [1] 143/18 | bring [9] 28/19 71/22 72/7 72/12 72/17 74/19 74/23 74/25 121/14 |
| Atkinson [15] 1/7 1/9 1/11 1/15 62/24 63/11 70/18 71/3 71/9 106/15 124/24 148/11 148/23 193/8 194/2 | bargaining' [1] 11/8 | | benefit [1] 143/18 | bringing [5] 64/18 73/19 75/5 131/16 132/25 |
| attend [1] 59/15 | barring [1] 52/9 | | bereaved [1] 131/17 | brings [1] 72/13 |
| attention [5] 9/10 71/23 136/17 177/20 178/20 | barrister [3] 13/11 122/23 122/25 | | between [29] 1/22 5/21 7/17 14/1 17/21 21/24 22/12 25/11 64/3 67/14 78/21 80/18 85/7 86/3 86/23 88/5 90/6 92/1 107/4 107/10 115/6 128/23 131/10 135/14 151/3 153/13 160/21 161/9 167/11 | break [11] 56/10 63/1 63/6 70/21 71/5 106/4 148/13 148/17 149/9 192/4 193/3 |
| Attorney [22] 44/9 45/9 45/15 46/7 46/14 46/17 47/2 52/10 58/1 58/5 81/19 82/14 83/2 83/19 97/20 115/2 152/2 152/3 162/1 183/6 183/15 188/17 | barristers [1] 134/19 | | below [3] 19/3 74/4 136/6 | break [11] 56/10 63/1 63/6 70/21 71/5 106/4 148/13 148/17 149/9 192/4 193/3 |
| audible [1] 5/20 | | | bench [1] 78/18 | Brian [3] 71/25 75/17 135/4 |
| audit [5] 22/20 22/24 23/4 71/17 93/21 | | | benchmark [1] 80/3 | brief [1] 51/8 |
| auditable [3] 24/21 32/14 32/17 | | | benefit [1] 143/18 | briefly [3] 34/1 56/16 63/14 |
| audited [2] 103/3 | | | bereaved [1] 131/17 | bring [9] 28/19 71/22 72/7 72/12 72/17 74/19 74/23 74/25 121/14 |

| | | | | |
|----------|---|---|---|--|
| B | 53/25 55/6 115/17 calibrating [1] 172/18 call [4] 1/6 6/19 85/18 90/23 called [9] 5/18 29/22 59/19 65/20 73/17 86/11 93/23 129/12 178/17 came [5] 30/9 83/21 135/1 148/4 151/24 can [139] 1/3 1/5 1/13 3/8 3/24 4/4 4/9 5/12 5/16 7/12 11/18 12/11 13/18 18/13 20/3 20/13 20/24 23/12 23/25 24/9 25/14 25/16 27/15 31/2 32/16 32/22 33/20 34/21 37/2 40/13 42/12 42/18 44/2 45/3 46/11 46/24 47/4 48/21 49/25 51/18 53/3 53/25 55/6 58/3 59/6 61/6 62/25 63/8 63/10 63/14 63/17 63/22 63/23 64/7 66/4 67/13 68/24 69/13 69/17 70/22 71/3 71/7 71/7 71/14 71/16 71/19 71/24 73/16 73/22 75/8 75/11 76/9 77/18 77/18 78/1 80/12 82/5 83/24 84/19 84/20 85/3 89/5 89/9 90/23 91/21 92/3 94/11 95/15 96/3 99/14 103/9 106/11 106/13 106/15 111/6 115/17 116/1 116/14 119/5 120/15 122/21 122/22 125/4 125/17 125/20 126/4 126/11 126/21 127/11 127/18 127/24 128/24 130/6 130/8 131/6 135/10 135/16 136/2 143/7 144/8 146/15 146/21 146/23 148/19 148/23 152/11 152/15 153/9 154/11 155/3 157/21 160/1 163/19 164/11 168/1 169/24 180/7 187/6 190/2 can't [10] 21/13 89/16 91/4 128/1 133/14 134/7 134/13 135/8 164/7 193/12 candid [1] 60/11 candour [5] 9/18 59/2 59/7 59/20 125/19 cannot [1] 163/17 | capable [1] 68/20 capacities [1] 78/15 capacity [1] 72/14 care [1] 64/2 carried [4] 36/24 47/8 132/8 147/9 carries [1] 106/25 carry [5] 22/19 25/20 126/4 128/2 128/18 carrying [2] 77/5 109/24 Cartwright [2] 75/24 135/3 case [63] 2/15 11/1 14/3 18/20 21/24 26/12 28/22 29/13 29/16 29/19 30/1 30/25 31/23 32/25 33/3 34/14 42/6 43/5 73/1 73/5 88/7 110/5 110/9 113/6 114/7 117/11 119/11 119/15 119/20 119/22 121/17 123/5 125/16 126/21 127/23 128/11 128/13 128/15 128/24 129/3 129/8 131/15 132/17 139/10 140/3 153/1 162/11 162/12 162/14 176/13 177/8 178/9 178/11 178/21 182/11 188/12 188/14 192/9 192/11 192/14 192/14 192/22 192/24 case' [1] 131/2 cases [35] 2/24 11/2 29/5 30/4 30/16 30/18 50/22 56/25 60/18 77/3 79/18 82/21 88/16 88/24 95/3 99/19 109/3 109/10 117/18 118/12 124/14 125/9 126/7 126/14 128/9 129/1 129/21 174/15 175/10 175/13 177/19 178/18 179/21 180/4 183/2 casework [1] 170/21 catch [1] 25/16 categories [1] 47/21 categorisations [2] 63/23 64/4 Catherine [2] 13/9 18/17 caused [1] 67/7 caution [1] 188/8 caveat [1] 19/7 central [2] 42/9 191/8 centrality [1] 187/5 centrally [1] 39/24 centre [1] 43/9 century [1] 118/6 certain [1] 85/14 certainly [29] 5/17 | 14/11 15/23 32/3 41/12 48/1 50/4 54/12 60/20 67/3 68/12 81/10 84/7 91/13 105/1 105/12 108/15 115/18 118/1 123/23 126/16 135/24 145/13 147/11 173/5 180/4 184/21 191/21 192/1 certainty [1] 18/23 certifying [1] 166/14 cetera [3] 11/2 72/2 155/11 chain [1] 16/25 Chair [1] 135/25 challenge [3] 16/6 82/19 131/15 challenged [1] 33/18 challenges [1] 22/13 chambers [1] 13/11 chance [4] 35/15 188/22 188/25 193/13 change [4] 38/14 107/12 113/5 192/8 changes [2] 152/4 192/21 character [1] 117/14 characterised [1] 167/4 charge [13] 49/9 50/10 53/5 58/18 92/3 116/5 117/23 119/25 123/7 124/11 129/24 189/4 189/5 charged [15] 137/5 137/12 138/4 138/11 138/20 138/25 157/7 157/13 158/2 158/4 158/5 158/12 165/2 165/3 169/17 charges [5] 56/12 56/24 57/5 57/11 192/15 charging [17] 2/10 8/20 9/5 9/7 9/9 9/12 10/1 49/18 61/3 112/22 133/18 137/6 137/13 138/5 138/25 190/6 193/4 Charlson [1] 27/23 cheated [2] 64/25 67/6 check [2] 114/14 146/23 checked [1] 65/21 checking [2] 142/2 149/19 Chief [3] 82/18 121/2 121/5 children [1] 144/10 choice [1] 32/6 Chris [3] 70/15 71/14 75/9 chronological [1] | 106/21 circuitous [2] 159/6 159/21 circular [2] 145/14 145/23 circulars [2] 145/11 145/20 circumstance [2] 15/3 59/21 circumstances [11] 74/15 131/1 138/7 146/7 159/17 169/1 174/11 176/6 182/12 192/9 192/21 circumstances' [1] 42/7 citation [2] 27/8 29/7 cite [6] 27/22 87/2 96/4 156/24 191/5 192/6 cited [4] 29/13 95/25 128/5 131/12 citing [1] 132/8 citizens [1] 23/21 civil [4] 119/12 137/17 137/19 158/22 clarified [1] 51/12 clarity [1] 193/8 class [1] 139/6 classes [1] 67/14 classic [1] 14/24 classically [1] 16/17 clear [44] 18/24 19/22 26/2 26/13 28/24 30/2 30/10 30/15 31/11 38/12 40/20 42/21 46/8 51/8 54/24 55/12 63/24 79/2 81/12 81/17 81/22 82/21 82/23 86/3 90/9 90/18 91/3 98/18 100/12 101/23 104/13 107/22 114/19 115/21 138/14 144/3 144/11 145/1 146/12 147/3 154/1 156/10 156/16 156/22 clear-cut [1] 145/1 clearer [2] 176/23 177/3 clearly [30] 16/20 22/14 35/6 36/13 52/15 54/5 64/11 66/8 67/2 91/19 93/10 102/14 105/8 108/4 110/14 113/25 114/17 124/10 125/17 127/1 134/20 135/1 141/22 147/24 148/5 150/4 150/13 151/10 185/19 185/19 click [1] 12/11 client [2] 28/18 121/14 |
| C | C14 [1] 155/1 calibrate [10] 34/22 40/13 42/18 45/3 46/22 49/25 51/18 | | | |

| | | | | |
|---|--|--|---|--|
| <p>C</p> <p>closing [2] 117/19 118/2</p> <p>CLT [1] 68/4</p> <p>co [1] 7/2</p> <p>Coast [1] 131/14</p> <p>code [136] 16/8 19/12 19/16 19/23 20/6 20/8 20/17 20/21 28/1 31/12 32/6 36/24 37/15 38/9 38/11 38/17 38/24 42/1 42/16 43/22 44/12 46/15 53/17 55/2 55/13 55/22 56/8 86/20 98/15 98/22 98/25 99/12 99/17 100/4 100/20 101/2 101/10 101/14 101/17 104/12 104/24 105/5 105/9 105/19 109/7 109/19 109/24 110/16 112/16 112/17 114/25 116/11 133/15 133/22 134/5 136/8 137/8 137/15 137/20 137/21 139/7 142/20 143/15 143/19 145/7 145/16 145/16 145/18 145/25 146/21 146/22 147/24 148/9 150/15 151/24 152/4 152/6 152/12 153/12 154/12 155/14 156/9 156/11 156/21 156/23 157/4 157/10 157/12 157/17 158/7 158/10 159/1 159/9 159/11 159/12 160/7 160/19 161/17 161/22 162/24 163/6 163/7 163/23 163/25 164/14 164/18 165/22 166/15 167/1 167/3 167/12 167/21 170/4 171/24 172/2 172/3 172/21 173/23 176/24 180/24 182/18 186/9 187/18 187/21 188/1 189/11 189/11 190/10 190/12 190/18 191/1 191/5 191/23 192/2 192/6 192/23</p> <p>Code C [1] 159/11</p> <p>codes [57] 2/14 18/19 24/15 34/10 34/15 37/5 37/11 37/21 38/3 38/5 38/14 79/14 89/22 97/19 102/10 114/12 135/19 136/1 136/13 136/13 136/18 137/9 138/14 139/12 139/17 139/24 140/22 141/9 142/12</p> | <p>142/19 142/22 143/2 143/4 143/10 143/23 145/4 145/7 146/3 146/10 147/1 147/6 147/11 147/14 149/3 149/22 150/25 151/4 151/6 151/17 161/6 165/19 167/25 168/25 169/8 171/19 172/24 189/24</p> <p>collated [1] 175/21</p> <p>collateral [1] 130/19</p> <p>colleagues [1] 193/15</p> <p>collection [2] 93/8 140/17</p> <p>collegiate [1] 108/12</p> <p>combination [3] 83/21 83/23 148/7</p> <p>come [25] 3/9 11/18 19/23 20/18 20/24 31/2 43/12 44/1 50/5 70/22 76/2 77/18 88/25 89/5 100/16 108/19 112/22 116/1 122/22 125/2 128/21 141/19 162/2 180/10 190/6</p> <p>comes [1] 157/4</p> <p>coming [2] 111/22 112/21</p> <p>commas [1] 14/16</p> <p>commenced [3] 9/16 108/3 153/17</p> <p>commendable [1] 170/9</p> <p>comment [1] 140/12</p> <p>commenting [1] 75/17</p> <p>comments [2] 109/22 141/5</p> <p>commercial [1] 76/8</p> <p>Commission [4] 61/15 61/16 87/20 87/23</p> <p>commissioned [1] 13/1</p> <p>committed [2] 47/13 47/14</p> <p>committee [4] 71/18 88/12 116/12 118/25</p> <p>committee's [1] 120/13</p> <p>common [2] 122/12 122/13</p> <p>companies [1] 72/16</p> <p>company [1] 68/7</p> <p>comparable [8] 37/14 39/17 77/17 83/4 84/2 91/20 135/8 184/1</p> <p>comparably [1] 79/11</p> <p>comparator [1] 21/22</p> | <p>comparators [1] 20/25</p> <p>compare [1] 18/1</p> <p>comparison [4] 21/13 21/24 22/11 80/21</p> <p>competently [1] 129/18</p> <p>compilation [1] 13/8</p> <p>complainant [3] 132/14 132/18 132/19</p> <p>completed [2] 3/3 190/15</p> <p>completeness [1] 18/24</p> <p>completing [1] 3/2</p> <p>compliance [10] 1/23 44/22 49/5 53/20 55/5 71/18 139/11 169/4 171/23 185/15</p> <p>complicated [1] 24/24</p> <p>complied [1] 23/1</p> <p>comply [1] 139/16</p> <p>comprehensive [7] 49/5 142/8 142/17 171/15 172/17 185/13 185/23</p> <p>Compton [1] 116/25</p> <p>compulsion [1] 140/4</p> <p>computer [19] 8/16 46/2 46/2 60/25 61/2 61/13 61/24 62/3 62/6 62/21 179/24 182/13 182/15 182/22 182/24 183/3 183/9 183/11 183/19</p> <p>concept [2] 118/3 118/12</p> <p>concern [44] 34/22 34/23 35/8 35/9 35/16 39/16 40/14 40/15 42/13 42/19 43/17 45/4 46/23 50/1 50/9 50/18 50/19 51/1 51/16 51/19 52/3 54/1 55/7 55/9 57/1 60/25 61/9 90/15 96/17 100/19 104/16 104/17 107/14 107/25 111/11 115/17 144/15 150/8 162/2 163/8 172/18 172/20 173/9 178/21</p> <p>concerned [5] 18/10 21/4 81/25 113/16 186/10</p> <p>concerning [9] 8/6 52/8 92/10 134/15 173/13 175/14 177/19 178/19 179/22</p> <p>concerns [12] 2/6 2/13 34/6 34/20 49/17 49/20 49/23 50/25</p> | <p>53/5 53/22 178/16 184/19</p> <p>concluded [1] 29/19</p> <p>conclusion [3] 49/14 114/3 179/14</p> <p>conclusions [7] 19/2 24/4 24/7 24/10 25/21 33/25 34/1</p> <p>conduct [30] 1/21 8/7 13/25 23/16 24/16 28/14 39/11 41/6 74/12 74/17 80/5 94/16 94/21 96/12 101/24 102/7 116/7 116/11 119/19 121/9 123/20 135/10 135/13 136/19 156/11 166/3 172/3 174/3 174/8 189/5</p> <p>conducted [10] 10/7 73/25 81/23 154/16 154/19 155/9 155/16 157/2 158/9 175/4</p> <p>conducting [10] 42/2 64/19 74/7 122/5 137/22 157/7 157/13 158/2 158/12 159/13</p> <p>confess [1] 98/18</p> <p>confidence [3] 83/24 102/6 102/16</p> <p>confirmation [1] 60/24</p> <p>confiscation [1] 65/3</p> <p>conjunction [4] 109/13 110/22 145/12 161/11</p> <p>connection [1] 171/19</p> <p>conscientious [1] 9/8</p> <p>conscious [3] 18/25 19/15 144/15</p> <p>consequences [4] 45/2 52/15 52/18 89/13</p> <p>consider [26] 7/16 8/10 10/5 10/18 10/21 16/15 19/4 21/18 47/21 48/12 48/23 49/2 57/13 61/2 62/11 78/9 88/8 135/13 174/12 174/24 176/7 177/4 180/25 187/17 189/1 189/15</p> <p>considerable [3] 26/14 28/24 30/3</p> <p>consideration [12] 2/13 2/17 95/5 99/21 100/11 100/12 104/6 104/18 178/3 179/2 185/1 191/9</p> <p>considered [13] 10/13 56/3 59/4 60/22 61/17 87/20 87/24</p> | <p>136/6 140/5 171/14 185/6 186/19 187/24</p> <p>considering [8] 5/10 55/17 55/18 55/19 56/21 57/1 83/9 179/18</p> <p>Consignia [2] 139/22 168/22</p> <p>consistency [5] 35/20 36/18 36/19 53/8 53/24</p> <p>consistent [7] 23/24 25/7 44/11 49/4 60/15 149/10 174/14</p> <p>consistently [2] 39/5 39/25</p> <p>consisting [2] 12/21 27/4</p> <p>consult [1] 193/15</p> <p>consultation [2] 61/19 92/23</p> <p>contact [1] 47/23</p> <p>contained [2] 149/2 179/23</p> <p>containing [1] 154/13</p> <p>contains [1] 4/2</p> <p>content [3] 118/2 183/9 189/16</p> <p>contents [4] 3/21 4/15 144/20 190/8</p> <p>context [14] 16/3 16/5 29/18 37/7 82/18 83/20 96/2 98/19 99/12 104/11 118/2 138/2 170/12 183/17</p> <p>contexts [1] 150/10</p> <p>continue [4] 57/24 58/25 63/8 170/13</p> <p>continued [3] 152/1 174/22 174/23</p> <p>continues [2] 76/4 154/17</p> <p>continuing [2] 192/7 192/20</p> <p>continuous [1] 184/11</p> <p>contrary [1] 100/16</p> <p>contrast [6] 41/15 111/25 112/15 160/20 166/15 186/5</p> <p>contributor [1] 7/6</p> <p>control [1] 179/4</p> <p>convenient [2] 193/2 193/3</p> <p>convergence [1] 184/4</p> <p>convict [1] 119/24</p> <p>conviction [3] 55/15 100/8 119/21</p> <p>conviction' [1] 117/4</p> <p>copy [3] 3/10 20/5 70/17</p> <p>copyright [1] 169/13</p> |
|---|--|--|---|--|

| | | | | |
|----------|---|--|--|--|
| C | 28/20 29/2 30/22 30/25 32/24 56/14 56/20 56/21 57/2 57/9 57/14 59/16 59/21 59/22 59/23 60/11 64/10 116/9 116/10 116/15 116/21 117/6 119/13 121/7 121/19 122/12 125/13 125/17 125/19 125/20 126/4 126/6 126/7 126/12 126/22 126/25 127/4 127/22 127/24 127/25 128/10 128/14 129/25 129/25 130/1 130/11 130/13 130/20 130/21 131/4 131/12 131/23 131/24 137/22 | create [2] 81/7 115/4 created [1] 10/9 creates [1] 81/11 creating [2] 75/3 88/23 creatures [1] 81/5 credibility [1] 120/5 crime [9] 25/1 25/25 63/19 63/19 63/20 63/21 78/7 86/5 96/4 criminal [87] 6/2 7/3 7/7 11/14 11/15 23/15 23/16 23/20 25/8 34/24 36/6 38/4 40/6 49/6 59/3 61/11 62/12 64/10 68/3 69/23 74/6 74/7 74/14 78/10 78/11 90/10 92/24 94/13 94/22 95/6 99/22 100/15 102/4 103/18 104/7 108/18 110/5 111/4 119/11 121/16 122/24 127/3 132/6 133/9 134/3 135/19 136/7 136/12 137/17 137/19 139/1 140/18 140/25 143/25 144/1 149/21 150/21 151/5 152/17 152/22 153/24 154/15 154/18 154/22 155/6 155/8 155/15 155/20 157/1 158/16 158/21 164/17 164/20 165/3 165/11 165/18 166/3 169/7 172/4 172/23 174/3 174/8 174/13 175/6 175/9 176/9 184/13 criteria [10] 32/21 32/23 33/1 33/4 50/12 50/15 56/6 58/14 65/8 146/19 critical [3] 25/23 80/17 91/24 criticism [1] 59/12 criticisms [1] 102/22 cross [18] 10/25 12/7 27/18 51/23 55/2 98/8 98/9 100/20 115/4 120/3 142/7 142/15 164/14 165/22 169/17 173/1 173/11 190/21 cross-examination [1] 120/3 cross-heading [2] 27/18 164/14 cross-refer [1] 12/7 cross-reference [8] 51/23 98/8 98/9 142/15 165/22 169/17 173/1 190/21 cross-referring [1] 115/4 Crown [53] 6/6 14/25 | 16/9 19/12 19/24 20/6 20/8 21/22 21/25 22/2 23/3 28/1 31/13 31/15 32/2 32/6 36/15 48/6 48/13 53/17 54/3 55/2 55/14 55/22 74/1 74/10 75/3 79/5 82/13 86/20 99/18 99/19 100/4 100/20 101/2 101/14 104/12 104/24 109/7 109/20 110/16 112/16 121/18 126/6 126/7 126/25 127/4 130/13 133/22 152/6 189/11 190/10 191/5 cumbersome [1] 61/17 cure [1] 60/19 cured [1] 70/23 customers [2] 47/13 102/5 cut [1] 145/1 CV [2] 5/13 13/13 | December [7] 5/1 50/5 94/15 95/10 95/17 100/24 113/11 December 2007 [1] 100/24 December 2015 [1] 113/11 decide [3] 130/2 182/14 182/23 decided [5] 26/12 28/22 30/1 82/21 174/9 deciding [3] 54/23 65/8 159/18 decision [87] 8/1 9/5 9/11 16/6 26/17 26/21 27/1 27/3 27/6 28/10 29/11 29/22 29/23 31/21 31/22 33/5 49/18 50/12 51/9 54/10 54/17 55/11 56/8 56/14 57/9 57/19 72/19 81/1 82/19 82/24 83/13 89/24 90/6 90/8 90/16 90/25 92/2 92/3 93/15 93/20 93/21 101/12 102/24 105/3 106/23 107/2 108/1 108/6 108/10 108/12 108/20 108/25 109/4 109/5 109/11 109/16 109/21 110/3 110/9 110/10 110/20 110/20 110/23 111/1 111/18 111/20 112/13 113/13 113/15 114/2 114/20 116/19 116/21 116/22 117/5 117/7 121/1 122/9 124/11 125/15 126/9 127/17 130/21 131/13 133/2 172/6 180/20 decision's [1] 130/12 decision-maker [3] 93/20 109/11 113/15 decision-makers [1] 92/2 decision-making [1] 93/21 decisions [61] 2/10 8/20 8/24 9/7 10/2 17/19 24/19 31/16 32/20 33/14 33/17 49/8 50/10 50/11 50/14 50/21 53/4 53/14 54/4 54/7 56/12 58/9 61/3 64/13 64/14 64/15 83/15 83/21 83/25 86/21 89/3 90/20 91/3 91/5 91/16 92/22 93/11 99/18 100/9 101/1 101/4 101/7 107/20 109/8 112/2 112/7 112/22 |
|----------|---|--|--|--|

| | | | | |
|------------------------------|-------------------------------|-------------------------------|------------------------------|------------------------------|
| D | 109/16 138/6 | 181/20 183/9 186/12 | disclosed [4] 124/7 | 6/18 8/3 18/23 26/22 |
| decisions... [14] | depends [5] 14/12 | 186/23 188/14 192/22 | 128/16 129/9 188/15 | 35/13 35/14 36/10 |
| 113/20 115/20 116/4 | 68/25 101/19 123/16 | didn't [20] 17/2 33/13 | disclosure [85] 2/11 | 37/6 39/1 39/5 40/17 |
| 116/9 116/15 124/4 | 126/12 | 40/1 43/14 45/11 | 10/5 10/6 10/20 10/25 | 40/23 44/16 45/18 |
| 124/16 133/4 133/5 | deprived [1] 19/1 | 57/18 57/19 58/22 | 11/2 39/20 40/7 41/16 | 48/18 48/24 53/5 64/7 |
| 134/9 172/7 180/21 | derogate [1] 133/3 | 70/7 77/17 80/24 | 41/17 42/11 43/6 | 74/17 83/7 88/8 88/11 |
| 190/7 193/4 | describe [1] 25/4 | 84/24 88/15 89/4 | 43/13 43/19 43/21 | 95/23 98/16 99/13 |
| declaration [2] 4/2 | described [8] 17/4 | 112/15 140/9 143/16 | 44/8 44/11 44/23 | 109/25 117/21 118/9 |
| 4/5 | 32/12 55/10 79/17 | 143/20 145/25 147/25 | 44/25 45/8 45/10 | 124/9 127/15 127/18 |
| declarations [3] 4/6 | 121/12 127/12 142/1 | died [1] 131/17 | 45/15 45/19 45/21 | 129/16 132/21 134/24 |
| 4/18 4/19 | 185/13 | differed [1] 37/4 | 46/12 47/7 48/8 48/11 | 143/9 143/13 143/19 |
| declined [2] 88/7 | describes [1] 120/9 | difference [5] 134/24 | 49/9 49/11 49/21 | 147/10 149/19 150/12 |
| 130/20 | describing [1] 14/15 | 148/4 148/4 151/2 | 49/23 51/16 51/21 | 152/18 161/10 161/11 |
| dedicated [1] 75/22 | description [2] | 168/4 | 51/22 51/24 52/1 52/5 | 169/13 173/19 176/18 |
| defence [12] 6/22 | 118/22 120/7 | differences [1] 20/19 | 52/8 52/13 52/20 | 183/12 185/17 186/14 |
| 28/8 119/11 126/20 | designed [7] 43/20 | different [28] 22/12 | 52/22 53/1 61/3 98/21 | 187/6 188/5 189/1 |
| 126/21 129/9 153/5 | 44/5 112/6 139/13 | 22/16 35/9 36/12 | 114/25 115/5 116/6 | 190/1 193/16 |
| 183/13 188/14 192/10 | 147/14 154/13 183/5 | 36/17 47/16 63/23 | 117/23 126/19 126/23 | document [27] 31/15 |
| 192/14 192/24 | designing [1] 184/12 | 64/4 66/3 66/4 66/5 | 127/11 128/21 134/9 | 38/13 39/1 71/12 |
| defence' [1] 26/10 | desire [1] 132/5 | 66/22 67/22 81/2 | 134/10 152/4 152/6 | 71/17 73/20 75/9 |
| defend [1] 33/3 | despite [2] 179/3 | 81/14 87/8 89/9 94/8 | 152/22 153/2 153/8 | 75/10 76/21 84/14 |
| defendant [6] 31/19 | 187/23 | 119/10 122/14 141/4 | 153/20 155/19 161/18 | 84/15 86/11 86/16 |
| 59/15 129/8 129/25 | detail [18] 7/15 23/13 | 147/16 148/2 149/13 | 162/1 165/7 165/21 | 89/5 102/17 102/18 |
| 130/3 162/13 | 39/4 39/23 41/4 41/21 | 150/9 150/11 150/11 | 166/6 166/9 166/10 | 102/21 104/11 105/1 |
| deficiencies [1] | 43/13 48/8 56/19 94/2 | 159/6 | 166/17 167/1 167/2 | 107/9 140/16 140/21 |
| 191/25 | 112/17 124/9 136/6 | difficult [6] 33/16 | 167/22 172/22 173/20 | 169/15 172/6 173/6 |
| define [2] 94/2 | 142/21 149/2 151/19 | 47/3 126/3 133/20 | 178/4 181/22 183/8 | 173/23 180/20 |
| 165/11 | 152/10 168/17 | 138/9 144/25 | 183/25 184/9 185/1 | documents [25] 2/17 |
| defined [9] 36/14 | detailed [12] 24/6 | difficulties [3] 7/22 | 185/3 185/5 185/8 | 8/6 10/21 26/24 32/4 |
| 54/5 91/19 94/23 | 24/23 33/24 36/16 | 10/9 140/6 | 185/10 | 37/3 37/9 37/11 37/19 |
| 101/5 114/18 154/23 | 45/17 50/20 53/19 | difficulty [3] 104/10 | Disclosure' [1] 185/5 | 38/19 38/22 44/4 48/7 |
| 157/8 157/14 | 55/3 56/6 161/24 | 111/11 147/13 | discontinued [1] | 57/20 60/14 70/11 |
| defines [1] 164/19 | 183/25 184/25 | dig [1] 130/2 | 192/16 | 106/21 113/2 133/8 |
| definition [4] 14/12 | detention [1] 142/23 | digital [2] 128/9 | discover [1] 73/13 | 134/2 149/4 182/9 |
| 16/19 155/20 164/21 | determining [1] | 128/10 | discovered [1] 73/12 | 184/1 186/22 188/4 |
| definitions [1] | 137/25 | diligently [1] 133/16 | discretionary [1] | does [26] 17/9 23/4 |
| 182/17 | develop [1] 150/5 | dip [1] 133/11 | 72/20 | 27/14 28/2 31/13 |
| definitive [1] 144/14 | developed [6] 33/24 | direct [7] 6/18 21/13 | discussed [1] 25/6 | 31/23 43/8 51/13 68/9 |
| degree [5] 41/3 124/5 | 118/4 118/5 118/14 | 78/13 112/4 154/4 | discussing [1] 149/8 | 72/6 74/13 78/25 |
| 125/9 151/3 167/10 | 141/21 163/16 | 155/13 156/18 | discussion [2] | 88/24 88/25 92/24 |
| degrees [1] 123/12 | Developments [1] | direction [1] 114/1 | 113/17 113/23 | 93/1 93/13 108/11 |
| delay [2] 71/8 71/9 | 29/23 | directly [7] 24/17 | dismiss [1] 127/7 | 112/18 112/21 114/17 |
| deliberate [1] 179/16 | develops [2] 192/9 | 79/18 79/21 80/2 | dispel [4] 175/9 | 123/16 140/14 157/12 |
| delineation [3] 91/4 | 192/22 | 153/23 154/6 156/11 | 176/11 176/21 177/11 | 169/5 170/24 |
| 91/9 115/22 | device [2] 136/22 | director [19] 15/17 | disprove [1] 47/20 | doesn't [22] 68/12 |
| demonstrate [1] | 158/18 | 54/19 74/9 74/9 74/11 | disputed [2] 27/20 | 87/16 93/10 93/17 |
| 62/12 | devise [1] 79/4 | 74/16 75/4 81/15 | 29/2 | 93/19 97/24 98/2 99/4 |
| demonstrated [1] | did [61] 11/25 16/15 | 82/11 82/16 82/25 | distinction [12] | 100/6 100/11 101/23 |
| 120/24 | 16/21 16/21 22/21 | 83/15 84/9 86/25 | 25/11 81/11 85/6 | 102/23 103/1 103/2 |
| department [10] | 32/5 33/6 37/5 37/8 | 94/21 107/5 109/2 | 85/13 85/17 86/2 | 103/5 105/13 114/16 |
| 15/18 17/7 32/8 68/3 | 38/9 40/2 41/4 41/8 | 109/18 110/25 | 86/10 86/22 89/10 | 124/15 126/3 128/2 |
| 90/10 90/10 90/11 | 43/7 50/9 51/25 58/16 | Director's [1] 74/8 | 114/9 115/16 128/23 | 140/13 152/10 |
| 90/12 112/4 138/10 | 60/8 62/6 62/19 69/12 | disagree [2] 5/17 | distinguishing [2] | doing [18] 16/23 |
| departments [2] | 75/1 76/17 77/6 82/7 | 146/2 | 66/18 67/13 | 38/22 43/10 43/11 |
| 67/25 68/23 | 84/14 87/24 90/25 | disagreements [1] | Ditta [1] 130/12 | 69/8 77/8 79/12 89/12 |
| depend [8] 42/6 | 107/14 107/19 113/4 | 108/18 | divide [1] 115/3 | 89/13 130/3 141/17 |
| 105/6 124/6 127/19 | 123/6 131/19 133/2 | disapproval [1] 9/14 | divided [2] 2/5 7/16 | 142/4 149/13 156/10 |
| 159/16 172/21 173/10 | 133/21 134/2 134/14 | disaster [1] 131/18 | dividends [1] 26/20 | 161/13 173/18 177/3 |
| 182/11 | 138/12 138/17 143/1 | discharge [4] 31/7 | division [5] 53/6 | 184/10 |
| depended [1] 127/1 | 145/13 147/22 150/4 | 120/10 137/6 137/15 | 53/11 92/1 92/12 | don't [18] 17/25 35/2 |
| dependent [1] | 153/15 161/14 161/20 | discharging [2] | 92/24 | 48/2 52/19 52/23 |
| 178/22 | 161/20 163/24 167/8 | 139/8 158/6 | Divisional [2] 26/17 | 52/24 52/25 72/11 |
| depending [2] | 170/4 174/7 177/23 | disclose [3] 52/25 | 27/3 | 80/15 104/20 125/6 |
| | 178/9 178/11 178/16 | 53/1 188/11 | do [56] 4/18 4/21 | 134/22 145/8 145/21 |

| | | | | |
|----------|---|--|---|--|
| D | 121/21 137/5 137/7 137/13 137/16 138/4 138/11 138/21 139/5 157/7 157/13 158/2 158/6 158/12 159/4 159/23 160/11 160/15 162/19 166/4 166/6 169/14 169/18 172/5 173/2 173/15 181/8 181/12 182/6 186/15 187/4 187/5 187/15 188/20 DWP [1] 21/2 | embedded [2] 12/8 30/23 emerge [2] 72/4 116/8 emerged [1] 72/10 emerges [1] 118/24 eminent [1] 121/15 emphasised [2] 86/10 90/1 emphasises [1] 31/3 emphasising [1] 65/6 employed [2] 24/19 32/13 employees [4] 77/13 102/2 102/5 138/24 enable [1] 124/8 enacted [2] 61/10 73/22 encapsulated [2] 63/22 122/1 end [10] 24/6 27/11 84/1 95/20 111/23 113/3 118/5 150/7 175/24 184/2 endeavour [2] 19/8 140/2 endeavoured [1] 18/16 ended [1] 114/21 enforce [1] 90/25 Enforcement [1] 111/5 engage [1] 45/14 engaged [1] 24/25 England [3] 107/3 111/24 183/23 enjoined [1] 170/22 enjoyed [1] 119/17 enjoys [1] 120/5 enough [8] 101/18 141/24 146/3 148/3 149/11 150/14 185/20 186/1 enquire [2] 182/15 182/24 enquiries [1] 143/25 enquiry [4] 8/12 139/25 170/23 183/20 ensure [30] 7/25 23/19 24/18 26/8 28/6 28/20 32/12 35/19 37/12 49/4 50/10 58/14 66/9 68/20 69/5 69/7 81/7 93/2 93/17 102/19 103/3 115/9 121/19 153/14 166/8 170/23 173/1 174/15 175/19 185/14 ensuring [1] 116/6 entered [2] 43/15 129/22 enterprise [2] 117/22 118/18 entirely [7] 68/8 78/9 | 91/2 102/14 108/7 114/16 144/12 entirety [1] 21/16 entities [4] 15/13 15/20 66/16 90/14 entitled [5] 71/17 79/3 123/10 130/14 173/23 entity [5] 14/8 14/17 14/24 46/3 46/4 entrusted [2] 82/25 83/14 Environment [6] 6/13 15/19 16/23 17/6 21/3 32/9 envisages [1] 108/21 equally [6] 4/19 20/13 57/25 83/25 120/20 188/25 equate [1] 66/20 equip [1] 186/24 equipment [1] 169/2 equipped [2] 10/23 50/7 equivalent [2] 10/8 23/9 erected [1] 24/22 error [2] 29/15 179/16 essential [3] 87/9 87/9 165/24 essentially [8] 19/7 25/17 30/4 74/19 78/25 96/9 113/12 142/1 establish [10] 28/11 29/4 31/24 84/22 129/3 154/24 175/15 175/20 176/12 180/16 established [9] 27/25 30/20 30/24 67/19 77/21 122/19 131/5 132/21 132/24 establishing [3] 85/11 178/25 179/12 et [3] 11/2 72/2 155/11 et cetera [3] 11/2 72/2 155/11 EU [2] 170/6 170/8 evaporated [1] 104/25 even [10] 33/6 43/14 75/2 77/1 77/6 80/1 105/24 169/14 172/14 175/23 event [3] 65/24 80/7 172/10 ever [2] 6/15 157/17 every [6] 19/8 25/24 95/24 119/18 172/6 180/20 everyone [1] 20/4 evidence [65] 2/11 | 3/19 5/1 8/25 9/4 9/25 11/8 11/14 11/15 36/6 38/5 40/6 49/7 51/3 51/6 51/20 61/11 62/8 72/25 75/18 99/16 100/7 104/8 105/13 119/23 119/24 120/1 123/5 123/6 124/19 124/22 125/1 128/17 133/8 134/14 134/22 135/9 135/20 137/20 140/18 140/25 149/22 150/21 151/5 158/16 162/11 162/12 171/17 171/22 174/20 175/12 175/21 177/13 178/22 179/5 179/10 180/17 180/25 185/2 189/4 190/17 191/8 191/11 191/20 193/11 evidential [7] 104/14 105/24 109/6 110/6 110/18 127/5 191/24 evolved [2] 19/16 152/8 EWHC [2] 26/3 131/24 ex [3] 29/6 82/16 131/14 Ex P [1] 82/16 ex parte [2] 29/6 131/14 exacting [1] 94/9 exactly [4] 40/22 57/3 97/22 168/20 examination [2] 103/11 120/3 examine [3] 17/20 63/14 154/21 examined [2] 115/16 191/12 examining [1] 166/11 example [55] 14/25 16/8 16/24 16/25 17/8 19/12 23/3 26/2 31/11 32/8 33/5 36/15 37/21 38/3 38/6 38/10 39/3 41/5 43/6 46/1 48/6 53/9 56/8 56/13 58/10 58/15 64/22 66/10 68/13 68/24 82/15 84/9 84/13 88/17 89/25 91/12 108/7 113/5 120/24 122/8 125/25 126/14 133/11 134/8 141/25 141/25 145/4 146/12 149/16 150/6 152/2 154/1 161/7 167/2 182/12 examples [7] 95/24 99/2 133/14 134/13 145/11 173/16 173/16 exception [2] 61/23 166/24 |
| | E | | | |
| | E4 [1] 70/18 each [19] 25/2 34/11 42/5 44/17 45/5 47/16 49/12 50/1 66/15 95/7 96/18 101/16 103/12 111/14 139/5 142/20 149/23 182/11 189/12 Eady [2] 131/25 132/8 earlier [22] 19/19 19/22 20/2 34/12 99/3 101/3 102/18 107/18 109/22 111/15 112/1 112/15 115/13 115/18 131/13 135/1 135/9 142/1 152/24 180/11 186/22 192/23 early [5] 91/13 118/6 129/23 141/25 153/6 ears [1] 120/9 economy [1] 193/9 Eden [4] 9/11 56/15 56/20 56/21 edition [11] 19/21 19/24 20/6 20/9 20/11 20/14 20/16 86/19 87/5 178/11 190/24 effect [6] 31/18 36/25 109/24 147/9 157/4 183/6 effective [2] 66/9 173/21 effectively [5] 22/9 61/14 69/3 83/11 111/20 effectiveness [1] 79/7 efficient [1] 75/21 effort [1] 140/3 either [10] 16/6 47/19 93/19 93/19 99/6 110/23 113/3 113/18 133/2 151/22 elements [2] 5/17 6/3 else [2] 111/2 142/4 else' [1] 83/4 elsewhere [1] 149/5 emanated [1] 70/12 emanating [1] 12/20 | | | |

| | | | | |
|---|---|---|--|--|
| <p>E</p> <p>exceptional [4] 76/12 76/16 76/25 77/16</p> <p>excursion [1] 21/1</p> <p>Executive [6] 6/9 15/19 21/3 91/9 91/11 91/12</p> <p>exercise [6] 17/25 22/5 48/11 123/11 128/18 185/8</p> <p>exercised [1] 82/22</p> <p>exercises [1] 75/19</p> <p>exhausted [1] 170/24</p> <p>exist [3] 10/7 31/4 65/19</p> <p>existed [3] 163/25 163/25 164/1</p> <p>existence [5] 9/18 52/10 144/19 150/24 166/21</p> <p>exists [1] 35/1</p> <p>exonerated [1] 187/2</p> <p>exonerates [1] 180/25</p> <p>expect [2] 123/4 143/25</p> <p>expectation [7] 36/21 47/17 47/25 54/12 78/22 80/7 81/18</p> <p>expected [1] 59/5</p> <p>expedient [1] 140/11</p> <p>expedient. [1] 140/5</p> <p>experience [5] 5/13 6/18 30/6 91/9 108/16</p> <p>experienced [1] 8/14</p> <p>expert [5] 1/18 2/11 3/19 4/18 75/22</p> <p>expert's [1] 4/2</p> <p>EXPG0000002 [4] 3/12 7/14 13/19 69/18</p> <p>EXPG0000003 [1] 4/10</p> <p>explain [11] 32/16 61/6 63/17 103/1 103/2 105/18 124/9 128/25 143/13 152/16 163/19</p> <p>explained [1] 171/12</p> <p>explaining [1] 171/3</p> <p>explanation [7] 13/24 35/17 36/22 176/17 176/19 188/7 189/8</p> <p>explicit [1] 41/24</p> <p>explicitly [2] 42/21 169/5</p> <p>exploration [1] 162/14</p> <p>express [1] 39/16</p> <p>expressed [2] 100/17 117/19</p> <p>expressly [3] 87/12</p> | <p>88/4 181/20</p> <p>extend [1] 14/20</p> <p>extended [1] 136/23</p> <p>extent [14] 9/6 9/21 10/24 11/4 16/7 45/11 57/14 72/18 76/12 90/14 163/14 172/12 183/1 192/15</p> <p>external [3] 65/21 84/12 134/18</p> <p>extract [2] 26/16 105/11</p> <p>extracted [1] 26/24</p> <p>F</p> <p>face [6] 31/14 100/13 134/14 141/17 145/16 147/4</p> <p>facility [1] 65/7</p> <p>fact [25] 2/22 17/21 23/1 31/4 34/13 38/19 46/14 65/11 68/17 68/22 69/2 72/4 90/24 94/10 96/1 102/23 115/8 123/10 131/18 136/17 138/6 155/23 160/19 180/15 189/4</p> <p>factor [3] 68/19 107/23 131/7</p> <p>factors [7] 55/23 56/2 101/15 105/22 105/25 112/18 112/19</p> <p>facts [5] 45/3 128/1 140/3 140/17 175/20</p> <p>factual [1] 57/10</p> <p>fail [1] 84/21</p> <p>failed [3] 73/13 132/16 189/1</p> <p>fails [1] 168/12</p> <p>failure [6] 60/15 137/11 162/16 162/20 178/5 178/6</p> <p>failures [1] 52/5</p> <p>fair [16] 21/21 23/23 24/21 25/7 28/20 42/10 42/11 44/10 58/14 116/6 121/20 130/23 162/9 162/13 166/7 180/15</p> <p>fairly [9] 39/6 40/1 45/19 68/21 69/8 101/5 119/15 153/15 167/8</p> <p>fairness [7] 35/20 53/2 60/5 120/18 138/14 147/19 161/6</p> <p>fall [1] 138/12</p> <p>false [7] 9/9 9/13 11/10 56/24 57/8 58/12 58/17</p> <p>familiar [1] 109/6</p> <p>family [2] 131/17 131/18</p> <p>far [12] 18/5 18/10</p> | <p>21/1 50/24 81/24 86/15 90/22 100/21 125/1 125/5 171/14 172/16</p> <p>Farquharson [8] 116/12 118/25 119/8 120/13 121/13 121/25 122/16 123/1</p> <p>Farquharson J [1] 121/13</p> <p>fault [2] 70/23 177/24</p> <p>faults [1] 175/18</p> <p>favour [1] 190/19</p> <p>feature [4] 68/7 163/5 163/5 163/6</p> <p>features [1] 67/13</p> <p>February [5] 113/6 113/17 113/22 170/14 185/10</p> <p>February 2014 [2] 113/17 113/22</p> <p>February 2015 [1] 185/10</p> <p>feel [2] 58/16 64/24</p> <p>feels [2] 64/9 66/24</p> <p>fell [1] 185/6</p> <p>felt [1] 123/6</p> <p>few [2] 148/23 164/22</p> <p>filter [1] 91/18</p> <p>final [1] 113/15</p> <p>finally [2] 60/22 186/20</p> <p>financial [7] 65/2 66/12 77/1 112/4 170/1 170/18 174/17</p> <p>financially [1] 66/25</p> <p>find [11] 3/25 19/8 19/19 36/8 70/7 76/17 77/17 84/14 91/5 91/20 154/25</p> <p>fine [3] 148/14 193/5 193/19</p> <p>fire [3] 68/15 68/15 68/17</p> <p>firmly [1] 119/20</p> <p>first [31] 2/5 3/4 3/12 23/25 29/5 31/12 32/18 34/19 36/1 38/1 41/24 42/13 78/8 88/20 97/1 98/12 100/3 100/19 100/21 112/9 112/11 116/18 122/15 138/7 143/8 155/13 157/21 162/24 181/16 184/17 190/23</p> <p>firstly [7] 33/14 49/17 61/6 79/18 93/10 101/3 152/15</p> <p>fit [2] 72/18 103/15</p> <p>flagged [1] 68/13</p> <p>flashing [1] 99/3</p> <p>flesh [1] 44/6</p> <p>flowed [1] 147/21</p> | <p>flowing [1] 90/17</p> <p>focus [6] 22/19 101/15 130/12 167/3 177/7 178/23</p> <p>focused [4] 21/21 39/10 77/8 178/7</p> <p>focusing [2] 14/2 178/19</p> <p>folder [1] 128/10</p> <p>follow [3] 4/11 54/25 104/20</p> <p>following [6] 13/22 33/22 41/23 47/21 85/12 193/22</p> <p>follows [5] 78/2 102/23 114/7 187/8 191/7</p> <p>foot [7] 24/2 71/13 75/12 82/6 98/11 114/4 191/4</p> <p>footnote [4] 93/4 95/12 112/6 184/10</p> <p>footnote 34 [1] 93/4</p> <p>footnote 37 [1] 95/12</p> <p>footnotes [1] 12/12</p> <p>force [1] 59/14</p> <p>forefront [1] 118/9</p> <p>foremost [1] 88/20</p> <p>form [4] 19/15 34/1 61/7 152/20</p> <p>formal [1] 124/25</p> <p>format [1] 128/9</p> <p>former [2] 7/10 90/12</p> <p>forms [2] 24/16 125/11</p> <p>formulated [1] 107/15</p> <p>formulation [2] 144/9 144/11</p> <p>forward [6] 75/15 103/22 110/8 111/22 141/21 185/22</p> <p>forwards [1] 86/17</p> <p>Foskett [1] 121/4</p> <p>found [4] 20/2 70/11 171/12 186/20</p> <p>foundation [2] 79/1 142/11</p> <p>foundational [1] 73/18</p> <p>founded [1] 183/2</p> <p>four [1] 163/10</p> <p>framework [5] 2/6 2/8 2/21 79/16 144/4</p> <p>fraud [9] 6/11 15/17 47/13 47/14 81/16 81/17 103/24 103/25 130/18</p> <p>freely [1] 149/24</p> <p>frequently [2] 26/22 132/20</p> <p>front [4] 4/11 43/9 71/16 73/21</p> <p>fulfil [2] 125/21</p> | <p>126/11</p> <p>full [7] 1/14 1/15 26/25 94/6 144/16 190/12 190/18</p> <p>fully [1] 133/21</p> <p>function [11] 66/2 73/3 75/20 76/11 80/19 80/20 85/1 88/6 88/6 123/18 129/16</p> <p>function' [1] 120/10</p> <p>functions [11] 66/6 80/13 80/18 81/9 87/6 88/10 88/14 89/8 90/7 91/10 106/22</p> <p>fundamental [13] 43/3 47/6 51/23 52/4 52/15 52/18 62/15 89/7 89/10 154/10 162/7 187/1 187/15</p> <p>fundamentally [3] 42/20 64/6 163/4</p> <p>further [15] 5/1 19/3 72/14 76/20 76/23 96/25 108/17 126/18 141/14 144/8 190/16 191/14 191/20 192/11 192/23</p> <p>furtherance [1] 64/20</p> <p>Furthermore [1] 119/14</p> <p>G</p> <p>gathered [1] 174/21</p> <p>gave [6] 45/17 56/20 69/4 115/13 167/13 192/25</p> <p>general [16] 23/12 30/20 58/5 70/13 72/9 81/19 82/14 83/2 83/19 90/4 97/21 113/14 115/3 138/19 152/2 152/15</p> <p>General's [13] 45/9 45/16 46/7 46/14 46/17 47/2 52/10 58/1 152/3 162/1 183/6 183/15 188/18</p> <p>generally [8] 8/12 54/8 75/7 77/21 116/8 123/7 147/2 166/19</p> <p>Generals [1] 44/10</p> <p>generated [2] 129/13 145/12</p> <p>George [1] 29/22</p> <p>get [10] 23/13 33/23 47/24 52/21 52/23 52/23 56/18 69/19 96/2 105/12</p> <p>getting [3] 47/6 62/22 111/1</p> <p>give [16] 1/13 11/1 13/15 13/16 20/20 24/3 44/11 48/17 105/16 129/1 130/23</p> |
|---|---|---|--|--|

| | | | | |
|---|---|---|--|---|
| <p>G</p> <p>give... [5] 139/13 161/20 161/20 183/6 186/12</p> <p>given [18] 16/19 26/15 27/9 44/13 67/25 70/12 88/4 123/25 125/10 144/1 144/18 150/19 151/14 151/15 173/15 177/21 187/5 188/16</p> <p>gives [2] 27/11 72/16</p> <p>giving [4] 5/8 141/16 173/16 177/15</p> <p>go [28] 22/14 27/9 33/20 35/7 41/1 42/12 43/24 62/21 62/22 71/3 71/12 71/16 72/3 75/8 77/19 86/9 86/17 96/11 98/10 103/9 106/15 129/1 135/15 149/24 155/3 156/5 156/19 156/19</p> <p>goes [4] 4/6 129/3 156/8 177/12</p> <p>going [40] 4/3 6/19 26/19 26/22 27/22 29/7 29/7 32/5 33/22 44/1 69/23 76/1 76/2 95/20 95/23 97/8 101/3 102/23 103/3 103/10 103/12 113/1 113/20 113/25 120/12 128/21 135/25 141/16 141/21 143/18 149/19 152/23 154/4 157/24 159/1 173/19 177/4 183/12 185/21 190/6</p> <p>gone [4] 70/21 118/16 171/4 179/17</p> <p>good [17] 1/3 1/11 41/13 63/8 79/6 106/11 106/15 110/12 110/12 141/15 143/1 146/8 146/8 148/19 165/15 173/17 180/6</p> <p>got [9] 3/10 20/4 52/20 103/15 104/19 105/5 106/18 165/10 173/5</p> <p>governed [1] 114/12</p> <p>Government [4] 68/8 69/4 69/7 76/9</p> <p>grant [2] 59/22 60/3</p> <p>great [3] 64/2 120/5 151/19</p> <p>greater [5] 35/14 48/17 48/17 119/16 168/19</p> <p>Gross [2] 27/4 27/12</p> <p>ground [5] 10/16 17/13 17/19 30/6 144/12</p> | <p>grounds [2] 45/24 67/3</p> <p>group [9] 53/13 76/10 94/13 96/5 99/22 102/2 102/4 104/7 106/24</p> <p>guardian [1] 83/3</p> <p>guidance [46] 2/15 2/18 8/23 9/24 12/22 18/20 19/9 22/4 24/17 25/2 33/9 33/11 36/16 41/4 41/17 44/12 44/20 44/24 45/17 51/21 51/24 52/12 53/6 53/19 55/4 55/13 55/20 56/11 56/13 56/19 57/14 58/8 84/15 86/15 91/25 92/8 92/12 97/7 97/20 105/16 143/17 151/17 151/20 152/7 160/14 183/2</p> <p>guide [2] 7/3 143/10</p> <p>guided [1] 65/10</p> <p>guideline [4] 44/4 45/9 52/11 188/18</p> <p>guidelines [25] 2/15 12/22 18/20 19/9 43/25 44/2 45/16 45/17 46/7 46/15 46/17 47/3 58/1 58/4 58/20 78/13 78/16 79/15 115/2 146/10 150/25 152/3 162/2 183/7 183/15</p> <p>guiding [1] 43/3</p> <p>guilt [1] 129/4</p> <p>guilty [4] 129/22 130/1 158/6 165/4</p> | <p>145/3 146/6 161/11 163/13 163/24 164/3 166/23 170/11 178/24 178/24 179/17 179/24 181/7 188/13 189/1 189/7 189/20 191/21 191/22 192/1</p> <p>hadn't [2] 38/1 68/1</p> <p>Haigh [1] 27/24</p> <p>half [2] 8/18 22/25</p> <p>halftime [1] 127/8</p> <p>halfway [1] 164/13</p> <p>hand [11] 7/18 69/4 77/2 80/19 86/4 86/6 86/25 90/7 115/6 151/6 177/15</p> <p>handling [1] 44/24</p> <p>happen [4] 50/8 53/2 126/3 153/15</p> <p>happened [1] 153/15</p> <p>happening [1] 124/16</p> <p>happens [1] 32/3</p> <p>happy [3] 19/4 84/7 84/19</p> <p>hard [4] 3/10 70/17 81/8 81/25</p> <p>hard-written [2] 81/8 81/25</p> <p>harder [2] 65/23 65/24</p> <p>hardwired [2] 85/18 90/5</p> <p>has [45] 5/7 5/11 14/17 17/8 18/22 19/16 20/4 50/25 51/12 52/4 52/18 70/23 72/1 76/11 77/21 77/22 78/4 81/15 81/22 81/23 89/20 90/1 91/2 118/4 118/12 119/16 121/14 121/22 122/13 128/10 130/21 132/16 132/23 145/23 146/9 152/5 152/8 157/17 166/3 166/14 169/21 174/20 175/8 175/18 176/21</p> <p>hasn't [2] 89/17 126/22</p> <p>hat [1] 127/21</p> <p>hats [1] 63/25</p> <p>have [205]</p> <p>haven't [3] 23/6 164/9 173/4</p> <p>having [11] 18/25 54/23 64/25 108/5 112/4 119/14 142/8 151/10 177/11 183/18 189/5</p> <p>he [15] 27/14 74/17 75/17 76/22 76/25 119/16 119/20 119/21 119/23 120/5 120/10</p> | <p>121/6 166/14 177/9 177/23</p> <p>head [7] 67/3 82/25 83/17 104/1 111/8 111/14 125/4</p> <p>heading [9] 8/19 10/4 10/18 24/11 27/18 101/24 164/14 174/9 181/21</p> <p>headline [1] 120/22</p> <p>heads [1] 108/19</p> <p>Health [6] 6/9 15/18 21/2 91/8 91/10 91/12</p> <p>hear [6] 1/3 26/23 63/9 71/8 106/11 148/19</p> <p>hearing [1] 193/21</p> <p>heartened [1] 70/10</p> <p>heartening [1] 73/11</p> <p>heightened [2] 51/1 51/2</p> <p>held [4] 47/22 67/12 182/13 182/22</p> <p>help [8] 48/17 90/4 90/24 101/13 141/2 172/17 173/7 185/20</p> <p>helped [1] 170/10</p> <p>helpful [3] 57/13 186/13 186/23</p> <p>helpfully [2] 20/2 24/3</p> <p>helping [1] 173/17</p> <p>helps [1] 176/12</p> <p>her [1] 107/6</p> <p>here [16] 25/20 39/17 56/25 85/5 85/15 98/7 99/6 108/11 109/25 112/10 135/17 136/17 172/12 173/3 173/14 190/5</p> <p>Hickinbottom [1] 121/5</p> <p>high [3] 1/19 7/11 179/21</p> <p>high-profile [1] 179/21</p> <p>highest [5] 28/15 94/1 94/5 94/7 121/10</p> <p>highlight [5] 49/17 49/20 49/22 112/10 189/17</p> <p>highlighted [5] 51/25 76/20 76/25 155/6 168/5</p> <p>highlights [1] 134/20</p> <p>him [4] 27/13 119/17 120/4 137/16</p> <p>his [14] 13/5 82/13 83/3 107/5 115/2 119/12 119/14 119/20 119/22 119/24 120/7 120/10 122/8 193/15</p> <p>historically [1] 152/5</p> <p>history [1] 69/21</p> | <p>Horizon [14] 8/15 8/25 11/13 175/7 175/14 177/18 177/20 178/13 178/18 178/19 178/22 179/11 188/6 189/8</p> <p>house [10] 15/24 66/2 75/23 75/24 77/1 77/12 94/25 96/6 103/25 124/17</p> <p>how [84] 2/20 9/15 17/18 22/10 22/12 22/15 22/20 30/20 35/5 35/11 36/19 36/23 38/6 38/7 38/24 40/3 40/13 40/19 40/22 41/9 43/20 44/7 44/16 45/18 46/22 47/4 48/4 48/18 50/7 50/21 53/19 53/20 55/4 55/4 55/13 55/16 55/23 58/8 58/21 59/7 60/6 62/21 62/22 68/25 69/12 79/11 81/23 95/18 100/12 101/7 101/13 101/15 101/20 101/20 103/2 103/6 104/14 105/16 107/22 117/18 126/4 135/4 141/10 143/2 143/10 143/22 144/13 146/7 146/14 146/15 148/9 149/12 149/17 150/12 153/3 153/12 154/7 160/15 161/5 161/25 164/3 168/20 173/3 183/12</p> <p>however [10] 5/4 34/11 37/7 41/19 60/25 78/9 131/4 143/6 147/24 185/12</p> <p>HR [4] 54/19 108/15 108/21 110/25</p> <p>HSE [1] 21/2</p> <p>human [4] 107/4 107/20 109/2 109/17</p> <p>hundreds [1] 67/17</p> <p>hybrid [4] 15/23 16/4 17/4 18/2</p> <p>hyperlinks [1] 12/8</p> |
| <p>H</p> <p>habitually [1] 47/19</p> <p>had [89] 8/14 18/21 21/4 22/10 24/14 26/13 28/18 28/23 30/2 31/19 32/8 33/1 33/4 36/4 39/17 40/5 43/15 43/17 44/13 44/16 45/4 48/12 48/16 48/17 50/8 54/25 56/23 57/15 67/6 67/7 67/8 67/9 67/16 67/25 68/17 73/12 75/17 76/15 78/13 79/8 81/2 81/3 83/14 84/10 86/15 88/19 90/9 91/15 91/15 99/1 100/4 100/17 100/18 104/23 111/15 113/18 113/20 117/19 122/19 124/12 124/24 125/10 128/16 130/13 134/24 142/10 144/16 144/19 144/20</p> | | | | |
| <p>(60) give... - I can</p> | | | | |

| | | | | |
|--|---|---|---|---|
| I | I see [3] 60/8 123/24 141/22 | 145/23 159/1 180/2 181/6 185/25 190/5 | 86/9 86/17 90/23 92/15 95/17 95/22 96/3 96/11 96/25 97/6 97/17 98/10 98/24 99/8 99/14 99/24 99/25 101/4 101/11 102/13 103/17 104/21 105/7 105/9 108/12 109/12 110/21 115/22 115/23 119/5 120/1 123/6 124/10 125/1 125/21 125/25 126/2 127/25 129/3 129/24 130/8 132/6 137/21 145/19 148/12 149/9 150/14 154/8 155/3 156/5 156/19 157/24 158/8 163/9 163/12 163/23 165/3 168/18 169/24 170/10 171/18 172/18 172/22 173/4 173/12 173/22 174/11 174/22 176/6 176/23 188/5 188/13 188/24 189/1 189/7 189/21 190/16 191/3 192/4 193/2 193/12 | inbuilt [1] 88/10 |
| I can't [6] 91/4 133/14 134/7 134/13 135/8 193/12 | I should [5] 2/25 37/23 79/2 98/11 144/13 | I've [21] 7/11 9/21 16/19 17/14 23/11 27/9 32/4 51/15 55/9 68/14 91/1 124/14 125/5 125/5 126/14 164/6 167/4 173/6 173/14 185/18 187/12 | 115/23 119/5 120/1 123/6 124/10 125/1 125/21 125/25 126/2 127/25 129/3 129/24 130/8 132/6 137/21 145/19 148/12 149/9 150/14 154/8 155/3 156/5 156/19 157/24 158/8 163/9 163/12 163/23 165/3 168/18 169/24 170/10 171/18 172/18 172/22 173/4 173/12 173/22 174/11 174/22 176/6 176/23 188/5 188/13 188/24 189/1 189/7 189/21 190/16 191/3 192/4 193/2 193/12 | incline [1] 59/22 |
| I come [1] 50/5 | I sometimes [1] 144/11 | I take [1] 193/10 | idea [1] 148/24 | include [5] 14/16 64/5 64/18 145/14 153/20 |
| I consider [2] 48/23 49/2 | I summarise [1] 5/16 | I then [2] 38/2 138/15 | ideally [1] 114/20 | included [4] 43/18 56/4 61/11 185/3 |
| I could [2] 18/8 91/19 | I suppose [1] 187/10 | I therefore [1] 168/5 | identifiable [1] 32/22 | includes [2] 14/22 192/10 |
| I couldn't [1] 91/5 | I think [70] 2/4 3/9 3/15 4/14 4/22 5/4 6/25 11/4 11/18 13/7 13/13 14/12 15/10 16/19 19/24 21/4 26/20 27/15 29/8 29/11 29/14 35/16 39/11 40/15 46/24 51/2 70/7 70/10 71/11 73/6 73/23 85/12 88/17 93/4 95/19 100/2 103/15 103/20 106/18 108/21 112/10 114/15 116/15 116/22 117/6 117/7 117/20 118/24 121/1 127/18 133/19 134/24 134/25 135/17 139/18 142/9 144/15 144/22 145/16 154/23 154/25 155/3 157/20 160/13 171/3 178/13 183/4 183/17 184/21 188/9 | I take [1] 193/10 | identified [32] 17/15 19/3 50/11 59/1 65/11 89/20 97/10 97/18 99/8 105/22 111/15 112/12 113/23 115/19 126/2 136/14 140/23 143/15 163/3 163/24 164/6 167/23 168/6 168/14 168/15 170/16 175/17 175/22 178/14 181/7 191/8 192/3 | incorrect [1] 179/25 |
| I did [1] 51/25 | I thought [1] 51/13 | I take [1] 193/10 | identifies [4] 92/18 93/24 103/24 141/8 | increasing [1] 41/11 |
| I didn't [4] 17/2 40/1 58/22 77/17 | I turn [1] 80/12 | I then [2] 38/2 138/15 | identify [33] 15/12 35/2 37/6 38/9 41/23 46/9 59/20 63/25 65/13 65/23 70/3 93/9 93/19 95/9 103/5 107/14 107/17 141/11 143/6 160/6 160/10 160/14 160/18 167/21 168/12 170/4 173/14 183/11 184/8 184/12 184/18 187/21 187/22 | indeed [7] 9/20 24/12 31/23 32/7 37/25 132/17 145/7 |
| I do [2] 8/3 53/5 | I understand [1] 3/4 | I then [2] 38/2 138/15 | identifying [5] 48/8 85/16 140/10 177/9 191/24 | independence [12] 7/25 49/18 53/7 53/23 83/22 87/10 88/21 89/2 91/18 112/7 115/21 119/16 |
| I don't [5] 17/25 48/2 80/15 125/6 145/21 | I understood [1] 162/19 | I then [2] 38/2 138/15 | ie [2] 10/25 11/8 | independent [24] 1/18 49/8 50/10 54/11 66/7 69/10 78/2 83/1 83/17 84/11 91/16 109/21 113/21 114/1 114/21 118/7 122/21 123/1 123/12 123/22 124/3 124/5 124/12 135/7 |
| I first [1] 138/7 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | ie offering [1] 11/8 | immediate [1] 136/15 |
| I got [1] 165/10 | I wasn't [1] 23/5 | I then [2] 38/2 138/15 | ie where [1] 10/25 | imagine [1] 193/12 |
| I had [6] 50/8 100/4 144/16 144/20 145/3 181/7 | I will [2] 50/5 50/22 | I then [2] 38/2 138/15 | if [145] 4/4 7/24 10/8 13/20 16/9 18/13 19/3 19/4 20/3 20/13 24/9 25/15 27/9 27/15 29/1 29/6 29/12 33/6 33/12 33/17 33/18 33/23 33/25 35/14 38/15 40/13 40/15 40/24 42/12 43/5 43/24 46/16 46/19 46/24 47/1 47/8 48/16 50/14 51/5 51/18 52/18 52/23 52/24 52/25 53/25 55/9 63/14 65/8 65/19 65/21 65/24 69/8 69/17 69/18 70/16 70/17 71/2 71/12 72/3 73/22 76/12 76/16 80/1 83/7 | immensely [1] 23/17 |
| I hadn't [1] 38/1 | I would [3] 33/25 62/5 77/16 | I then [2] 38/2 138/15 | impediment [1] 108/4 | impediment [1] 108/4 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I wrote [1] 19/20 | I then [2] 38/2 138/15 | impermissible [1] 64/21 | immediately [1] 136/15 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I'd [3] 3/1 140/12 155/5 | I then [2] 38/2 138/15 | implicate [1] 171/1 | immense [1] 23/17 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I'll [3] 70/24 71/1 129/1 | I then [2] 38/2 138/15 | implicated [1] 187/2 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I'm [34] 3/17 4/2 6/19 19/17 23/2 26/19 26/22 27/22 33/22 56/24 69/23 70/20 70/25 76/1 84/6 84/19 95/23 100/2 103/10 109/12 112/11 113/1 115/23 120/12 123/23 135/25 144/10 144/12 | I then [2] 38/2 138/15 | implicates [1] 181/1 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | implications [4] 60/22 169/21 176/18 176/19 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | importance [12] 26/15 38/22 42/9 49/13 79/17 82/15 83/8 87/9 89/8 110/14 138/1 154/10 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | important [32] 23/17 23/19 25/2 32/20 32/24 33/2 35/18 39/24 40/18 42/20 46/18 49/6 53/1 53/16 54/9 72/4 78/22 84/25 97/5 97/25 112/8 115/11 125/20 147/17 162/8 163/4 172/6 174/24 175/14 180/17 180/19 186/17 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | impossible [1] 130/23 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | improper [1] 130/19 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | improperly [1] 132/2 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | improve [1] 41/5 | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145/10 151/3 164/7 172/2 192/2 | I was [10] 12/23 13/10 18/5 19/15 22/8 22/18 50/3 91/14 113/16 144/18 | I then [2] 38/2 138/15 | | imminent [1] 181/1 |
| I have [27] 2/25 3/3 3/11 18/24 18/25 19/2 37/13 45/12 48/3 50/18 51/2 51/5 51/7 51/8 51/12 59/1 59/4 59/12 60/16 60/22 124/14 125/8 145 | | | | |

| | | | | |
|--|---|--|--|---|
| I | 97/6 | investigation [91] 2/6 7/21 23/14 24/25 25/25 26/1 34/5 34/17 35/20 42/2 42/23 42/25 43/4 43/5 47/10 47/18 53/14 54/21 70/4 78/6 81/16 85/1 91/17 92/10 92/16 92/21 93/5 94/14 94/17 94/24 96/5 96/13 98/21 103/18 103/24 103/25 107/7 108/1 108/5 108/14 108/19 109/15 110/24 111/16 124/21 124/22 129/7 129/14 138/10 139/22 142/22 143/11 153/3 154/15 154/19 154/22 155/7 155/9 155/9 155/21 157/8 157/14 158/2 158/8 159/13 162/5 162/10 163/1 164/20 165/1 165/11 166/3 166/12 166/13 168/22 169/22 170/2 171/15 172/10 174/8 174/14 174/19 174/25 175/2 175/3 176/9 178/3 178/18 180/15 184/13 190/15 | 63/20 114/10 140/2 146/12 147/3 153/14 159/13 161/22 165/21 166/2 166/17 167/22 169/22 182/14 182/23 188/5 investigator's [1] 186/10 investigator/prosecu tor [1] 14/1 investigators [44] 2/10 32/13 39/21 39/22 41/10 41/25 42/14 44/6 44/14 46/9 48/18 51/4 62/10 75/23 80/9 85/8 85/14 92/2 93/25 94/18 94/20 94/22 96/14 97/14 98/23 102/8 104/1 136/10 136/14 138/20 141/8 143/23 145/5 145/18 146/5 149/5 150/20 159/8 170/19 174/18 181/21 186/24 186/25 187/8 investigators' [2] 37/16 134/15 investigatory [1] 78/19 invite [1] 119/23 involve [2] 107/20 124/20 involved [5] 55/16 136/7 140/4 166/2 175/7 involvement [3] 135/7 153/4 183/13 involves [4] 117/21 118/24 170/25 177/3 involving [1] 6/3 irrelevant [1] 62/7 is [467] isn't [7] 65/25 89/17 95/19 96/9 104/12 110/15 132/23 issue [18] 9/16 10/12 10/14 10/25 46/23 55/7 68/25 91/22 106/22 107/14 115/14 125/16 125/18 128/19 135/18 160/2 178/9 179/4 issued [22] 2/15 2/18 18/19 24/16 34/11 37/22 86/20 115/1 115/2 136/8 141/7 142/9 142/9 149/23 155/14 156/21 164/19 165/19 168/25 170/4 172/25 186/9 issues [17] 3/18 5/9 7/15 7/17 9/24 20/21 21/1 21/7 22/15 45/5 45/5 68/10 83/9 95/9 | 96/23 126/25 167/19 it [454] it' [1] 165/4 it's [88] 5/4 5/14 11/24 17/9 17/24 20/7 23/19 27/3 27/8 27/15 27/16 29/11 29/13 29/15 29/16 29/18 32/24 33/21 40/15 47/3 51/8 54/3 55/8 62/7 65/23 68/25 70/16 70/18 72/10 73/2 73/18 74/22 79/25 81/4 89/11 90/9 95/19 96/18 97/6 97/7 98/18 98/25 106/3 108/18 110/25 118/15 118/16 118/17 118/20 122/12 122/13 126/3 129/11 130/1 132/23 138/3 140/13 141/19 144/25 146/3 146/17 147/11 148/7 148/12 150/16 155/1 155/3 155/4 156/24 158/14 159/4 162/21 163/10 164/12 167/18 167/25 170/9 173/4 173/5 176/10 182/3 182/22 190/7 191/17 193/2 193/2 193/6 193/18 iteration [5] 87/5 95/8 95/13 110/13 190/8 iterations [4] 19/8 20/3 105/20 189/12 its [46] 15/6 19/14 22/4 23/1 23/4 33/8 61/18 63/18 66/15 67/21 75/19 77/9 77/12 79/4 80/5 81/18 90/8 94/14 95/8 101/22 105/19 127/20 127/23 127/25 129/3 129/3 129/7 133/9 138/10 141/2 143/15 152/5 152/6 152/7 152/10 153/1 153/1 160/3 160/7 160/19 161/21 163/23 169/13 170/2 186/21 188/1 itself [14] 17/1 26/21 67/25 81/23 86/2 89/7 90/5 97/18 128/18 130/2 137/16 143/21 156/23 186/1 |
| initiate... [1] 110/11 initiated [2] 2/1 59/16 initiates [1] 59/8 initiating [1] 59/10 input [3] 54/18 108/5 153/5 inquiry [36] 1/13 1/18 1/19 4/23 4/25 6/4 18/17 40/8 42/4 42/17 43/1 43/18 70/12 131/19 135/25 144/24 159/14 159/23 160/12 162/6 163/2 170/25 176/25 181/9 181/24 186/16 186/18 187/5 189/6 189/15 189/18 190/14 190/22 191/19 191/25 192/11 inquiry' [1] 191/15 Inquiry's [7] 2/4 44/25 49/13 114/8 150/8 162/15 191/22 insofar [4] 17/14 46/24 186/9 186/23 inspection [1] 65/21 inspectorate [3] 23/2 23/7 23/10 instances [1] 41/21 instead [6] 23/22 39/7 69/24 120/15 146/4 151/20 instigation [1] 23/16 instilled [1] 53/11 instituted [3] 73/25 74/15 121/22 instituting [1] 74/6 institutions [2] 21/15 77/1 instructed [10] 1/17 6/15 28/18 101/21 119/10 121/14 123/4 123/11 123/22 124/17 instructing [2] 119/12 119/17 instruction [7] 18/4 25/1 41/25 42/14 52/6 105/10 124/1 instructions [8] 4/24 7/12 21/18 22/17 42/15 50/4 124/25 125/6 instrument [1] 36/24 instruments [3] 14/4 25/23 32/11 insufficient [1] 52/7 integrity [8] 28/15 56/5 97/3 102/7 121/10 184/14 184/19 186/19 intended [3] 25/5 136/4 183/4 intention [2] 36/18 | interact [1] 101/16 interaction [3] 98/23 153/13 167/10 interest [17] 28/16 55/16 83/3 99/17 104/15 105/18 106/1 109/7 110/11 110/19 112/5 121/11 121/21 131/7 131/11 132/14 133/23 interest' [1] 104/9 interesting [1] 193/6 interestingly [3] 45/10 61/23 155/18 interests [6] 24/22 28/18 56/4 65/10 120/19 121/13 interfere [1] 130/20 internal [2] 52/11 84/23 interplay [1] 103/6 interpretation [3] 40/25 54/15 55/9 interpretations [1] 36/12 interpreted [1] 104/19 interrogating [1] 183/11 intervals [1] 134/21 interview [12] 41/10 159/19 159/24 161/1 161/5 175/20 178/14 179/9 188/8 188/24 189/17 189/19 Interviewers [1] 159/17 interviewing [3] 150/7 150/10 150/15 interviews [8] 38/6 38/11 39/14 41/6 41/14 140/23 142/24 161/12 into [28] 2/5 21/1 23/13 33/24 36/25 40/2 43/16 56/18 69/10 76/3 81/8 81/25 85/18 88/22 91/18 100/24 103/6 108/5 109/24 113/4 118/6 130/2 137/24 147/9 157/4 157/10 182/15 182/24 introduction [3] 156/23 156/24 190/21 introductory [2] 119/7 155/4 inverted [1] 14/16 investigated [2] 174/16 189/21 investigating [6] 43/2 137/5 137/13 138/5 138/11 138/21 | investigator [31] 1/22 7/24 8/11 14/1 34/9 39/4 40/16 42/3 42/22 45/23 46/1 47/9 54/22 63/13 63/16 | January [5] 108/24 110/4 139/23 168/23 171/16 January 2001 [1] 171/16 January 2011 [2] | |

| | | | | |
|--|--|---|---|--|
| J | 132/8 132/9 132/18 justice [1] 120/8 justify [1] 33/17 | 41/12 78/18 81/13 90/11 131/13 151/8 law [42] 1/20 1/24 2/16 6/4 13/24 18/6 18/20 21/19 22/9 23/20 25/8 30/23 33/7 43/16 61/15 61/16 68/3 79/22 90/10 92/24 94/18 95/6 96/14 96/19 97/15 97/25 98/2 99/22 100/15 104/7 108/18 122/12 122/13 122/24 132/23 133/9 134/3 149/10 149/14 151/21 152/7 152/8 lawfully [1] 39/5 laws [1] 102/9 lawyer [15] 54/13 54/17 55/12 101/13 107/8 108/14 110/5 110/15 112/2 112/12 113/21 114/21 189/3 189/4 191/19 lawyers [6] 50/11 50/13 51/6 75/23 104/18 109/23 lead [5] 95/1 96/7 174/13 176/9 176/25 leaders [2] 170/22 174/17 leadership [2] 133/10 134/3 leading [5] 43/1 98/13 162/6 170/25 181/9 learning [1] 142/12 least [13] 31/18 36/18 41/18 42/10 45/13 50/17 67/3 81/18 96/25 104/23 117/7 126/16 145/14 leave [4] 1/6 40/24 70/22 70/25 led [3] 134/24 176/4 187/17 Leeds [1] 26/2 left [6] 40/17 40/17 51/11 53/12 54/14 148/24 legal [14] 2/6 54/15 54/24 55/11 66/16 92/23 103/6 107/22 109/21 111/1 111/9 133/13 166/13 166/14 legislation [12] 35/4 35/19 36/4 36/23 40/19 72/20 87/15 89/22 89/22 141/1 170/6 170/8 legislation' [1] 140/19 legislative [1] 72/22 less [4] 60/3 73/1 | 110/12 173/12 let [2] 24/10 193/14 let's [1] 139/14 level [17] 1/19 7/11 34/22 39/16 40/13 42/18 45/4 46/22 49/25 51/19 53/25 55/6 115/17 172/18 172/20 173/9 175/15 liable [1] 137/16 lie [1] 8/16 light [1] 43/4 like [11] 16/23 33/25 41/15 51/14 66/14 77/7 86/5 89/24 96/2 117/23 186/19 likely [4] 46/4 55/24 60/3 175/12 limb [1] 133/23 limbs [2] 112/19 133/21 limitation [3] 21/12 129/15 129/21 limitations [2] 163/13 181/7 limited [32] 6/16 13/1 14/22 23/10 29/23 44/20 48/16 48/19 66/20 75/19 76/8 83/24 94/13 102/5 103/18 103/23 109/10 111/4 111/9 112/3 113/10 131/14 132/9 139/23 151/7 160/18 168/24 170/1 171/14 172/16 184/7 187/12 Limited's [2] 76/6 184/15 limits [1] 119/22 line [9] 8/12 105/21 119/6 131/10 164/20 168/11 176/6 183/20 190/11 lines [27] 40/8 42/3 42/16 42/25 115/9 159/14 159/23 160/11 162/5 163/2 163/10 170/25 176/25 181/9 181/24 186/16 186/18 187/4 189/6 189/15 189/17 190/14 190/22 191/14 191/19 191/25 192/11 list [3] 29/3 30/4 30/16 listed [3] 11/22 12/15 15/10 listening [1] 128/22 literal [1] 64/8 little [7] 25/16 29/12 56/13 60/5 113/16 135/1 163/22 log' [1] 172/11 logical [1] 143/4 | London [2] 68/14 77/8 long [12] 4/14 31/18 58/21 94/18 95/18 96/14 96/18 97/15 100/18 104/19 165/23 193/6 longer [3] 62/2 119/25 120/5 longstanding [1] 59/18 look [51] 3/8 7/12 13/19 17/2 18/6 18/13 18/14 20/13 22/14 24/2 25/15 26/21 36/6 36/8 36/9 42/25 51/14 52/19 70/16 71/10 71/13 73/16 75/11 78/1 82/5 82/6 85/3 85/4 92/4 92/15 94/11 95/15 95/23 98/10 99/14 105/19 112/21 135/25 149/25 154/4 154/23 154/25 157/20 157/21 157/24 162/10 162/11 163/9 187/20 188/1 191/3 looked [13] 9/21 16/20 17/3 17/12 17/14 23/6 25/18 103/20 122/6 125/5 125/9 138/15 151/1 looking [36] 13/18 16/5 17/18 18/5 19/21 20/20 20/25 22/8 22/12 27/17 38/16 46/16 50/6 57/10 68/10 75/9 75/15 84/23 85/21 102/21 105/9 116/19 124/15 124/20 126/15 133/20 139/11 141/2 141/23 146/24 149/17 176/3 176/12 184/3 187/1 189/23 looks [3] 96/2 96/25 162/22 Lord [12] 27/4 27/12 82/17 82/17 83/8 83/10 121/2 121/2 121/5 121/5 122/7 132/9 Lord Justice [1] 132/9 Lord Justice Gross [2] 27/4 27/12 Lord Thomas [3] 121/2 121/5 122/7 Lords [1] 15/24 loser [1] 67/2 loss [8] 65/11 65/15 66/12 67/7 67/8 67/10 67/11 67/12 losses [1] 188/7 |
| January 2011... [2] 108/24 110/4 Jason [1] 1/12 job [3] 45/18 69/7 99/13 jobs [1] 167/24 Jonathan [1] 13/2 judge [3] 80/3 121/15 130/13 judgement [1] 119/24 judges [2] 117/17 118/11 judgment [1] 27/11 judicial [3] 9/13 82/20 83/12 judiciary [1] 78/23 July [3] 165/8 181/18 182/4 July 2010 [1] 182/4 jumped [1] 107/24 jury [4] 119/16 119/23 120/4 129/12 just [80] 4/4 4/19 5/4 16/19 20/3 20/25 22/4 25/6 25/15 25/16 25/18 27/9 27/16 28/10 29/1 29/6 29/8 36/22 41/8 42/12 45/20 47/8 52/19 55/10 56/18 58/3 58/11 59/6 61/6 63/14 67/23 68/6 70/16 71/11 75/9 89/15 89/20 95/18 95/23 95/24 101/9 101/16 103/16 103/20 112/16 115/14 118/2 118/16 118/20 119/5 122/3 122/11 124/24 127/12 128/4 128/22 130/8 133/25 145/24 152/1 152/4 154/5 154/9 154/21 157/24 162/10 163/9 163/19 164/8 164/22 167/16 171/12 173/6 176/20 181/15 182/21 188/1 188/19 190/7 192/5 justice [41] 24/22 26/4 26/6 27/4 27/4 27/10 27/12 28/4 28/17 29/15 29/21 30/10 64/17 82/18 88/19 102/4 116/25 117/3 117/8 117/14 117/15 118/4 118/9 118/23 120/19 121/2 121/4 121/4 121/5 121/12 121/16 122/2 123/2 127/21 129/19 130/25 131/25 132/5 | K Kay [7] 26/2 26/17 27/1 30/1 31/3 31/23 122/6 KC [4] 1/7 1/9 135/4 194/2 keep [6] 29/7 29/7 64/3 68/23 95/20 159/18 keeping [2] 114/14 184/25 kept [2] 81/20 171/18 key [8] 5/17 53/13 152/19 153/6 153/10 166/25 167/14 175/18 kind [8] 33/13 38/20 38/21 65/25 147/5 161/8 170/8 185/23 kinds [1] 150/11 King [2] 75/24 135/3 King's [1] 13/2 know [16] 1/11 24/10 31/20 48/12 97/21 98/2 99/1 105/4 128/3 141/3 145/9 145/21 146/6 162/3 164/1 193/14 knowing [1] 145/1 knowledge [3] 3/22 4/16 23/9 known [5] 119/18 135/24 150/24 187/9 192/10 knows [1] 148/9 | L label [1] 16/12 lack [14] 41/24 42/13 42/14 51/22 53/18 55/3 56/11 64/6 91/24 96/17 143/21 169/17 186/17 188/16 lacking [1] 83/23 laid [2] 69/6 119/25 Laidlaw [1] 13/2 landscape [4] 48/23 48/25 49/3 52/7 language [1] 147/6 large [4] 11/19 12/1 15/8 119/14 largely [1] 140/8 larger [1] 105/24 last [3] 71/25 144/7 163/10 lastly [5] 10/24 11/6 11/11 56/9 192/4 later [8] 4/25 12/4 20/18 76/3 93/22 128/21 165/5 173/19 latter [8] 7/9 35/14 | | |

| | | | | |
|--|--|--|--|--|
| L | 19/6 31/22 32/19 49/18 50/14 50/15 54/17 55/10 81/1 89/24 90/6 90/8 90/17 90/19 90/25 93/21 101/12 106/23 108/2 112/12 114/19 115/20 122/14 124/10 125/15 126/10 127/17 127/22 134/8 149/14 156/16 164/22 165/9 166/20 181/6 184/9 185/25 | 165/17 166/11 166/12 169/6 171/18 172/23 175/7 176/4 179/8 181/5 182/13 182/14 182/17 182/21 182/23 184/8 184/12 184/19 185/6 185/18 187/2 187/12 188/11 188/13 188/21 190/17 191/10 191/12 191/13 192/13 | 32/18 45/20 48/24 62/6 88/24 98/16 117/21 133/2 163/19 176/18 189/2 | 52/16 98/1 |
| lost [1] 66/25 | 89/24 90/6 90/8 90/17 90/19 90/25 93/21 101/12 106/23 108/2 112/12 114/19 115/20 122/14 124/10 125/15 126/10 127/17 127/22 134/8 149/14 156/16 164/22 165/9 166/20 181/6 184/9 185/25 | 191/12 191/13 192/13 | 62/6 88/24 98/16 117/21 133/2 163/19 176/18 189/2 | missing [2] 97/13 100/1 |
| lot [6] 123/24 141/21 160/23 160/25 161/9 170/9 | management [1] 170/22 | Material' [1] 181/20 | meaningful [1] 99/5 | mixed [6] 10/10 10/20 131/8 132/11 132/21 132/25 |
| lunch [1] 103/16 | manager [7] 109/3 109/10 175/1 175/8 176/10 176/21 180/14 | materialising [1] 51/14 | means [9] 31/10 54/24 74/1 98/19 102/9 105/14 105/18 139/5 160/15 | moderately [1] 119/20 |
| M | managers [1] 175/19 | materials [18] 25/5 37/4 37/7 37/14 37/24 38/2 39/10 39/18 40/11 48/10 58/23 60/16 79/14 80/1 92/8 143/1 151/16 169/10 | meant [21] 16/10 35/5 35/6 35/12 40/23 43/11 43/21 44/23 64/13 82/7 141/3 141/18 143/13 146/20 149/12 149/17 159/1 162/25 168/18 168/20 173/18 | modern [1] 120/9 |
| made [40] 8/24 17/18 18/24 26/2 26/9 26/13 26/16 27/6 28/7 28/23 30/2 30/14 32/7 46/8 50/21 51/9 61/15 91/3 108/6 108/9 109/22 111/2 113/13 116/22 117/8 122/11 124/16 127/11 128/4 131/15 144/2 156/22 163/17 170/3 172/7 175/4 176/22 180/21 182/3 187/16 | mandated [3] 24/17 84/16 84/25 | matter [9] 10/2 65/1 79/22 94/17 96/13 97/14 108/13 182/13 182/22 | measured [1] 103/3 | moment [9] 26/20 43/13 44/1 106/4 125/2 133/25 154/5 177/5 180/11 |
| Magistrates [8] 9/17 59/16 125/12 125/17 125/19 125/20 126/4 131/24 | mandates [1] 72/23 | matters [6] 38/8 118/10 119/12 156/8 167/6 173/2 | measures [1] 64/3 | money [1] 65/7 |
| Magistrates' [1] 26/3 | manner [6] 75/22 136/9 170/17 174/16 182/25 183/25 | Maxwell [5] 29/22 88/17 121/16 122/9 122/19 | mechanisms [1] 78/5 | monitor [3] 42/1 133/10 134/4 |
| mail [15] 47/12 56/5 76/10 94/13 96/5 97/3 99/22 102/2 102/4 104/7 106/24 107/2 108/25 110/3 181/19 | manner' [2] 170/21 182/16 | may [63] 1/6 14/3 21/14 26/20 27/6 29/8 29/14 33/23 33/25 36/11 38/16 46/10 47/8 49/21 51/17 55/11 59/22 63/15 64/23 65/1 65/10 65/20 74/17 79/18 94/8 94/9 94/10 97/5 98/24 101/12 101/17 104/17 107/17 120/8 125/23 128/6 129/7 132/11 132/14 132/16 132/18 132/24 145/17 145/21 150/22 156/9 156/9 164/19 165/20 170/2 171/17 172/20 172/25 173/6 174/11 176/6 180/18 184/8 184/14 188/18 191/10 191/14 192/13 | meet [2] 110/6 184/8 | monitored [2] 53/21 55/5 |
| main [1] 134/22 | Manning [2] 82/16 83/8 | May 2001 [3] 164/19 165/20 172/25 | meeting [1] 133/13 | monitoring [2] 44/21 134/11 |
| mainstream [1] 78/6 | manual [1] 152/6 | Maybe [1] 71/2 | member [1] 107/25 | more [55] 2/8 7/9 7/15 11/4 12/4 12/25 21/5 29/12 43/13 44/11 48/16 48/19 54/8 55/12 56/6 62/21 69/4 75/6 80/23 83/16 83/23 91/19 94/9 96/2 115/10 116/8 123/7 124/9 126/15 133/17 136/6 140/13 142/21 143/1 144/14 144/25 145/25 147/7 151/13 151/14 154/4 159/6 159/21 160/23 166/19 170/10 173/21 174/11 176/7 183/25 183/25 184/25 185/22 186/4 188/16 |
| maintain [5] 88/10 93/25 94/5 94/25 96/7 | many [5] 26/23 124/25 132/12 185/24 186/13 | May 2010 [1] 170/2 | memory [3] 36/5 135/3 145/13 | monitored [2] 53/21 55/5 |
| maintained [1] 53/11 | March [2] 92/16 93/22 | me [29] 1/4 5/16 18/9 19/2 19/18 22/7 22/17 39/7 50/17 51/11 52/3 57/13 71/8 79/6 91/3 98/18 106/12 107/24 113/18 138/7 138/14 142/25 143/16 144/25 148/20 151/12 151/23 180/5 193/3 | mentality [1] 65/17 | monitored [2] 53/21 55/5 |
| Majesty's [2] 82/13 115/2 | March 2000 [2] 92/16 93/22 | mean [12] 32/16 | mentioned [6] 39/11 56/16 67/23 85/23 135/21 162/15 | monitored [2] 53/21 55/5 |
| major [1] 161/4 | Marchioness [1] 131/18 | | meet [2] 110/6 184/8 | monitored [2] 53/21 55/5 |
| majority [3] 88/24 161/3 162/15 | mark [1] 78/18 | | meeting [1] 133/13 | monitored [2] 53/21 55/5 |
| make [35] 4/7 19/21 21/13 33/4 48/1 50/12 53/13 60/3 62/5 64/2 79/2 79/15 82/21 100/12 101/23 109/8 109/15 113/19 117/16 133/4 133/5 140/12 143/24 144/11 147/2 147/12 156/10 161/14 164/5 164/7 169/16 173/21 174/19 175/23 182/25 | marked [1] 41/9 | | member [1] 107/25 | monitored [2] 53/21 55/5 |
| maker [7] 93/20 109/4 109/11 110/10 110/20 110/23 113/15 | material [110] 2/16 5/6 11/19 12/2 12/7 12/15 12/20 13/5 13/8 18/21 19/1 19/3 19/9 20/19 24/23 26/8 28/6 37/18 38/8 39/6 40/1 40/5 41/13 41/14 41/18 45/12 45/22 46/5 46/6 46/10 46/20 47/21 48/3 49/9 49/21 50/25 51/11 51/14 51/17 52/1 55/8 55/21 56/1 60/2 60/5 60/7 60/20 61/4 62/4 62/15 62/17 70/10 84/6 90/23 91/1 123/17 128/12 128/15 128/20 128/24 129/2 129/5 129/10 129/11 130/2 136/11 144/17 145/2 151/7 151/11 152/25 153/2 160/19 160/21 160/22 161/23 163/21 163/22 164/17 165/7 | | memory [3] 36/5 135/3 145/13 | monitored [2] 53/21 55/5 |
| makers [2] 92/2 109/5 | | | mentality [1] 65/17 | monitored [2] 53/21 55/5 |
| makes [8] 31/11 42/21 81/12 86/22 102/17 111/18 148/7 168/24 | | | mentioned [6] 39/11 56/16 67/23 85/23 135/21 162/15 | monitored [2] 53/21 55/5 |
| making [39] 8/1 9/5 | | | mentions [1] 177/18 | monitored [2] 53/21 55/5 |

| | | | | |
|--|--|---|--|--|
| M | 186/24 193/6 myself [1] 70/24 | 44/24 46/19 47/2 52/11 54/24 57/21 57/25 59/12 60/10 62/2 62/20 65/21 69/11 70/9 72/20 75/18 76/20 77/22 77/23 82/3 83/4 83/4 84/2 84/4 84/21 85/2 89/19 93/16 98/3 102/25 104/13 105/15 107/10 108/4 114/9 115/9 119/8 119/25 120/5 133/7 133/14 140/4 140/20 147/6 149/6 150/3 155/25 156/3 170/3 171/8 173/8 178/2 180/1 187/16 188/9 192/19 nodded [1] 9/3 nominated [10] 95/4 99/20 100/10 100/13 101/11 101/19 104/4 107/6 107/6 107/17 non [11] 14/3 25/25 50/13 58/15 88/1 95/3 98/5 99/19 109/23 134/10 158/11 non-application [1] 14/3 non-CPS [1] 95/3 non-crime [1] 25/25 non-Crown [1] 99/19 non-disclosure [1] 134/10 non-lawyers [2] 50/13 109/23 non-oppressive [1] 58/15 non-police [2] 88/1 158/11 Non-verbal [1] 98/5 nonetheless [2] 22/6 47/5 nor [5] 72/22 88/12 105/16 105/18 136/1 normal [1] 108/7 normally [2] 168/7 168/15 not [213] notable [1] 141/19 note [6] 106/3 142/6 159/8 159/11 169/10 181/2 notebooks [5] 37/16 169/3 169/11 171/21 171/22 noted [2] 76/5 172/9 notes [7] 38/16 76/14 142/8 142/17 143/9 144/1 144/4 nothing [1] 74/4 noting [1] 29/18 November [11] 70/15 71/15 95/8 111/6 | 111/22 111/25 112/9 113/18 183/24 184/23 185/3 November 2010 [1] 95/8 November 2012 [1] 185/3 November 2013 [4] 111/22 111/25 112/9 184/23 now [14] 3/4 4/3 5/5 10/3 26/15 58/3 71/7 71/11 72/10 77/18 79/13 123/23 128/8 148/13 nowhere [1] 60/8 nuanced [1] 56/6 number [12] 15/8 16/20 27/8 36/11 47/10 49/5 53/15 67/21 80/14 113/8 144/9 175/23 | 145/14 occasionally [1] 62/20 occasions [4] 126/24 127/3 127/10 173/15 occupies [1] 81/13 occur [1] 56/25 occurred [1] 19/18 occurs [1] 192/9 October [9] 1/1 19/25 71/25 86/21 93/24 107/1 141/8 142/7 190/8 October 2000 [1] 93/24 October 2018 [1] 190/8 off [3] 70/25 125/4 148/24 offence [9] 47/20 48/19 55/17 58/13 132/6 158/4 158/5 165/3 165/3 offences [24] 15/6 16/22 23/15 48/15 53/10 54/4 57/3 58/10 69/23 70/5 72/15 73/17 78/12 81/10 85/22 88/13 89/1 89/21 137/5 137/13 138/5 138/11 138/21 139/1 offenders [5] 99/15 137/6 137/14 138/5 139/1 offending [2] 55/18 55/19 offends [1] 130/24 offer [1] 161/15 offering [1] 11/8 office [147] 1/24 2/7 2/18 2/22 6/11 6/15 8/23 9/12 12/21 13/1 15/17 16/18 17/21 18/7 18/10 22/1 22/19 23/10 31/24 32/4 33/6 34/4 34/8 34/20 35/5 41/9 43/7 43/20 47/14 48/24 49/2 52/12 53/12 54/2 55/25 57/12 57/16 58/23 59/12 60/7 60/10 61/21 63/12 63/18 66/14 66/15 66/19 66/20 67/5 67/16 69/3 69/14 71/17 72/6 72/11 72/21 73/3 75/19 76/5 76/7 76/19 77/10 77/22 78/3 78/10 78/14 78/20 79/3 79/12 79/23 80/2 80/24 83/6 84/4 84/9 84/16 88/9 90/5 90/24 91/20 91/22 92/7 |
| MR... [24] 30/10 62/24 63/11 70/18 71/3 71/9 72/5 75/16 76/14 76/21 106/15 116/25 117/8 121/4 121/4 124/24 131/25 132/8 148/11 148/23 193/5 193/8 193/14 194/3 Mr Altman [2] 72/5 76/14 Mr Altman's [1] 75/16 Mr Atkinson [11] 1/11 62/24 63/11 70/18 71/3 71/9 106/15 124/24 148/11 148/23 193/8 Mr Aujard [1] 76/21 MR BEER [4] 1/10 193/5 193/14 194/3 Mr Justice [9] 26/4 27/4 27/10 29/15 30/10 116/25 117/8 121/4 121/4 Mr Justice Eady [2] 131/25 132/8 much [34] 4/22 18/11 18/12 20/18 25/24 27/2 35/14 41/13 48/14 54/8 56/6 62/14 63/4 63/11 70/19 71/2 81/11 91/19 106/6 106/7 106/14 124/6 127/19 136/1 140/9 148/15 148/22 161/12 167/3 173/9 186/4 193/1 193/7 193/17 multiplied [1] 65/20 must [22] 28/14 47/20 98/18 102/6 119/19 119/20 119/21 119/23 120/3 121/9 122/2 132/2 166/7 170/7 171/18 171/22 177/20 179/16 180/14 181/23 187/8 192/8 my [48] 1/12 1/15 18/4 22/17 34/23 35/8 38/21 38/25 40/24 43/3 50/3 53/18 66/11 76/20 76/22 81/24 84/21 90/15 96/17 104/16 104/17 107/16 108/16 109/12 123/23 125/4 134/20 144/10 144/12 144/15 144/18 146/8 146/18 149/20 150/3 150/17 151/2 151/12 153/9 162/7 162/16 162/21 172/20 173/9 176/22 184/21 | N nail [1] 154/5 name [9] 1/12 1/14 1/15 1/16 27/23 68/6 142/1 149/19 173/5 namely [4] 114/6 141/6 176/24 179/19 narrative [1] 96/9 National [2] 86/5 179/24 nature [2] 7/12 67/21 necessarily [7] 37/12 54/16 90/18 151/16 174/13 176/8 187/18 necessary [15] 19/1 19/4 53/1 62/11 69/9 97/7 126/13 140/5 140/11 141/18 152/21 174/10 175/5 175/11 177/13 neck [1] 123/24 need [27] 11/23 15/13 50/5 55/12 59/25 61/1 89/12 89/17 89/20 91/25 101/13 101/15 115/9 128/19 133/3 147/6 149/11 150/15 157/20 168/19 174/18 180/24 181/4 184/18 185/22 191/20 192/20 needed [8] 44/11 109/23 146/5 148/3 151/13 164/1 186/1 188/23 needn't [1] 147/8 needs [5] 55/20 139/16 152/9 168/12 174/10 neither [4] 88/12 94/10 105/20 185/13 network [6] 24/14 24/23 25/4 25/22 32/11 79/16 neutral [1] 27/8 never [2] 39/2 152/8 nevertheless [4] 74/17 88/19 89/1 129/13 new [8] 31/1 122/7 145/24 151/24 152/11 191/23 192/1 192/25 next [3] 27/17 76/3 193/3 nice [1] 122/11 no [76] 5/20 6/17 11/8 11/23 15/13 17/1 18/4 19/12 21/17 23/2 23/11 25/11 25/13 30/11 31/8 31/23 32/1 32/3 33/12 39/19 | objective [4] 64/14 65/3 133/4 166/7 objectively [1] 65/13 objectives [5] 34/7 61/18 64/21 97/2 174/25 objectivity [1] 64/6 obligation [3] 31/9 31/25 189/14 obligations [7] 26/6 28/4 29/20 119/9 153/20 166/9 183/8 obliged [1] 88/9 oblique [1] 131/11 observation [4] 102/15 131/13 176/15 182/25 observations [2] 117/9 178/16 observe [3] 28/14 121/9 131/4 observed [4] 26/4 82/18 131/25 132/10 observing [1] 130/21 obtain [5] 12/3 18/8 18/18 46/11 119/21 obtainable [1] 149/4 obtained [5] 60/7 100/14 100/18 136/11 191/14 obtaining [5] 49/23 60/6 60/24 65/2 179/10 obvious [5] 59/13 128/4 140/8 166/24 187/7 obviously [5] 48/13 67/22 74/22 107/12 128/5 occasion [2] 103/12 | | |

| O | | | | P |
|---|--|---|--|---|
| office... [65] 93/23 97/17 100/3 103/23 109/3 109/10 111/4 111/9 111/24 112/3 112/18 113/5 113/10 113/22 114/8 123/9 123/20 124/2 133/3 134/17 138/9 138/15 138/20 138/22 138/24 139/3 139/15 139/20 141/7 141/20 142/22 146/5 147/19 149/1 150/4 150/19 153/18 154/8 155/19 155/22 159/2 159/22 160/3 160/7 161/8 163/8 164/15 164/16 165/11 168/6 168/11 170/1 171/13 171/19 171/24 172/3 172/13 172/21 173/23 174/3 183/23 184/6 184/11 184/15 189/24 | 103/20 105/21 108/13 108/14 108/15 114/13 115/6 117/17 117/20 126/16 131/17 137/9 145/9 145/14 146/25 151/5 161/19 161/19 162/22 166/24 177/15 177/20 184/3 187/18 one's [1] 177/20 ones [2] 143/4 145/20 online [6] 149/24 150/16 150/25 151/11 151/22 164/4 only [19] 19/17 21/4 76/8 77/11 78/12 79/8 81/13 111/13 125/21 125/22 128/5 133/5 140/12 145/17 153/23 154/6 155/15 156/11 176/14 onwards [5] 34/2 139/21 186/5 186/12 192/3 opaque [1] 51/11 open [2] 53/12 142/11 operate [4] 153/4 178/8 179/1 184/11 operated [2] 46/3 78/4 operating [3] 36/12 157/11 178/24 operation [3] 178/5 188/6 189/7 operative [1] 21/8 operator [2] 4/4 178/7 opinion [2] 4/24 5/8 opinions [2] 13/15 20/20 opportunities [1] 127/4 opposed [6] 17/12 21/7 56/5 110/19 112/13 178/6 oppressive [2] 23/21 58/15 or [210] oral [1] 5/1 order [2] 133/12 190/5 ordinarily [1] 128/13 organisation [13] 16/24 17/10 36/25 67/9 67/10 68/18 68/23 76/8 76/18 77/9 77/17 91/8 114/18 organisations [7] 17/1 61/20 61/22 66/5 81/3 85/11 114/17 organised [1] 75/21 orientate [1] 71/11 original [1] 157/16 | originally [2] 61/10 73/22 originating [1] 86/2 other [75] 2/16 7/18 14/4 14/9 15/8 15/13 16/16 16/17 18/2 18/8 18/20 19/9 20/25 22/20 24/16 31/23 32/7 36/14 36/24 41/15 41/19 44/17 48/4 53/9 75/2 75/20 76/25 77/3 80/20 81/3 85/9 85/11 86/4 86/7 87/1 89/21 90/8 101/16 109/13 111/14 112/4 114/14 115/7 117/22 117/24 118/17 119/17 125/11 129/5 131/11 132/5 137/4 137/11 138/3 140/19 145/1 145/9 146/25 149/3 151/7 152/7 153/23 156/15 157/6 158/1 161/6 161/25 167/19 167/20 174/12 176/7 177/16 179/18 183/7 185/18 others [6] 15/5 77/14 107/21 112/13 132/9 136/7 otherwise [11] 10/1 22/15 22/20 43/19 73/25 101/21 139/12 140/21 161/16 173/13 186/8 ought [16] 8/21 9/5 36/21 52/21 65/4 66/2 114/20 117/11 117/13 122/25 129/8 129/9 186/18 188/15 189/16 190/1 OUP [1] 7/4 our [5] 7/2 27/1 100/24 113/3 138/2 ourselves [2] 71/12 133/25 out [67] 4/3 5/13 7/11 7/14 13/13 15/6 19/2 22/20 24/6 28/10 28/22 30/9 30/22 34/2 34/13 38/20 39/8 39/20 40/19 41/9 44/6 47/9 58/8 58/21 71/20 75/4 77/5 79/1 79/9 80/18 86/10 92/25 97/6 97/17 97/24 98/25 107/19 107/24 108/21 112/17 114/3 120/14 126/4 126/20 128/2 128/18 136/9 142/19 144/5 148/5 151/24 152/20 153/7 154/8 166/1 167/2 167/6 167/7 168/21 | 170/24 171/4 171/23 173/2 179/7 182/17 185/12 190/5 outcome [1] 31/9 outline [1] 175/2 outlined [1] 2/21 outset [1] 163/3 outside [4] 77/9 77/11 113/3 188/22 outstanding [2] 190/13 190/22 over [18] 4/6 19/16 21/1 43/24 49/20 49/23 65/6 67/25 74/12 74/16 75/12 77/2 86/9 103/21 111/21 139/14 166/1 172/13 over-emphasising [1] 65/6 overall [2] 102/21 121/20 overarching [2] 49/14 114/3 overcome [1] 68/25 overexacting [1] 104/17 overlap [1] 161/9 overlook [3] 45/15 45/16 180/14 overlooked [2] 46/21 52/14 oversee [1] 134/4 overseeing [1] 44/21 oversight [25] 65/22 65/25 83/5 83/22 84/2 84/5 84/8 84/10 84/12 84/17 84/23 84/25 101/25 114/12 124/3 124/5 124/8 125/12 125/13 126/5 126/8 127/15 128/2 129/16 129/21 overview [8] 24/3 24/9 25/18 33/21 34/1 115/13 161/21 186/13 overwhelming [1] 161/3 owe [1] 33/6 owed [1] 121/21 owes [1] 121/18 owing [1] 28/19 own [10] 13/16 40/18 73/13 77/13 79/4 101/23 119/24 133/21 141/3 157/11 owned [3] 68/8 69/3 76/9 owner [2] 68/24 69/12 ownership [1] 68/9 Oxford [1] 7/7 | PACE [32] 34/10 35/24 37/5 37/10 37/21 60/23 61/7 135/20 136/13 136/15 136/16 136/18 137/1 139/16 139/18 139/20 139/24 141/9 142/12 145/4 145/7 145/16 147/14 150/4 151/9 159/7 160/21 160/23 160/25 163/13 163/14 164/6 page [61] 3/12 3/24 4/6 4/11 5/15 7/13 7/14 13/20 18/13 23/25 24/3 25/14 27/10 27/15 27/17 33/21 43/24 69/15 69/18 71/12 71/13 71/16 73/21 73/24 75/12 77/19 82/5 82/7 85/3 86/9 86/17 92/4 95/22 98/10 98/11 103/10 103/21 106/16 106/18 111/21 114/4 116/16 116/18 120/16 130/7 135/16 139/14 139/14 152/14 155/3 156/6 156/6 160/1 160/5 163/9 164/12 166/1 180/8 190/3 191/4 192/5 page 1 [1] 95/22 page 10 [2] 69/15 69/18 page 13 [1] 77/19 page 145 [1] 25/14 page 167 [1] 3/24 page 169 [1] 5/15 page 19 [2] 116/16 116/18 page 21 [1] 120/16 page 22 [1] 130/7 page 25 [1] 86/17 page 27 [2] 92/4 103/10 page 28 [2] 106/16 106/18 page 3 [1] 98/10 page 31 [1] 135/16 page 33 [1] 139/14 page 39 [1] 152/14 page 4 [2] 13/20 73/24 page 40 [2] 156/6 156/6 page 42 [1] 160/1 page 45 [2] 160/5 163/9 page 5 [3] 7/13 7/14 7/12 page 50 [1] 164/12 |

| | | | |
|--|---|---|--|
| <p>P</p> <p>page 54 [1] 180/8</p> <p>page 67 [1] 190/3</p> <p>page 68 [1] 191/4</p> <p>page 7 [2] 18/13 23/25</p> <p>page 70 [1] 192/5</p> <p>page 8 [1] 33/21</p> <p>pages [8] 3/15 4/7 4/14 11/24 12/17 13/13 95/19 165/23</p> <p>pages 171 [1] 13/13</p> <p>pages 173 [1] 11/24</p> <p>pages 179 [1] 12/17</p> <p>paper [3] 22/9 113/17 128/14</p> <p>papers [2] 110/6 110/9</p> <p>para [3] 94/15 95/2 181/22</p> <p>paragraph [101] 13/20 15/12 18/14 24/2 24/11 25/15 26/4 27/17 29/10 30/22 32/10 33/22 34/2 37/2 41/2 48/21 53/3 56/10 62/5 71/24 72/3 75/11 78/1 78/25 82/6 82/8 82/20 84/1 85/4 85/12 85/21 86/9 86/12 86/18 92/5 92/6 92/15 94/11 94/23 101/22 101/22 104/3 109/1 114/4 116/16 117/16 119/3 120/14 120/15 121/6 130/8 131/3 132/1 135/16 135/17 136/2 139/21 142/6 143/6 144/7 152/14 153/9 156/6 156/7 156/20 156/25 157/22 160/4 160/5 163/10 164/11 164/25 165/16 166/19 167/19 168/10 168/23 169/3 169/5 169/24 170/5 171/10 171/16 171/21 173/25 176/1 177/5 180/7 180/23 180/24 181/10 181/13 181/18 183/21 184/6 190/2 190/13 191/3 191/5 192/5 192/6</p> <p>paragraph 1.1-2 [1] 156/25</p> <p>paragraph 10 [1] 37/2</p> <p>paragraph 107 [3] 165/16 166/19 167/19</p> <p>Paragraph 108 [1] 168/10</p> <p>paragraph 109 [1] 168/23</p> <p>paragraph 110 [1] 169/24</p> <p>paragraph 111 [1] 171/10</p> <p>paragraph 112 [1] 173/25</p> <p>paragraph 114 [1] 176/1</p> <p>paragraph 115 [1] 180/7</p> <p>paragraph 116 [1] 181/18</p> <p>paragraph 117 [1] 183/21</p> <p>paragraph 12 [1] 48/21</p> <p>paragraph 13 [1] 53/3</p> <p>paragraph 14 [1] 56/10</p> <p>paragraph 141 [1] 190/2</p> <p>paragraph 146 [1] 191/3</p> <p>paragraph 151 [1] 192/5</p> <p>paragraph 2.1 [1] 13/20</p> <p>paragraph 2.2 [1] 71/24</p> <p>paragraph 2.4 [1] 75/11</p> <p>paragraph 2.5 [1] 72/3</p> <p>paragraph 22 [2] 29/10 78/1</p> <p>paragraph 23 [4] 26/4 27/17 30/22 82/20</p> <p>paragraph 29 [2] 82/6 82/8</p> <p>paragraph 3.1 [2] 164/25 170/5</p> <p>paragraph 3.15 [1] 104/3</p> <p>paragraph 3.2 [2] 169/3 171/16</p> <p>paragraph 3.3 [2] 169/5 171/21</p> <p>paragraph 3.4 [1] 180/24</p> <p>paragraph 3.6 [1] 192/6</p> <p>paragraph 335 [1] 25/15</p> <p>paragraph 34 [1] 15/12</p> <p>paragraph 37 [1] 116/16</p> <p>paragraph 38 [1] 119/3</p> <p>paragraph 39 [1] 120/14</p> <p>paragraph 4.3 [1]</p> | <p>190/13</p> <p>paragraph 4.4 [1] 109/1</p> <p>paragraph 4.8 [1] 191/5</p> <p>paragraph 40 [1] 120/15</p> <p>paragraph 44 [1] 130/8</p> <p>paragraph 45 [1] 131/3</p> <p>paragraph 48 [3] 85/4 85/12 132/1</p> <p>paragraph 49 [2] 86/9 86/12</p> <p>paragraph 5.5.7 [1] 181/10</p> <p>paragraph 5.5.9 [2] 177/5 181/13</p> <p>paragraph 50 [1] 86/18</p> <p>paragraph 55 [3] 92/5 92/15 94/11</p> <p>paragraph 56 [1] 114/4</p> <p>paragraph 59 [2] 135/16 135/17</p> <p>paragraph 6 [1] 18/14</p> <p>paragraph 6.2 [1] 184/6</p> <p>paragraph 61 [1] 121/6</p> <p>paragraph 64 [1] 139/21</p> <p>paragraph 65 [1] 142/6</p> <p>paragraph 66 [1] 143/6</p> <p>paragraph 76 [1] 152/14</p> <p>paragraph 77 [1] 153/9</p> <p>paragraph 78 [2] 156/6 156/7</p> <p>paragraph 8 [1] 24/2</p> <p>paragraph 80 [1] 156/20</p> <p>paragraph 81 [1] 157/22</p> <p>paragraph 9 [3] 32/10 33/22 34/2</p> <p>paragraph 92 [2] 160/5 163/10</p> <p>paragraphs [13] 4/5 28/23 31/12 69/19 69/20 69/24 71/20 76/22 80/16 85/13 91/23 119/7 135/14</p> <p>paragraphs 1.1 [1] 71/20</p> <p>paragraphs 15 [2] 69/19 69/20</p> <p>paragraphs 17 [1]</p> | <p>76/22</p> <p>paragraphs 26 [1] 80/16</p> <p>paragraphs 30 [1] 91/23</p> <p>paragraphs 57 [1] 135/14</p> <p>paraphrased [1] 147/8</p> <p>Parliament [15] 43/22 78/23 80/8 81/20 82/25 83/14 83/19 87/11 88/4 89/16 89/19 90/1 142/2 149/3 149/16</p> <p>part [28] 2/5 2/20 3/2 3/3 3/4 3/18 4/24 12/15 35/10 36/9 41/12 52/20 52/21 74/5 85/5 115/18 123/24 124/7 128/5 128/16 137/11 144/7 146/17 152/19 153/1 153/21 155/5 155/8</p> <p>Part 2 [1] 4/24</p> <p>Part II [1] 155/5</p> <p>parte [2] 29/6 131/14</p> <p>particular [27] 34/11 39/14 42/6 49/8 57/10 58/7 59/7 64/1 64/1 67/1 77/3 77/15 78/7 91/23 92/3 105/1 116/10 125/8 125/16 129/22 131/1 139/17 145/15 150/8 159/17 166/4 182/12</p> <p>particularly [8] 34/24 55/24 122/24 133/22 148/8 161/20 162/20 168/2</p> <p>parties [3] 108/13 130/4 134/18</p> <p>parts [25] 2/5 35/3 36/4 36/17 36/23 37/6 38/11 68/18 79/21 91/22 98/25 99/7 99/8 99/11 102/18 118/17 147/24 147/25 147/25 148/1 149/16 153/16 153/23 154/6 156/15</p> <p>party [16] 27/23 44/25 45/19 45/20 45/25 46/6 46/10 46/20 47/16 48/9 49/11 49/23 52/8 52/12 108/1 188/21</p> <p>passages [1] 80/14</p> <p>passed [1] 88/16</p> <p>passing [2] 85/23 176/14</p> <p>path [2] 37/10 37/20</p> <p>pay [1] 26/20</p> <p>Pensions [3] 15/18 17/7 32/9</p> | <p>people [8] 38/24 67/14 107/10 140/11 141/16 149/11 164/1 173/17</p> <p>people's [1] 94/7</p> <p>perceive [2] 64/12 64/24</p> <p>perceived [1] 67/6</p> <p>Perfect [1] 155/2</p> <p>perform [2] 102/2 123/18</p> <p>performed [1] 22/6</p> <p>perhaps [10] 29/17 50/22 64/8 67/14 76/6 80/23 133/17 140/9 168/19 173/12</p> <p>period [39] 5/24 6/20 15/15 18/3 18/13 18/22 19/10 20/22 21/16 21/20 22/3 22/23 24/12 24/13 26/14 28/24 30/3 30/14 31/18 34/12 34/21 41/3 41/12 43/17 45/1 49/3 78/16 100/25 111/23 113/3 114/9 115/18 143/22 150/8 162/16 169/12 176/1 184/3 191/22</p> <p>periods [2] 169/4 171/23</p> <p>permissible [1] 137/20</p> <p>permission [1] 62/25</p> <p>permits [3] 87/12 87/15 119/23</p> <p>permitted [1] 133/3</p> <p>person [39] 8/13 43/2 47/23 53/13 54/20 55/10 58/16 64/1 64/16 67/1 67/8 67/11 67/11 74/5 90/19 93/14 93/20 105/3 109/14 110/23 121/22 130/17 137/11 138/3 150/11 158/1 158/4 158/5 158/21 165/2 166/10 166/18 168/1 168/4 168/7 168/9 168/16 168/18 178/23</p> <p>personnel [1] 61/25</p> <p>persons [7] 53/13 77/9 77/11 137/4 147/17 157/6 157/12</p> <p>perspective [2] 64/16 186/11</p> <p>Philips [3] 87/19 87/23 88/12</p> <p>phrase [2] 32/10 122/1</p> <p>pick [2] 95/24 148/23</p> <p>picked [1] 156/14</p> <p>picking [1] 91/7</p> |
|--|---|---|--|

| | | | | |
|--|--|--|---|---|
| <p>P</p> <p>picture [1] 146/17</p> <p>piece [5] 35/3 36/3 40/18 66/18 141/1</p> <p>pieces [1] 35/18</p> <p>place [11] 21/14 21/15 24/18 33/13 35/19 41/18 58/21 64/3 89/3 123/10 186/21</p> <p>placed [1] 120/6</p> <p>places [1] 19/19</p> <p>plan [1] 175/2</p> <p>plays [1] 35/7</p> <p>plea [3] 11/9 58/10 58/12</p> <p>plead [1] 58/17</p> <p>pleading [1] 130/1</p> <p>pleas [3] 58/2 58/4 129/22</p> <p>please [85] 1/7 1/14 3/8 3/24 4/4 4/9 5/12 7/13 13/18 13/20 18/13 20/5 23/25 24/1 24/9 25/14 27/10 27/16 29/1 29/12 33/21 34/22 37/2 40/14 41/2 42/13 42/19 43/24 44/3 45/6 48/21 50/2 53/3 54/1 63/1 69/17 70/16 71/13 71/16 73/16 73/20 73/23 75/8 75/11 77/18 77/19 77/20 78/1 82/5 85/3 86/9 86/17 89/5 92/4 94/11 95/15 96/3 98/10 99/14 103/9 103/17 106/16 111/21 119/5 128/25 130/6 135/10 135/16 136/3 143/14 152/12 154/9 156/6 156/7 160/1 163/9 163/20 164/11 165/16 168/10 169/25 174/23 180/7 190/3 193/18</p> <p>pleased [1] 26/23</p> <p>pm [5] 71/6 106/10 148/16 148/18 193/20</p> <p>PNC [1] 179/24</p> <p>POA [2] 73/18 73/21</p> <p>point [40] 19/6 25/10 26/15 28/9 30/6 30/13 33/18 38/23 42/4 42/17 47/8 59/8 62/4 75/1 77/3 86/1 87/9 102/18 115/15 117/17 117/20 120/22 122/11 122/14 128/4 143/24 147/1 159/15 159/24 164/22 165/9 169/16 175/18 181/6 181/24</p> | <p>182/2 185/12 185/25 190/7 193/7</p> <p>points [6] 110/12 129/15 143/7 165/24 166/20 175/23</p> <p>POL00027501 [3] 70/17 71/10 75/8</p> <p>POL00104812 [1] 95/16</p> <p>police [66] 11/14 14/9 14/11 15/4 17/10 25/25 36/6 38/4 40/6 49/6 54/7 59/14 61/10 73/5 75/6 78/7 78/17 79/5 79/8 85/15 86/4 86/11 86/16 86/24 88/1 88/5 88/11 96/8 108/7 135/19 136/20 136/23 137/4 137/12 138/4 140/18 140/25 147/15 147/16 147/18 147/20 147/21 148/9 148/9 149/21 150/21 151/5 153/24 154/2 154/6 155/10 155/16 156/12 156/14 156/15 156/22 157/2 157/6 158/1 158/9 158/11 158/15 161/10 168/3 179/24 191/13</p> <p>Police' [1] 95/1</p> <p>policies [78] 12/21 17/15 17/16 21/5 21/14 22/5 23/1 31/25 33/9 33/11 34/4 34/8 34/12 34/21 35/1 41/4 50/7 50/9 51/11 53/12 53/16 54/14 54/18 57/17 59/4 79/15 80/4 80/10 80/17 80/24 84/24 90/3 90/8 91/6 91/22 92/8 93/24 100/4 103/11 107/18 109/13 110/22 111/14 112/1 112/15 113/2 113/5 115/15 115/19 134/15 134/21 135/5 135/9 138/15 139/15 139/20 141/21 143/22 147/7 147/10 149/1 150/3 150/6 150/9 151/20 155/19 160/4 160/8 161/17 161/18 163/13 165/5 165/10 168/11 171/13 172/13 184/18 186/8</p> <p>Policing [1] 96/4</p> <p>policy [161] 2/17 8/6 8/23 8/24 9/23 10/14 10/21 16/16 17/12 18/7 33/13 35/2 35/23 37/3 37/9 37/19 38/22 39/1 39/2 40/10 40/21 43/6 43/9 43/14 43/19</p> | <p>45/8 46/19 47/3 47/17 48/7 48/12 48/23 48/24 49/2 50/16 51/21 52/7 52/12 53/6 53/23 57/20 60/14 62/16 69/6 71/19 71/19 72/22 75/14 76/4 76/14 79/9 79/12 84/14 91/20 91/25 92/11 92/17 93/6 93/9 93/22 94/14 95/7 95/11 95/15 95/17 95/22 95/24 95/25 96/1 96/1 97/1 97/1 97/17 99/7 99/9 100/3 100/25 101/6 101/25 102/21 103/19 103/23 103/24 105/4 105/10 106/21 106/24 107/15 110/13 111/5 111/24 112/8 112/9 112/11 112/15 113/6 113/9 113/12 113/19 115/24 133/8 134/1 134/25 140/1 141/4 141/7 141/17 142/7 144/3 146/6 146/19 146/25 148/5 149/4 150/14 151/25 152/8 163/6 163/24 164/19 165/7 165/19 166/16 166/23 167/11 167/13 168/6 169/8 169/15 169/20 170/2 170/8 170/14 170/22 171/3 172/4 172/8 174/2 174/4 175/24 177/19 180/13 181/4 181/11 181/20 182/16 183/5 183/23 185/23 185/24 186/1 186/12 186/22 187/16 187/20 187/22 187/25 188/3 188/10 188/17 189/25</p> <p>pompous [1] 120/8</p> <p>pool [1] 105/10</p> <p>position [21] 10/15 15/7 18/7 26/13 28/22 30/2 38/18 40/16 50/16 63/18 84/22 107/12 115/24 130/5 144/22 144/23 173/12 180/19 181/14 186/3 186/6</p> <p>positions [2] 30/15 80/21</p> <p>positive [1] 75/16</p> <p>positively [1] 8/13</p> <p>possession [5] 45/23 128/1 128/7 129/6 191/13</p> <p>possibility [1] 179/18</p> <p>possible [4] 18/23 101/5 147/13 188/7</p> | <p>post [158] 1/24 2/7 2/18 2/22 6/15 8/5 8/22 9/12 12/20 13/1 16/18 17/21 18/7 18/10 22/1 22/19 23/10 31/24 32/4 33/6 34/4 34/8 34/20 35/5 41/9 43/6 43/20 47/14 48/24 49/2 52/11 53/11 54/2 55/25 57/12 57/16 58/23 59/11 60/7 60/10 61/21 63/12 63/18 66/13 66/15 66/19 66/20 67/5 67/16 69/3 69/14 70/3 70/12 71/17 71/21 72/6 72/9 72/10 72/21 73/3 75/18 76/7 76/15 76/18 76/24 77/10 77/22 78/3 78/10 78/14 78/20 79/3 79/11 79/23 80/2 80/4 80/17 80/23 83/6 84/4 84/8 84/16 84/17 88/8 90/5 90/24 91/20 91/21 92/7 93/23 97/17 100/3 103/23 109/2 109/10 111/4 111/9 111/24 112/3 112/18 113/4 113/9 113/21 114/7 123/9 123/20 124/2 124/3 125/14 126/8 133/2 134/17 138/9 138/15 138/20 138/21 138/24 139/3 139/15 139/20 141/6 141/20 142/21 146/4 147/19 149/1 150/4 150/19 153/17 154/8 155/19 155/21 159/2 159/22 160/3 160/7 161/7 163/7 164/15 164/16 165/11 168/5 168/11 170/1 171/13 171/19 171/24 172/3 172/13 172/21 173/23 174/3 183/23 184/11 184/15 184/20 189/5 189/24</p> <p>post-charge [1] 189/5</p> <p>postal [1] 69/21</p> <p>postmaster [1] 56/23</p> <p>potential [8] 52/4 63/18 63/19 66/23 96/23 98/13 178/21 183/20</p> <p>potentially [5] 68/16 95/10 108/4 179/14 179/19</p> <p>power [8] 14/17 15/14 71/21 72/11 74/19 82/21 130/21</p> | <p>135/18</p> <p>powers [7] 72/7 77/23 77/24 85/7 147/16 147/17 147/20</p> <p>practice [53] 1/20 1/25 2/14 6/3 7/7 9/12 11/6 11/7 13/24 16/16 17/2 17/13 17/14 17/20 18/2 18/6 18/9 18/10 18/19 21/19 21/25 22/1 22/2 22/14 22/16 37/6 38/4 38/9 46/25 98/15 114/13 115/1 135/19 136/18 139/7 139/17 142/12 146/4 147/1 149/3 149/23 152/12 153/12 154/13 159/12 160/7 160/15 171/20 171/24 172/21 172/24 173/24 191/1</p> <p>Practice' [3] 164/19 165/19 169/8</p> <p>practices [6] 78/20 80/4 80/10 125/14 126/9 127/16</p> <p>practising [1] 122/24</p> <p>practitioner [2] 6/2 119/18</p> <p>precisely [1] 80/23</p> <p>preclude [1] 74/5</p> <p>precursor [2] 61/14 62/2</p> <p>prefer [1] 56/12</p> <p>preference [2] 28/17 121/13</p> <p>prepare [5] 37/25 153/11 154/12 162/23 175/1</p> <p>prepared [3] 3/1 72/1 185/10</p> <p>presence [1] 160/6</p> <p>present [8] 19/15 83/9 86/19 119/15 120/4 132/11 138/2 152/19</p> <p>Presentation [1] 185/9</p> <p>presented [1] 124/19</p> <p>preserve [1] 75/1</p> <p>press [2] 7/8 119/22</p> <p>pressure [2] 58/17 69/11</p> <p>prevent [2] 80/25 131/19</p> <p>previous [2] 104/11 107/12</p> <p>previously [1] 104/23</p> <p>primarily [6] 21/21 46/14 61/24 123/21 136/18 147/14</p> <p>primary [2] 82/23 130/12</p> <p>principal [2] 102/22</p> |
|--|--|--|---|---|

| | | | | |
|---|---|--|--|---|
| P | 137/17 137/19 137/22 137/24 152/23 153/17 158/22 | 99/18 101/8 102/24 104/4 107/2 107/11 108/12 111/18 113/14 123/5 124/2 | 1/21 2/1 2/10 2/23 6/19 8/20 8/25 13/25 25/12 28/2 28/14 30/14 31/17 34/17 53/15 58/7 64/19 64/20 67/22 69/22 71/18 71/22 72/8 72/12 72/13 72/19 72/21 72/23 73/19 73/24 74/11 74/20 74/23 75/5 82/12 82/16 87/1 87/12 87/21 87/25 90/12 90/17 95/2 100/9 104/2 109/5 121/9 122/4 123/21 129/17 132/12 133/11 135/5 179/22 179/25 | 110/17 112/16 122/4 122/17 132/24 133/12 133/15 133/22 134/5 146/5 149/5 152/7 166/8 189/11 190/10 191/6 192/8 |
| principal... [1] 104/21 | proceeds [1] 166/16 | prosecuted [6] 6/6 | prosecutors' [1] 134/16 | |
| principles [7] 29/4 30/21 30/24 120/17 121/25 122/16 185/9 | process [37] 39/20 42/24 45/15 50/8 60/2 65/22 73/1 91/18 93/21 103/7 107/9 107/23 108/6 108/22 109/15 110/25 111/16 124/7 126/1 126/13 126/17 127/3 129/23 130/15 134/11 152/21 152/21 153/4 153/8 153/12 153/15 173/21 175/21 184/12 187/10 192/7 192/20 | prosecution [129] 2/7 6/7 7/18 10/7 14/6 14/7 14/14 15/1 15/5 16/22 21/22 21/25 22/3 23/4 24/25 26/1 28/19 31/15 32/2 34/5 35/21 36/15 48/6 48/13 51/5 53/10 53/14 54/3 54/4 54/5 54/23 55/16 55/25 56/3 56/7 57/2 59/24 60/1 60/3 62/9 65/7 68/16 70/4 72/15 72/17 73/2 73/17 74/2 74/10 74/25 75/3 75/20 76/6 76/11 76/15 76/24 77/4 77/7 78/6 78/11 79/5 81/10 81/17 82/13 85/1 85/22 88/13 88/23 88/25 89/21 90/20 92/10 92/17 93/5 94/14 98/14 99/14 99/19 103/19 106/24 107/20 108/10 108/25 110/3 110/6 111/5 111/8 111/24 112/1 112/13 112/20 115/20 117/2 117/11 117/18 118/15 118/16 118/20 119/9 119/15 119/19 120/3 120/6 120/19 120/21 121/15 121/17 123/7 125/24 125/25 126/9 127/19 127/21 129/2 131/9 131/16 131/20 132/1 132/4 132/12 132/19 132/22 133/1 152/25 183/23 188/12 189/5 192/14 192/16 | prospect [1] 100/8 prospects [1] 55/15 protecting [3] 97/2 97/3 97/4 | |
| prior [2] 174/19 190/15 | processes [1] 39/25 | prosecutor [58] 1/22 7/24 8/21 9/4 14/1 14/25 16/13 16/13 16/17 21/19 25/24 26/5 27/19 28/3 29/20 29/21 31/6 31/6 31/14 34/9 40/16 42/23 45/23 47/9 63/13 63/16 63/20 64/12 65/4 66/21 67/4 67/19 79/4 79/25 88/9 88/21 114/10 116/3 116/4 116/20 118/3 120/20 122/1 128/6 130/11 130/15 131/6 132/4 132/20 136/11 147/4 153/14 161/23 173/20 189/2 189/10 190/16 191/24 | protections [1] 139/12 | |
| priorities [7] 94/19 96/15 96/20 97/9 97/10 97/16 98/4 | produced [4] 37/25 161/19 175/19 183/3 | prosecutorial [37] 8/23 11/6 24/20 33/9 33/11 64/15 65/22 66/2 66/6 68/1 77/24 78/4 78/20 80/13 80/20 81/9 81/12 83/5 83/12 83/20 83/25 84/3 84/18 86/6 88/6 89/2 89/23 90/7 91/16 92/22 117/22 118/18 124/4 125/14 126/9 127/16 127/16 | prove [7] 47/19 129/2 162/11 175/9 176/11 176/21 177/11 | |
| prisoner [1] 117/12 | professional [3] 83/1 83/17 102/7 | prosecutors [64] 10/19 15/21 16/9 18/3 19/13 19/24 20/6 20/8 28/1 31/5 31/13 32/6 32/14 39/23 42/1 42/15 44/7 44/15 44/21 46/9 48/18 53/18 54/9 55/3 55/14 55/22 62/10 64/7 80/9 85/8 85/15 86/20 87/13 88/8 88/14 88/18 98/24 99/11 99/18 100/5 100/21 101/2 101/14 104/13 104/24 109/7 109/20 | proven [1] 132/6 | |
| private [66] 1/22 6/18 14/1 14/6 14/7 14/8 14/13 15/21 16/1 16/13 16/17 18/2 18/3 21/19 25/11 25/24 26/5 27/19 28/2 28/3 28/14 29/19 30/13 31/4 31/6 31/14 54/9 63/12 63/13 63/16 63/16 64/7 66/1 66/5 66/6 66/11 66/21 67/19 67/21 72/17 74/20 74/25 79/3 79/25 80/8 87/13 87/20 88/1 88/7 88/9 88/13 88/18 120/20 121/9 121/17 122/4 122/16 130/10 130/15 131/5 131/9 131/16 132/2 132/4 132/19 132/24 | professionalism [2] 94/1 94/6 | | provide [12] 4/22 5/1 80/3 108/8 108/8 110/7 127/15 143/1 143/17 147/23 185/20 191/19 | |
| problems [6] 8/14 93/8 140/6 143/7 164/5 171/4 | professionally [1] 129/18 | | provided [15] 11/19 12/19 12/25 13/4 24/15 46/2 54/16 73/11 84/15 95/6 99/22 104/6 104/18 142/10 164/2 | |
| procedure [16] 7/3 34/24 102/11 109/1 110/4 139/22 152/17 164/18 165/18 168/22 169/7 169/19 169/19 169/23 172/23 173/11 | profile [1] 179/21 | | providers [2] 94/24 96/6 | |
| procedures [5] 24/19 32/13 157/11 170/15 171/15 | Programme [1] 142/11 | | provides [4] 78/18 109/1 111/7 155/7 | |
| proceed [2] 111/7 129/16 | progress [2] 94/16 96/12 | | providing [6] 51/6 104/15 110/15 125/13 126/7 137/3 | |
| proceed' [1] 192/17 | promised [1] 180/10 | | provision [7] 73/19 137/7 137/15 137/21 139/7 158/7 158/25 | |
| proceeding [2] 28/20 121/20 | proof [2] 175/5 175/10 | | provisions [7] 2/14 18/18 138/1 154/13 157/9 166/21 166/22 | |
| proceedings [27] 9/15 23/16 59/3 59/9 59/10 59/16 62/12 69/14 74/6 74/7 74/12 74/14 108/3 116/7 116/8 121/23 130/14 130/16 130/22 132/13 | proper [17] 32/19 44/22 53/6 53/20 56/12 59/24 65/14 91/25 92/11 116/4 116/6 118/8 126/23 162/10 163/12 174/14 181/12 | | proxy [1] 130/17 | |
| | properly [13] 48/2 50/9 58/8 58/22 125/21 127/25 132/25 133/16 134/6 144/8 146/16 179/13 186/24 | | PSO [1] 110/8 | |
| | proportionate [2] 174/10 183/10 | | public [43] 6/3 6/4 14/25 15/20 16/1 16/12 25/11 26/7 28/5 28/16 29/21 31/4 31/5 33/7 55/16 73/2 74/11 82/11 82/16 83/3 85/14 85/15 99/17 102/3 104/9 104/14 105/18 106/1 109/6 110/11 110/19 119/13 121/11 121/19 121/20 122/3 131/7 131/10 131/19 132/2 132/12 132/13 133/23 | |
| | proposals [1] 61/15 | | publication [2] 7/4 33/7 | |
| | proposed [2] 113/9 113/12 | | publications [1] 7/1 | |
| | proposing [2] 17/20 17/24 | | publicly [2] 12/1 12/7 | |
| | proposition [1] 123/25 | | published [1] 6/25 | |
| | propositions [1] 120/14 | | Puddick [1] 116/22 | |
| | propriety [1] 130/25 | | | |
| | prosecute [30] 14/18 15/14 16/6 16/7 16/21 31/21 31/22 33/5 54/10 65/9 65/12 67/2 82/19 82/24 82/24 86/22 91/3 93/11 95/3 | | | |
| | | prosecution' [3] 110/11 112/5 190/19 | | |
| | | prosecution's [2] 128/17 129/5 | | |
| | | prosecutions [55] | | |

| | | | | |
|--|---|--|--|---|
| <p>P</p> <p>pull [1] 28/10</p> <p>punished' [1] 132/7</p> <p>purely [1] 72/14</p> <p>purpose [4] 71/19 79/9 84/21 143/16</p> <p>purposes [14] 7/2 9/22 16/15 17/11 18/4 22/7 79/10 91/2 130/19 152/19 155/8 155/21 163/1 179/8</p> <p>pursuant [2] 53/9 126/19</p> <p>pursue [11] 8/11 40/8 42/3 42/16 159/14 160/11 162/5 176/25 181/8 181/23 188/23</p> <p>pursued [9] 2/2 129/17 163/2 189/7 189/16 190/14 190/23 192/1 192/12</p> <p>pursuit [1] 65/1</p> <p>put [5] 16/12 43/9 88/22 118/8 128/1</p> <p>putting [1] 38/23</p> | <p>quote [1] 86/12</p> <p>quoted [3] 26/18 26/24 96/1</p> <p>R</p> <p>raft [1] 150/9</p> <p>raised [7] 5/9 127/24 188/6 188/24 189/7 189/19 189/19</p> <p>ramifications [1] 34/16</p> <p>range [9] 2/16 48/14 48/16 48/19 61/20 101/5 105/22 105/24 144/16</p> <p>rare [1] 83/12</p> <p>rather [44] 10/3 15/21 17/17 19/22 22/4 22/19 29/17 31/1 31/5 31/10 35/17 36/13 40/20 46/15 50/12 57/6 62/13 62/22 64/17 65/3 65/12 67/9 72/13 77/4 77/13 90/2 100/7 101/9 109/20 113/7 117/13 118/9 118/15 126/3 152/9 157/24 168/8 172/20 177/9 179/2 179/7 183/18 187/24 189/24</p> <p>rationalise [1] 111/13</p> <p>reach [2] 19/2 136/22</p> <p>reached [4] 33/19 107/4 126/7 130/5</p> <p>reaching [1] 61/3</p> <p>read [19] 4/3 12/11 50/24 69/25 90/22 96/24 97/9 98/11 108/11 109/18 110/21 113/17 119/5 120/12 130/8 144/13 150/16 169/24 188/4</p> <p>reader [4] 12/11 97/9 97/21 98/2</p> <p>readily [2] 49/11 145/8</p> <p>reading [12] 101/24 105/6 107/16 109/12 144/18 150/3 167/11 167/12 169/18 181/13 181/15 189/10</p> <p>ready [2] 71/1 188/13</p> <p>reaffirmation [1] 73/12</p> <p>real [10] 35/8 38/2 40/24 52/3 52/13 52/22 55/9 60/25 61/9 163/8</p> <p>realised [1] 188/23</p> <p>realistic [3] 55/14 100/7 126/5</p> <p>realistically [1] 18/1</p> | <p>reality [2] 52/9 57/3</p> <p>really [4] 22/18 41/22 169/16 173/14</p> <p>reason [12] 21/10 23/6 33/10 65/12 83/13 154/3 154/4 155/13 156/16 172/7 180/20 193/13</p> <p>reasonable [29] 8/12 23/23 25/7 40/8 42/3 42/5 42/16 45/24 159/14 159/16 159/23 160/11 162/5 162/25 163/2 175/11 176/25 181/8 181/23 182/11 182/15 182/24 184/7 186/16 187/4 190/14 190/22 191/14 192/11</p> <p>reasons [4] 33/24 82/23 149/8 163/16</p> <p>recall [2] 36/3 125/6</p> <p>receipt [1] 192/12</p> <p>receive [1] 25/1</p> <p>received [10] 9/13 36/2 38/2 54/24 100/18 150/20 175/16 175/16 187/11 187/16</p> <p>receiving [1] 145/20</p> <p>recent [1] 21/5</p> <p>recently [5] 12/25 19/17 68/14 126/15 145/10</p> <p>recognise [8] 34/8 46/4 50/19 54/2 66/3 79/2 87/11 150/17</p> <p>recognised [23] 31/17 31/19 54/8 60/4 62/8 74/24 82/14 85/17 88/18 89/3 122/3 132/3 138/3 138/16 138/22 139/3 139/9 147/19 150/13 150/16 151/13 161/8 167/25</p> <p>recognises [2] 110/14 184/18</p> <p>recognition [11] 17/16 44/9 45/13 89/7 89/11 122/15 141/23 156/3 160/2 176/3 183/8</p> <p>recollection [1] 184/21</p> <p>recommend [1] 87/24</p> <p>recommendations [3] 51/3 113/12 116/11</p> <p>record [7] 166/4 167/5 172/5 173/2 173/15 182/19 184/8</p> <p>recorded [4] 129/10 142/23 170/20 172/10</p> <p>records [2] 169/1</p> | <p>171/17</p> <p>recoup [1] 67/10</p> <p>recourse [1] 64/9</p> <p>recover [1] 65/7</p> <p>recovered [1] 180/19</p> <p>redress [1] 65/2</p> <p>reduced [2] 72/25 83/25</p> <p>refer [12] 11/25 12/7 30/15 43/7 43/14 86/12 92/16 99/6 99/7 112/16 155/20 169/13</p> <p>reference [61] 2/23 15/5 35/22 46/19 47/2 48/11 49/13 51/23 52/9 53/15 55/2 56/8 57/25 58/22 59/1 60/8 60/10 78/12 98/8 98/9 99/4 100/3 100/20 104/12 104/23 105/3 110/16 110/17 122/9 140/20 141/6 141/12 142/7 142/15 146/21 147/15 156/14 160/10 160/18 162/3 162/18 165/22 169/12 169/17 170/3 173/1 173/11 175/3 175/4 176/10 178/2 182/21 183/18 184/9 184/17 186/17 187/16 188/17 188/19 190/21 192/24</p> <p>references [10] 20/4 36/22 56/2 62/20 102/17 118/5 139/23 160/6 168/24 181/8</p> <p>referral [1] 73/5</p> <p>referred [11] 13/5 29/5 34/13 58/11 102/11 145/15 147/7 153/9 172/14 173/6 176/23</p> <p>referring [7] 66/15 95/16 100/6 101/9 101/9 115/4 135/17</p> <p>refers [5] 92/21 100/9 154/2 168/25 172/3</p> <p>reflect [2] 100/6 151/16</p> <p>reflected [3] 74/22 118/13 182/7</p> <p>reflecting [1] 4/23</p> <p>reflects [1] 180/23</p> <p>refocus [1] 177/20</p> <p>refuse [2] 125/16 125/17</p> <p>regard [23] 28/15 78/24 80/9 91/24 94/21 117/2 119/14 121/10 122/8 125/12 126/6 136/8 137/7 137/14 138/13 139/6 141/14 156/1 157/9</p> | <p>158/7 158/16 159/4 159/8</p> <p>regard' [1] 158/11</p> <p>regime [5] 78/13 78/15 89/6 98/22 115/5</p> <p>regimes [1] 49/7</p> <p>regional [2] 109/2 109/17</p> <p>regularly [3] 6/6 56/25 133/23</p> <p>regulates [1] 39/19</p> <p>regulation [4] 24/15 37/13 41/20 72/20</p> <p>regulations [1] 102/10</p> <p>reining [1] 133/25</p> <p>relate [2] 98/24 184/14</p> <p>related [6] 17/10 34/6 61/24 163/13 163/14 178/18</p> <p>relating [8] 2/8 7/17 10/14 30/13 37/14 139/20 169/1 169/11</p> <p>relation [86] 7/21 8/18 8/24 9/20 9/20 9/24 18/7 23/3 34/5 34/23 35/18 37/15 37/23 38/3 39/18 40/7 41/14 42/15 42/19 45/4 45/8 45/10 46/23 48/9 49/8 50/1 50/16 51/21 51/22 53/4 57/11 59/8 61/19 65/15 68/17 75/5 78/7 82/3 86/24 87/1 90/15 91/15 92/2 95/1 100/19 101/5 104/2 115/14 120/17 130/10 135/9 135/20 140/22 145/3 150/4 150/6 150/9 151/4 151/8 151/9 152/3 152/22 155/15 158/15 160/21 160/22 161/25 163/17 163/22 164/6 164/7 166/25 167/1 167/7 167/9 167/20 171/20 172/5 179/5 179/11 179/11 183/1 183/9 186/15 187/12 188/21</p> <p>relations [2] 86/11 86/16</p> <p>relationship [1] 132/16</p> <p>relevance [4] 11/12 78/17 142/21 182/17</p> <p>relevant [46] 5/6 6/20 7/2 15/15 18/12 18/21 19/10 20/21 21/20 22/3 24/12 26/8 28/6 34/21 36/23 41/3 45/1 46/5 55/25 56/3 59/21</p> |
|--|---|--|--|---|

| R | | | | |
|--|--|--|--|--|
| relevant... [25] 68/7 97/19 97/19 97/20 99/7 100/24 105/23 105/25 106/22 110/9 111/23 112/18 114/8 136/19 137/7 137/14 137/23 139/7 150/22 153/5 157/9 158/7 158/13 162/16 176/1 reliability [18] 46/5 49/10 49/22 51/17 52/2 60/24 61/2 61/4 61/13 62/3 62/6 62/8 179/5 183/19 184/15 184/20 186/20 191/7 reliable [2] 62/17 158/21 reliance [3] 11/13 61/14 123/10 relied [3] 29/22 30/18 129/11 rely [6] 36/5 39/6 47/19 129/2 130/4 144/1 relying [5] 30/4 38/15 46/1 76/14 153/1 remain [2] 178/9 178/11 remainder [1] 117/16 remained [2] 95/7 95/12 remains [3] 52/3 144/22 144/23 remarks [1] 83/8 remedy [2] 175/17 177/23 remember [1] 155/5 render [1] 137/16 rendered [1] 144/5 rendering [1] 158/21 repeal [6] 11/13 60/23 61/7 61/16 61/25 62/14 repeat [1] 25/17 replicate [1] 183/5 replicates [1] 182/16 report [88] 3/2 3/6 3/13 3/18 3/21 4/12 4/15 4/20 4/23 5/7 5/14 7/13 8/2 8/8 9/2 9/22 10/12 10/15 10/21 11/3 11/22 12/9 12/17 12/24 12/25 13/5 13/14 13/15 13/19 13/23 15/12 15/15 16/16 17/22 18/14 19/5 21/21 24/1 24/4 24/6 25/14 26/25 28/21 29/25 32/11 33/21 37/25 38/1 66/14 68/13 69/15 69/20 75/15 75/16 | 76/20 76/22 77/19 80/14 82/6 82/8 85/3 85/5 87/11 91/23 92/4 94/20 103/9 106/16 108/8 116/3 116/16 119/3 119/8 124/21 130/7 134/20 135/14 135/15 142/10 152/14 153/10 156/5 160/1 160/5 164/12 180/11 190/2 191/4 reported [5] 27/8 98/14 98/17 99/10 117/7 reporting [1] 98/19 reports [11] 5/9 10/13 12/6 12/14 13/9 17/11 23/3 72/2 72/5 72/6 87/19 repository [2] 47/23 47/24 represent [3] 37/8 37/18 126/1 representative [4] 100/14 101/11 107/6 107/7 representatives [6] 95/4 99/20 100/10 101/20 104/5 107/17 request [2] 2/4 125/7 require [4] 87/16 88/7 183/10 189/23 required [26] 10/22 16/8 21/18 24/24 40/21 59/2 88/4 89/1 89/17 133/10 134/4 138/13 147/3 151/1 153/11 156/1 159/7 161/22 162/23 171/17 175/1 181/15 185/7 186/14 187/20 188/11 requirement [16] 42/1 42/16 42/20 42/24 43/7 43/14 43/15 59/18 61/12 74/23 84/16 126/2 134/3 162/4 162/9 191/18 requirements [8] 17/17 24/15 25/22 39/24 40/3 44/6 44/22 48/9 requires [2] 72/21 136/7 requiring [1] 186/14 research [1] 40/18 researches [2] 73/14 76/17 residual [1] 76/10 resolved [1] 113/20 resources [4] 107/4 107/21 109/2 109/17 respect [8] 29/14 121/17 150/20 157/1 | 160/20 177/2 187/1 188/15 respect of [1] 121/17 respective [1] 102/11 respects [11] 15/22 25/23 37/3 75/2 77/15 78/22 95/8 147/17 162/8 185/24 186/13 responded [1] 61/20 response [2] 5/20 127/2 responsibilities [8] 2/9 39/3 39/21 44/8 85/7 90/1 92/13 167/25 responsibility [14] 46/8 46/18 48/5 53/7 58/6 69/5 87/25 92/1 113/7 113/11 115/4 115/10 120/6 138/25 responsible [5] 54/20 67/12 68/15 81/15 115/20 responsibly [1] 130/5 rest [1] 103/10 restate [1] 115/14 restated [1] 30/25 result [7] 31/9 52/4 59/17 73/13 126/23 135/2 135/6 resume [1] 63/2 retain [3] 136/10 166/4 167/5 retained [3] 166/11 169/2 171/22 retains [1] 76/10 retention [6] 37/16 169/3 169/4 169/14 171/23 182/19 return [3] 4/25 11/9 50/23 reveal [3] 136/11 167/17 167/18 revealing [1] 166/12 revelation [3] 123/17 173/20 182/19 revenge [1] 132/15 review [13] 42/24 43/4 46/11 52/24 52/24 82/22 83/12 115/10 123/5 135/4 167/5 167/16 192/20 reviewed [8] 5/5 9/4 9/6 9/25 10/19 34/4 134/17 181/3 reviewing [2] 189/3 191/18 revision [3] 93/5 170/14 181/19 RICHARD [3] 1/9 1/15 194/2 right [86] 2/2 3/6 3/19 5/2 5/3 5/4 5/19 7/19 | 7/20 8/17 11/20 21/5 21/6 21/9 21/12 21/17 24/8 25/10 27/5 27/11 31/8 31/20 36/9 47/7 49/15 55/10 57/4 67/17 70/8 70/9 72/17 73/7 73/15 74/24 75/2 79/13 80/22 81/4 82/4 84/4 85/19 86/13 87/6 87/8 87/23 88/3 89/6 89/15 89/19 92/6 92/13 93/9 93/16 94/3 94/10 100/2 102/22 103/21 104/21 105/17 106/19 109/12 112/11 113/25 116/12 116/23 119/1 130/3 132/23 147/11 150/17 153/16 158/25 160/8 165/10 167/18 168/12 171/5 174/5 175/24 177/18 184/4 184/22 190/20 191/17 193/16 rightly [1] 121/16 rigorous [1] 73/1 rise [1] 192/25 risk [19] 33/12 36/1 36/8 38/14 40/24 45/13 46/20 50/13 51/13 52/13 52/22 63/22 63/24 64/18 65/16 71/18 97/8 97/25 105/8 risks [5] 63/15 63/17 63/22 64/5 65/19 RLIT0000073 [1] 73/20 RLIT0000079 [2] 155/1 155/2 RLIT0000117 [1] 27/2 RLIT0000170 [1] 20/13 RLIT0000171 [1] 20/5 RMG [4] 66/19 94/23 95/6 103/18 robberies [1] 47/11 role [28] 35/7 44/20 76/6 76/12 76/16 76/24 77/5 77/7 78/2 83/3 86/3 86/7 91/15 102/3 114/13 115/22 116/2 116/4 116/20 122/21 124/1 124/13 125/21 126/11 127/20 166/1 185/5 191/24 roles [16] 43/10 81/12 81/20 85/6 85/14 85/17 86/23 114/9 115/17 165/20 165/24 167/7 167/21 167/23 168/14 168/19 room [3] 54/14 70/25 | 71/3 rosy [1] 76/3 route [3] 155/24 159/6 159/22 routinely [3] 46/17 48/5 57/12 Royal [12] 76/10 94/13 96/5 99/22 102/2 102/4 104/7 106/24 107/2 108/25 110/3 181/19 Rs [3] 167/4 167/16 172/14 RSPCA [1] 77/8 rules [9] 7/4 93/23 94/19 96/15 96/19 97/15 98/1 98/4 141/7 run [4] 33/12 60/19 106/21 152/1 runs [1] 3/15 |
| S | | | | |
| | | | | safest [1] 48/1 safety [8] 6/9 15/19 21/2 68/16 83/20 91/8 91/11 91/12 said [28] 5/4 9/8 11/7 27/19 28/21 29/24 29/25 41/8 43/12 48/4 52/16 71/21 73/11 76/5 76/15 89/16 89/16 114/15 121/6 140/1 145/23 145/24 151/15 154/10 174/9 177/11 177/19 187/6 same [39] 7/23 21/10 22/13 26/5 28/3 29/20 29/24 31/7 31/17 31/25 36/13 40/4 53/12 57/3 78/16 88/11 90/19 93/6 106/25 115/8 128/13 140/16 141/5 141/5 158/14 158/16 158/18 158/22 158/23 163/16 165/5 166/18 168/1 168/4 168/7 168/9 168/16 168/18 173/5 sampling [1] 133/11 satisfaction [1] 61/12 satisfactory [2] 166/21 186/4 satisfied [5] 47/4 59/23 130/16 146/15 190/16 satisfying [1] 62/3 save [2] 37/15 170/18 saw [27] 51/20 52/9 54/14 54/18 55/8 55/21 56/1 57/21 57/22 60/5 60/8 60/20 62/16 80/24 84/6 |

| | | | | |
|---|---|--|---|---|
| S | second [12] 2/20 8/18 27/9 28/9 29/13 39/16 51/16 64/18 78/8 118/22 119/5 143/24 | 29/1 29/11 30/16 36/7 40/1 45/7 47/3 51/25 57/16 57/17 58/22 60/8 63/9 71/7 71/7 71/14 71/17 71/19 71/24 72/18 79/8 79/10 84/24 91/4 95/18 95/25 100/22 105/19 106/11 123/24 126/4 134/2 134/14 139/15 141/22 143/8 148/19 153/9 154/11 154/18 155/18 169/2 169/4 170/5 182/6 | separation [21] 64/3 66/8 80/12 80/18 81/8 85/6 85/13 87/5 87/17 87/17 88/5 88/10 89/8 89/12 89/25 90/5 90/18 90/25 91/10 106/22 106/23 | should [56] 2/25 3/24 7/25 37/23 39/1 41/10 42/3 47/17 47/22 51/4 56/7 66/7 72/17 72/23 79/2 87/25 98/7 98/11 101/8 102/16 108/2 108/20 112/2 113/13 120/10 124/11 132/7 136/10 140/2 143/11 144/13 146/7 153/14 157/10 158/4 159/14 159/17 165/2 169/2 170/19 170/23 172/10 176/24 179/1 179/12 188/5 189/6 189/13 189/18 189/21 190/12 191/25 192/12 192/15 192/16 193/13 |
| saw... [12] 115/19 133/19 133/24 134/2 134/22 151/7 158/14 160/21 160/22 163/21 164/9 179/8 | secondly [10] 28/12 32/24 33/15 43/25 49/20 80/1 86/16 93/13 101/11 112/14 | serious [6] 6/11 15/16 35/16 40/15 43/8 115/25 | shouldn't [1] 69/12 | |
| say [78] 2/25 13/21 17/18 18/15 26/11 30/16 30/21 33/6 34/3 34/19 35/10 35/10 37/2 37/23 41/2 42/8 43/24 44/18 47/18 48/22 51/7 53/3 56/10 58/24 60/13 60/21 61/9 66/1 66/12 72/24 78/1 82/7 82/10 83/7 84/1 86/18 89/11 91/8 92/17 94/11 99/4 102/23 105/13 114/23 118/24 119/6 124/14 132/15 133/21 136/3 139/21 140/13 141/4 143/8 144/7 147/10 156/7 156/19 157/15 159/1 163/11 169/9 170/7 172/1 172/16 176/14 177/4 177/6 180/1 180/11 180/23 181/1 181/17 183/21 185/17 190/11 191/6 191/18 | Secretariat [1] 18/17 Secretary [4] 135/18 153/11 154/12 162/23 | service [27] 6/7 15/1 15/4 21/22 21/25 22/3 23/4 31/16 32/2 36/15 48/7 48/14 54/3 68/15 69/21 74/1 74/1 74/2 74/10 75/3 79/6 82/13 83/2 83/18 92/20 152/25 153/25 | show [1] 20/3 showed [2] 133/19 156/3 shown [1] 189/9 shows [1] 162/12 sic [1] 167/5 side [1] 85/8 sight [1] 21/4 significant [8] 7/1 24/13 47/1 49/3 82/15 130/18 151/2 162/16 | |
| section [44] 11/14 15/10 24/5 60/23 61/7 61/11 62/1 62/14 72/15 73/16 73/23 73/24 85/22 86/19 126/19 127/12 136/5 136/16 136/25 141/12 153/8 153/10 154/9 154/24 155/4 155/15 156/10 156/15 156/22 157/20 157/21 157/22 157/25 157/25 158/15 158/20 158/23 159/7 162/22 165/13 170/15 184/10 187/6 187/7 | Section 22 [1] 154/24 section 23 [8] 153/8 154/9 155/15 156/15 156/22 162/22 187/6 187/7 | Services [4] 92/24 99/19 166/13 166/14 | showed [2] 133/19 156/3 shown [1] 189/9 shows [1] 162/12 sic [1] 167/5 side [1] 85/8 sight [1] 21/4 significant [8] 7/1 24/13 47/1 49/3 82/15 130/18 151/2 162/16 | |
| section 26 [5] 136/5 157/25 158/20 158/23 165/13 | Section 3 [3] 15/10 85/22 86/19 | session [1] 144/2 | silence [1] 170/17 | |
| Section 6 [4] 72/15 73/16 73/23 73/24 | Section 67 [6] 136/16 136/25 141/12 157/21 158/15 159/7 | set [36] 5/13 7/11 13/13 19/2 28/22 30/22 34/2 38/20 47/9 56/6 58/21 71/20 79/1 79/9 84/21 98/25 112/17 114/3 116/18 120/14 126/20 142/19 148/5 152/20 153/7 154/8 166/1 167/2 167/6 167/6 171/3 171/23 173/2 182/17 185/8 185/21 | silence [1] 170/17 silk [1] 5/19 similar [5] 56/11 76/18 117/8 136/4 185/11 similarities [1] 66/23 similarly [9] 38/25 53/4 75/16 86/19 115/3 158/20 170/21 181/18 191/3 | |
| Section 69 [6] 11/14 60/23 61/7 61/11 62/14 157/20 | Section 76 [1] 157/22 | sets [4] 7/14 15/6 39/20 136/9 | simplicity [1] 149/1 simplistic [1] 16/12 simply [4] 73/2 132/5 147/23 149/19 | |
| Section 8 [2] 126/19 127/12 | sections [4] 128/12 153/6 153/7 154/2 | setting [4] 24/6 34/13 58/8 75/4 | since [7] 12/24 71/24 91/13 118/5 118/13 157/18 193/11 | |
| sections [4] 128/12 153/6 153/7 154/2 | secure [1] 154/14 | several [1] 91/22 | single [1] 68/9 | |
| securing [2] 42/10 44/22 | security [22] 54/19 68/3 84/10 92/19 92/20 94/21 94/24 96/5 102/2 103/23 104/2 109/3 109/10 111/9 111/14 142/11 175/1 175/8 175/19 176/10 176/20 180/14 | severely [1] 120/2 SFO [10] 6/11 15/16 15/17 80/22 81/2 81/4 81/13 81/15 81/23 82/3 | sir [14] 1/3 62/25 63/4 63/8 70/20 71/2 71/7 106/3 106/7 106/11 148/12 148/19 193/2 193/17 | |
| see [52] 1/3 4/5 18/9 27/3 27/5 27/10 27/12 | see [52] 1/3 4/5 18/9 27/3 27/5 27/10 27/12 | severely [1] 120/2 SFO [10] 6/11 15/16 15/17 80/22 81/2 81/4 81/13 81/15 81/23 82/3 | SIS [1] 92/23 situation [5] 56/22 57/10 105/21 109/17 146/20 situations [2] 48/15 101/8 | |
| | | self [1] 40/25 self-interpretation [1] 40/25 | skipped [1] 75/12 sky [1] 30/10 slides [2] 185/9 | |
| | | Senior [2] 5/24 109/3 | | |
| | | sense [13] 51/2 62/21 64/8 66/23 77/12 81/14 89/19 99/5 100/16 101/6 130/24 151/19 161/14 | | |
| | | sentence [7] 26/18 34/19 34/23 97/13 128/25 183/4 190/11 | | |
| | | separate [20] 46/3 54/6 57/7 68/18 68/22 68/24 72/2 81/21 87/16 90/14 102/19 114/11 114/11 114/12 114/16 116/2 167/21 167/23 167/24 169/20 | | |
| | | separately [1] 78/5 separates [1] 167/24 | | |

| S | | | | |
|--|---|---|--|--|
| slides... [1] 185/21 | special [5] 7/22 72/7 72/11 77/22 77/23 | 18/19 24/16 25/5 35/23 39/19 41/20 69/6 74/22 81/5 82/1 86/1 86/2 86/15 88/22 88/22 97/20 | succeeded [1] 19/11 | 174/17 179/25 180/18 |
| slightly [7] 7/15 14/12 93/22 133/17 142/21 148/2 190/5 | specialist [1] 6/2 | | successful [1] 83/13 | supported [2] 75/23 188/14 |
| small [1] 128/5 | species [1] 47/18 | | succession [3] 44/9 115/15 116/9 | suppose [1] 187/10 |
| smaller [1] 168/2 | specific [15] 2/22 2/24 34/14 55/20 110/16 112/18 125/7 165/22 170/3 173/16 173/16 178/14 178/17 184/9 192/24 | statutes [5] 14/4 79/14 81/7 97/19 146/10 | such [31] 9/19 14/24 23/10 27/20 33/3 33/10 37/7 37/11 46/10 53/10 53/15 60/1 66/21 74/23 80/10 86/24 114/9 123/4 131/20 133/6 134/18 137/8 137/15 137/20 137/21 139/10 144/4 147/6 158/21 162/1 189/17 | sure [5] 48/2 64/2 144/12 148/8 174/19 |
| Smith [1] 131/23 | specifically [2] 185/2 189/25 | statutory [20] 2/14 14/17 15/6 15/14 16/2 17/9 17/16 18/18 24/14 70/3 72/7 72/11 78/12 78/15 89/6 136/2 136/22 144/3 152/20 155/23 | suffered [2] 67/8 67/9 | surrounding [1] 168/17 |
| Smith-Allison [1] 131/23 | specificity [1] 96/17 | stay [2] 130/14 130/22 | sufficiency [5] 104/14 105/24 110/18 127/5 191/11 | surveillance [1] 169/2 |
| so [242] | specified [1] 170/11 | steer [1] 37/20 | sufficient [13] 39/4 49/4 99/16 100/7 102/19 104/8 105/13 143/17 150/2 150/5 170/7 185/14 189/3 | suspect [21] 42/5 42/18 99/15 108/2 159/16 161/1 161/5 162/7 171/1 175/16 176/4 177/1 177/8 177/21 177/23 178/6 178/20 181/10 187/3 188/5 189/7 |
| software [1] 61/24 | speech [2] 117/20 118/3 | steered [1] 37/9 | suggested [1] 188/4 | suspect's [1] 189/17 |
| solicitors [5] 28/13 75/24 121/8 122/5 134/19 | spell [3] 92/25 97/24 170/24 | steers [1] 167/13 | suggestion [4] 60/18 76/23 146/2 147/10 | suspect.' [1] 181/25 |
| solve [1] 140/3 | spelling [1] 80/18 | stepping [1] 65/13 | suitable [2] 37/8 37/19 | suspected [1] 177/10 |
| some [26] 1/25 14/9 15/22 17/3 23/12 26/19 37/3 41/21 54/18 63/15 67/13 70/10 79/18 79/21 95/24 112/17 116/25 125/8 145/10 150/20 153/16 162/8 171/11 176/3 179/7 184/3 | spelt [4] 97/6 97/17 107/19 168/21 | steps [5] 46/11 64/14 73/3 162/25 184/7 | suite [1] 186/8 | suspects [1] 41/10 |
| somebody [1] 150/15 | spoke [1] 99/2 | sticking [1] 133/25 | summarise [6] 5/16 44/2 56/18 58/3 59/6 69/21 | sustained [1] 66/13 |
| someone [20] 36/1 38/15 64/23 64/24 67/6 111/2 141/2 143/17 147/23 148/8 148/8 166/2 167/11 167/12 169/17 173/1 181/13 181/15 185/21 188/24 | squarely [1] 127/21 | still [5] 20/25 132/18 173/22 178/23 180/12 | summarised [2] 73/6 147/9 | sustains [1] 119/25 |
| something [15] 10/10 15/22 30/9 46/13 62/9 70/21 87/4 87/6 96/4 141/20 144/14 161/13 179/17 183/14 187/21 | staff [1] 47/14 | stop [2] 36/7 94/6 | summarising [1] 159/21 | Sweeney [5] 26/4 27/5 27/10 29/15 30/10 |
| sometimes [5] 15/25 16/1 73/17 132/17 144/11 | stage [13] 22/18 25/2 44/13 44/14 50/6 74/18 108/17 124/13 129/23 135/3 135/8 152/21 153/7 | stopping [2] 124/24 141/15 | summary [3] 1/19 61/6 120/12 | sworn [2] 1/9 194/2 |
| sorry [5] 30/24 52/16 82/7 87/17 157/20 | stages [3] 12/23 117/22 153/5 | straightforward [1] 106/2 | summons [8] 9/17 9/19 59/3 59/15 59/19 59/22 125/16 125/18 | system [17] 8/16 46/3 69/10 70/22 85/18 102/4 175/7 175/14 178/5 178/8 178/19 178/24 179/6 179/13 179/20 188/6 189/8 |
| sort [3] 17/1 38/8 128/18 | stakeholders [2] 102/6 102/15 | strengthening [1] 177/8 | summarised [2] 73/6 147/9 | systems [5] 49/10 49/22 51/18 184/20 186/20 |
| sought [5] 24/18 32/12 47/22 70/2 152/20 | standard [1] 175/5 | striking [1] 162/20 | summarising [1] 159/21 | systems' [1] 184/16 |
| sound [1] 120/8 | standards [18] 28/15 53/20 72/24 93/1 93/2 93/13 93/18 93/23 94/1 94/5 94/8 97/23 102/11 103/1 103/2 121/10 141/7 170/15 | strive [1] 119/21 | summary [3] 1/19 61/6 120/12 | T |
| source [2] 103/13 118/22 | standards [18] 28/15 53/20 72/24 93/1 93/2 93/13 93/18 93/23 94/1 94/5 94/8 97/23 102/11 103/1 103/2 121/10 141/7 170/15 | structure [5] 24/22 41/20 114/25 161/21 166/24 | tab [2] 27/1 155/1 | |
| sources [10] 2/16 47/15 51/23 116/14 116/19 145/2 149/14 151/21 161/25 175/21 | stark [2] 41/15 186/5 | structured [1] 75/21 | take [25] 33/22 46/11 56/9 62/25 64/9 68/12 69/24 70/20 70/24 74/12 74/16 87/25 89/4 93/10 101/1 102/24 113/10 116/5 116/21 148/12 157/10 184/7 192/8 192/21 193/10 | |
| South [1] 131/14 | start [7] 5/12 13/18 24/9 63/15 85/21 116/15 135/16 | struggle [2] 117/4 117/12 | taken [25] 11/12 15/25 24/19 33/14 33/15 54/5 54/7 54/10 64/2 64/15 92/23 92/25 95/4 99/20 100/10 101/4 101/8 104/4 108/21 110/8 110/20 111/8 112/2 137/24 163/1 | |
| sparingly [1] 82/22 | stated [5] 98/7 112/1 121/16 122/12 175/8 | subheading [2] 10/24 139/18 | taking [8] 54/23 64/22 90/2 93/14 105/3 139/10 177/15 190/5 | |
| speak [2] 193/11 193/13 | statement [2] 126/21 140/8 | subject [8] 26/5 28/3 29/20 34/10 74/4 114/11 175/17 184/13 | | |
| speaking [3] 77/22 121/6 144/10 | states [10] 94/15 95/2 104/3 107/1 140/16 159/12 171/16 172/5 180/13 184/6 | subject's [1] 180/18 | | |
| | static [1] 152/8 | submission [2] 127/8 174/20 | | |
| | status [3] 69/13 82/11 102/7 | submit [1] 126/22 | | |
| | statute [17] 2/15 | submitted [1] 174/16 | | |
| | | subparagraph [1] 103/17 | | |
| | | subsection [1] 74/4 | | |
| | | subsequent [1] 183/15 | | |
| | | substantial [3] 13/4 24/5 35/3 | | |
| | | substantiate [3] 175/13 177/14 180/16 | | |
| | | substitute [3] 39/2 146/11 146/18 | | |
| | | subtopic [2] 112/23 116/2 | | |

| | | | | |
|----------|---|---|--|---|
| T | 35/17 36/13 40/20 44/12 46/15 50/12 57/6 62/22 64/17 65/3 65/12 73/1 73/25 75/20 77/5 77/13 83/16 90/2 91/19 93/22 94/9 100/7 101/9 101/10 109/20 110/12 113/7 117/24 118/2 118/10 118/15 119/17 129/11 132/5 137/4 137/12 138/3 140/13 141/14 145/1 146/1 147/7 152/9 157/6 157/24 158/1 160/23 168/8 169/22 173/13 177/9 179/2 181/15 183/18 187/24 188/16 189/24 | 156/16 157/22 158/10 158/25 159/21 161/12 173/23 174/3 180/1 183/17 184/22 184/23 190/1 193/3 193/5 theft [9] 9/9 9/13 11/9 17/1 56/23 57/6 57/7 58/13 58/18 thefts [1] 47/12 their [69] 8/15 16/2 16/22 17/2 17/12 17/12 17/14 17/15 17/15 18/9 21/5 21/11 25/2 34/6 36/5 36/10 38/15 40/17 41/10 42/23 44/7 45/18 48/7 48/11 48/18 57/17 58/6 64/13 64/16 65/1 66/25 67/3 68/18 68/24 69/10 69/11 74/16 75/24 77/3 81/2 91/14 102/10 108/8 118/2 123/1 124/1 126/21 133/1 133/13 133/20 134/14 135/4 136/1 136/22 139/11 141/21 146/7 147/4 150/6 150/22 156/3 157/11 173/2 179/3 179/4 186/25 187/11 188/7 189/9 them [111] 10/22 10/23 12/12 15/25 16/12 17/17 26/24 27/22 28/18 31/7 31/21 31/22 32/22 33/17 33/19 34/2 36/5 38/3 38/25 39/6 40/17 40/19 40/20 40/21 40/22 42/22 44/15 44/16 45/18 47/16 50/15 59/12 59/13 60/3 64/25 65/23 65/24 67/2 67/6 67/7 68/23 69/4 69/11 78/24 80/15 81/7 81/8 87/16 92/12 94/2 94/10 108/3 114/19 118/7 121/14 122/5 123/18 124/8 124/19 124/20 124/23 126/23 133/20 134/23 134/24 139/11 141/3 141/13 141/14 141/16 141/19 141/23 143/4 146/14 146/15 146/16 146/22 147/12 147/22 147/25 148/2 148/5 148/10 149/12 149/15 149/15 149/18 149/18 151/1 161/11 164/2 164/3 164/4 167/13 167/15 169/22 169/23 171/1 171/4 177/3 179/20 | 180/2 181/15 187/17 187/19 187/20 187/23 187/25 188/1 189/23 189/25 themselves [17] 37/4 37/9 64/10 64/12 77/5 77/7 77/13 117/3 117/13 117/19 131/8 132/22 134/17 138/22 147/8 161/13 185/14 then [90] 2/17 5/12 8/18 14/4 20/13 22/14 23/12 24/5 25/20 26/11 27/11 27/17 28/9 29/3 33/20 38/2 48/16 51/9 52/7 52/22 53/1 55/12 56/9 63/3 67/1 67/7 69/10 70/13 72/3 73/16 87/2 91/21 96/11 97/21 99/1 99/12 100/9 101/13 105/8 105/10 108/9 108/17 109/15 110/19 110/22 111/1 113/11 113/22 117/5 118/13 121/1 124/12 124/17 124/17 124/18 125/2 126/3 128/1 131/21 138/15 139/10 139/14 141/15 142/20 143/19 146/21 146/23 153/8 154/7 154/17 155/19 156/24 157/5 163/16 164/2 166/1 172/25 173/4 173/12 174/22 175/22 177/12 177/18 179/14 182/18 187/10 187/20 188/15 192/4 193/14 there [202] there's [16] 11/23 15/13 29/3 47/1 52/22 59/24 70/21 97/8 97/24 100/19 105/8 108/4 108/17 168/19 170/9 188/22 thereafter [2] 62/4 185/8 therefore [21] 20/7 24/24 45/16 47/20 52/13 57/13 72/18 89/11 104/13 109/14 138/12 138/13 147/18 150/23 150/25 151/18 161/11 168/5 179/1 179/15 188/12 thereunder [6] 37/11 37/15 43/23 46/16 168/25 170/4 these [32] 10/12 17/11 20/20 28/23 34/7 35/8 36/17 38/11 42/4 49/12 60/14 60/16 60/18 69/24 | 78/14 95/7 102/5 111/13 112/1 120/17 135/24 136/12 138/1 138/13 146/13 146/19 157/10 159/15 161/17 165/10 175/20 181/24 they [214] they'd [2] 33/19 170/10 they're [16] 15/22 40/23 55/17 79/14 80/1 80/16 103/4 106/1 146/23 147/4 147/5 149/17 172/16 173/10 173/18 173/19 they've [1] 105/4 thing [8] 29/24 35/9 141/15 146/8 146/8 162/24 163/4 173/17 things [10] 41/1 50/8 91/14 118/14 128/13 146/13 150/11 152/18 183/7 190/5 think [86] 2/4 3/9 3/15 4/14 4/22 5/4 6/25 11/4 11/18 13/7 13/13 14/12 15/10 16/19 17/25 19/24 21/4 26/20 27/15 29/8 29/11 29/14 35/16 36/9 39/11 40/15 40/19 46/24 48/2 51/2 70/7 70/10 71/11 73/6 73/23 76/9 84/19 84/20 85/12 88/17 93/4 95/19 100/2 103/15 103/20 106/18 108/21 112/10 114/15 116/15 116/22 117/6 117/7 117/20 118/24 121/1 125/4 127/18 133/14 133/19 134/7 134/13 134/22 134/24 134/25 135/8 135/17 139/18 142/9 144/15 144/22 145/16 150/5 154/23 154/25 155/3 157/20 160/13 171/3 173/22 178/13 183/4 183/17 184/21 187/6 188/9 third [19] 44/24 45/19 45/20 45/25 46/6 46/10 46/20 47/16 48/9 49/11 49/23 52/8 52/12 65/16 134/18 167/16 188/21 190/11 190/11 third-party [9] 46/6 46/10 46/20 47/16 48/9 49/23 52/8 52/12 188/21 thirdly [6] 10/5 33/2 33/16 52/7 80/7 93/17 |
|----------|---|---|--|---|

| | | | | |
|----------|--|---|--|--|
| T | those [127] 2/2 3/8 4/7 7/1 9/24 13/15 15/15 15/20 17/16 20/3 21/15 22/15 23/6 24/24 25/22 28/11 29/4 29/5 30/18 30/18 31/12 32/19 32/20 32/22 32/23 33/3 33/17 34/15 34/16 35/4 35/18 39/22 39/25 40/2 43/1 43/10 43/10 44/4 44/14 44/15 45/5 45/5 45/14 45/17 48/19 50/1 50/3 50/8 50/14 51/7 55/17 57/21 58/20 58/23 61/22 63/22 63/23 63/25 64/4 65/19 67/14 77/6 77/15 79/7 79/10 80/1 81/20 90/14 90/16 90/17 96/18 96/21 97/10 97/24 98/22 99/8 99/11 101/4 101/7 101/8 103/2 103/5 104/15 105/21 107/10 107/19 107/23 115/8 117/18 118/5 118/11 118/12 119/10 119/17 123/11 126/6 126/24 126/25 128/22 131/17 135/5 139/8 139/12 142/25 143/10 143/25 147/21 149/14 149/23 154/5 154/21 155/6 162/6 167/6 167/7 167/9 168/1 171/12 175/6 176/20 181/9 181/16 188/2 189/12 189/18 189/24 190/20 | ticked [1] 104/16 time [17] 3/1 19/16 19/20 50/5 58/21 64/1 65/23 75/1 78/16 100/21 103/15 113/4 142/9 143/22 169/12 184/2 190/23 timely [2] 170/21 174/16 times [2] 144/9 182/3 today [3] 5/10 13/16 151/15 together [5] 130/9 152/1 166/8 169/24 191/9 told [13] 18/9 101/16 116/25 125/21 127/1 128/19 129/25 145/19 145/21 169/19 169/23 187/25 193/10 tomorrow [4] 56/19 112/25 190/7 193/18 tone [1] 75/17 too [10] 4/20 16/11 41/13 125/1 132/21 136/1 138/17 139/3 158/23 159/7 took [4] 5/18 18/4 62/13 175/17 top [2] 27/5 125/4 topic [6] 41/9 48/13 52/2 161/4 178/14 188/21 topical [1] 152/11 topics [2] 60/17 135/21 touched [1] 134/25 towards [9] 42/4 42/17 75/12 111/22 113/3 159/15 177/1 181/11 181/24 trace [1] 91/14 trained [1] 101/20 training [57] 25/1 35/7 36/2 37/4 37/7 37/11 37/14 37/18 37/23 38/2 38/8 38/13 38/15 38/19 38/24 39/6 39/10 39/18 40/1 40/5 40/11 40/25 51/20 60/15 60/19 105/10 142/8 142/25 143/9 143/18 144/2 144/16 148/6 149/14 150/20 151/4 151/9 151/15 160/18 163/14 163/22 164/2 164/8 169/10 175/15 177/21 178/24 179/3 179/10 179/11 185/2 185/9 185/18 185/21 185/25 187/11 187/13 transcends [1] 121/21 | transcript [4] 5/15 11/24 11/25 12/18 transparency [2] 53/8 53/24 transparently [3] 24/21 32/14 32/16 transpires [1] 179/23 Transport [1] 77/7 Treasury [2] 5/21 5/24 treated [1] 15/25 treatment [2] 160/25 161/16 trial [2] 42/10 130/23 tribunal [1] 137/22 triggers [1] 165/12 trilogy [1] 116/14 true [4] 3/21 4/15 117/10 132/17 truly [2] 14/14 18/2 trumps [1] 96/22 truth [1] 180/16 try [1] 130/25 trying [2] 71/10 111/13 turn [31] 3/24 4/9 11/23 15/13 23/12 23/25 25/14 27/15 30/18 37/2 41/2 48/21 53/3 69/13 80/12 91/21 92/15 106/23 120/15 122/21 130/6 135/10 139/14 141/4 152/11 160/1 163/9 164/11 180/7 190/2 192/5 turned [1] 80/15 turning [1] 63/12 two [31] 2/5 4/7 5/9 17/11 20/2 29/4 29/5 45/2 45/3 45/5 45/5 55/13 67/14 68/6 72/1 81/13 90/14 94/7 95/9 97/1 99/24 104/15 106/25 107/24 114/16 125/4 128/25 129/15 151/25 161/18 181/13 two pages [1] 4/7 types [3] 47/10 185/6 186/18 typically [1] 73/4 typing [1] 29/15 | uncover [1] 76/18 uncovered [1] 180/18 undefined [2] 96/19 96/19 under [47] 2/15 8/19 10/4 10/7 10/18 10/24 18/19 24/16 27/8 27/18 31/24 34/11 35/13 37/22 38/4 40/23 44/12 54/3 58/16 74/16 89/22 97/19 101/24 114/25 115/1 127/11 135/19 136/9 139/17 139/25 149/23 151/4 151/6 155/14 156/21 158/23 164/13 171/20 171/24 172/22 173/24 174/8 181/20 186/9 188/8 188/20 189/14 underlined [2] 38/21 89/25 underlines [1] 122/10 underlying [1] 31/16 undermine [6] 49/10 49/21 51/17 52/1 129/7 192/13 undermined [3] 61/4 120/2 188/12 undermines [1] 176/13 underpinned [1] 167/12 underpins [2] 62/9 125/22 underscored [1] 83/10 understand [11] 3/4 33/1 33/3 36/10 38/24 98/16 111/6 146/22 148/3 173/17 181/14 understanding [7] 5/8 50/20 59/25 109/19 115/24 118/14 189/10 understood [6] 162/19 164/3 173/3 188/10 189/13 189/14 undertake [11] 41/25 43/21 44/7 72/19 72/21 77/6 90/13 124/8 126/13 127/25 168/18 undertaken [20] 9/9 11/7 38/7 38/7 39/25 48/2 53/16 73/4 92/19 114/10 123/21 135/2 153/13 153/24 168/1 168/3 168/7 168/8 168/16 172/9 undertaking [8] 34/17 35/4 42/22 48/5 |
|----------|--|---|--|--|

| U | | | | |
|--|---|--|---|--|
| undertaking... [4] 48/10 69/22 78/10 143/25 undertook [3] 2/1 70/2 76/23 unexamined [1] 191/12 unfair [1] 58/19 unfairly [1] 119/21 unfortunately [1] 167/14 unique [3] 76/13 76/17 87/4 unit [2] 92/21 107/5 University [1] 7/7 unjustified [1] 23/22 unless [2] 64/1 140/4 unlike [1] 104/11 unlikely [2] 130/1 190/17 unsatisfactory [2] 39/7 166/22 unspecified [2] 94/8 96/20 unsuccessfully [1] 131/15 until [15] 37/16 43/7 43/15 57/18 57/23 57/24 58/2 58/23 63/1 106/4 148/13 160/13 162/4 182/4 193/21 unused [14] 41/18 128/12 128/15 128/24 129/10 164/17 165/7 165/17 169/6 171/18 172/23 181/5 181/19 192/13 unusual [1] 108/16 unusually [1] 26/21 up [31] 3/9 7/9 11/23 15/13 25/16 29/1 29/6 37/13 38/17 68/13 69/17 79/15 80/15 84/21 97/1 106/19 114/21 123/23 145/6 145/17 145/22 146/3 146/9 146/23 148/23 149/25 151/17 151/21 156/14 160/4 164/4 update [1] 71/25 updated [6] 134/21 134/23 134/23 145/15 151/25 152/5 updates [1] 152/2 upon [5] 30/19 111/9 120/6 124/23 183/2 us [35] 1/13 20/2 24/3 24/10 24/11 34/22 45/20 63/9 90/4 90/24 93/4 95/11 102/1 103/15 115/13 116/3 116/21 117/1 | 120/16 139/15 140/20 143/7 152/16 154/8 164/15 165/16 168/23 169/25 171/10 171/12 172/17 173/25 176/2 178/1 178/13 use [9] 32/10 65/6 143/20 144/9 144/11 147/15 159/1 169/12 178/24 used [9] 19/7 33/4 57/12 59/11 66/10 158/18 171/21 179/24 193/9 useful [2] 167/10 185/19 user [2] 179/15 179/17 using [3] 47/15 58/10 143/19 usually [2] 16/5 77/2 | view [28] 3/2 38/25 40/24 43/3 53/18 62/13 65/1 68/11 100/16 138/19 138/24 146/8 146/18 149/20 150/17 151/2 151/12 155/10 158/3 162/7 162/17 162/21 165/1 176/22 178/25 179/12 186/24 193/7 views [3] 120/13 161/15 186/7 vintage [1] 116/25 vital [2] 102/3 174/15 vitiate [2] 132/22 133/1 volume [33] 3/8 3/13 4/9 4/23 5/6 5/14 7/13 10/2 10/14 11/5 11/19 12/1 12/6 12/14 12/17 13/8 13/14 13/19 17/22 18/5 18/11 18/14 19/20 22/8 50/23 50/24 51/15 90/22 91/2 124/15 125/3 133/17 179/8 volume 1 [13] 3/8 3/13 5/14 7/13 12/6 12/14 12/17 13/8 13/14 13/19 18/14 19/20 22/8 volume 1A [1] 4/9 volume 2 [12] 5/6 10/14 11/5 17/22 18/11 50/23 50/24 51/15 90/22 91/2 125/3 179/8 volumes [2] 3/5 134/1 | 82/20 84/13 88/11 88/17 89/24 91/19 99/9 107/15 112/17 112/21 120/9 129/3 145/9 147/2 165/12 165/12 167/8 167/11 175/3 186/4 ways [7] 34/14 66/3 66/4 79/17 81/2 89/9 149/13 we [128] 3/8 3/24 4/9 7/12 13/18 13/20 18/13 20/3 20/13 23/12 23/13 23/25 24/9 25/6 25/14 25/15 25/16 27/5 27/9 27/15 29/1 29/6 29/8 29/12 33/20 33/23 37/2 42/12 43/24 45/7 47/18 48/21 53/3 56/9 56/16 56/18 56/25 62/25 69/13 69/17 69/18 70/16 70/22 71/10 71/12 71/13 71/16 71/24 72/3 72/10 73/16 73/22 75/8 75/9 75/11 75/12 77/19 78/1 82/5 83/9 85/3 86/9 86/17 88/16 91/21 92/3 92/15 94/11 95/15 95/17 95/23 96/3 96/11 98/10 99/1 99/2 99/14 103/9 103/17 103/20 105/19 106/15 112/22 116/14 119/5 120/15 122/6 122/21 130/6 130/8 134/25 135/10 135/16 136/2 148/12 148/23 149/8 152/11 152/23 154/8 154/23 155/3 155/18 156/5 156/19 157/20 157/21 157/24 158/14 160/1 163/9 163/24 163/24 164/1 164/3 164/11 169/24 170/7 173/22 174/22 177/5 180/7 182/6 190/2 191/3 192/4 192/4 193/3 we'd [1] 106/18 we'll [19] 4/5 19/23 20/18 27/10 27/12 29/11 35/7 43/12 63/2 70/20 70/22 95/18 105/19 112/21 125/2 141/19 154/7 154/25 162/2 we're [12] 5/9 24/10 44/1 63/11 68/10 76/2 116/16 116/19 128/8 128/21 184/3 190/6 we've [7] 4/18 25/17 58/11 86/15 103/15 | 149/2 165/13 website [4] 19/14 19/14 21/11 91/14 well [34] 18/6 22/15 22/20 30/20 30/24 31/19 38/23 38/25 39/8 48/20 50/7 60/4 62/7 75/21 81/16 94/8 100/24 101/3 107/16 110/14 119/18 124/10 131/5 131/6 132/21 135/24 155/22 163/23 171/1 172/20 180/16 180/25 186/2 187/2 went [3] 131/4 141/14 186/23 were [149] 5/18 5/21 7/15 7/16 7/21 8/4 8/10 8/19 9/15 9/16 10/4 10/18 11/18 12/19 12/25 13/7 16/8 16/10 21/14 22/15 24/20 30/3 30/23 30/24 30/25 32/5 35/5 35/6 38/12 38/19 41/19 41/20 43/21 44/3 44/4 44/5 44/8 44/16 44/18 45/14 48/4 48/6 48/7 48/9 50/3 50/4 50/13 50/15 50/21 53/15 55/24 56/3 56/21 59/14 60/6 60/15 62/20 67/7 68/15 68/20 69/6 69/7 70/10 70/11 71/10 75/9 77/8 79/10 81/4 84/15 90/14 91/16 97/18 97/23 99/10 105/6 105/7 105/9 107/18 107/23 110/12 113/25 118/11 123/20 124/10 124/16 124/17 126/17 126/18 126/24 127/1 127/3 128/13 130/16 133/12 133/15 134/5 134/8 134/17 134/21 134/23 135/5 135/6 138/20 138/25 139/13 141/13 141/13 141/16 143/3 143/4 143/19 143/20 143/23 145/2 145/7 145/19 145/19 145/20 147/20 149/4 149/8 149/23 150/12 150/17 152/23 153/2 156/1 158/8 161/13 161/13 161/18 163/23 164/22 166/20 167/7 175/22 176/23 178/8 183/12 185/7 185/10 186/22 186/23 187/1 188/11 188/20 189/14 189/15 weren't [4] 22/24 |

| | | | | |
|-----------------------------|-----------------------------|------------------------------|------------------------------|------------------------------|
| W | 70/23 71/1 79/25 | 72/16 74/7 74/15 75/8 | whose [1] 13/13 | working [2] 12/23 |
| weren't... [3] 33/18 | 105/19 112/22 113/16 | 75/11 76/21 78/19 | why [14] 9/23 31/11 | 70/17 |
| 180/1 180/4 | 122/12 128/13 138/7 | 79/15 80/3 85/23 | 36/14 37/18 40/3 88/8 | worn [1] 63/25 |
| Westminster [1] | 138/14 139/7 140/10 | 86/11 87/20 91/13 | 125/18 134/22 149/7 | worth [1] 29/18 |
| 131/24 | 143/19 144/10 145/14 | 92/22 95/15 96/21 | 154/5 155/13 173/18 | worthy [1] 120/4 |
| what [160] 6/19 7/25 | 146/14 146/23 149/18 | 96/22 96/23 97/18 | 185/17 193/13 | would [135] 10/7 |
| 9/21 9/22 9/24 16/3 | 151/1 151/24 152/4 | 98/2 98/4 98/25 99/9 | widely [1] 6/25 | 14/6 14/15 14/24 |
| 16/9 17/9 17/16 18/9 | 159/18 173/15 175/16 | 104/16 106/24 107/18 | wider [7] 48/14 105/9 | 15/20 21/7 21/20 |
| 21/10 22/9 25/4 25/17 | 177/18 | 108/6 108/13 108/14 | 118/13 119/13 129/11 | 21/24 22/1 23/13 |
| 28/9 29/2 31/3 31/20 | where [55] 7/23 8/13 | 108/15 111/5 112/10 | 153/2 169/21 | 30/15 30/16 30/20 |
| 32/16 32/18 32/23 | 10/25 18/8 19/18 | 112/22 114/19 115/15 | will [59] 3/9 35/15 | 31/2 33/9 33/12 33/16 |
| 35/3 35/12 37/7 40/22 | 24/10 29/19 46/10 | 115/19 117/6 118/4 | 36/1 36/3 36/5 36/6 | 33/25 36/19 37/12 |
| 42/5 43/10 44/2 44/14 | 56/22 57/5 57/17 59/4 | 119/22 119/24 120/10 | 36/8 41/1 42/6 45/7 | 37/18 41/23 45/15 |
| 44/15 45/20 46/25 | 62/11 65/3 67/5 68/14 | 121/23 124/19 125/22 | 46/21 47/4 49/11 50/5 | 45/25 46/3 46/6 46/22 |
| 48/8 50/15 50/24 51/4 | 74/14 76/22 83/23 | 126/24 128/2 128/15 | 50/22 53/2 81/20 | 47/17 47/25 48/1 |
| 51/5 51/8 51/10 51/13 | 85/16 88/18 95/25 | 129/6 129/7 129/11 | 92/18 92/22 93/10 | 48/12 54/12 56/7 |
| 52/16 52/19 52/21 | 97/24 99/3 99/8 99/15 | 129/12 131/25 132/9 | 94/17 94/20 94/25 | 58/18 60/2 62/5 64/5 |
| 56/19 59/19 61/6 61/8 | 104/7 107/10 108/17 | 133/1 133/23 136/5 | 95/3 96/7 96/13 98/1 | 64/18 65/16 65/19 |
| 63/17 71/21 73/6 | 112/12 114/18 115/7 | 136/6 136/9 136/10 | 98/14 98/17 99/15 | 66/1 66/20 68/6 69/11 |
| 73/12 74/25 76/14 | 125/5 126/16 126/18 | 141/8 142/14 143/2 | 99/19 101/17 104/4 | 73/1 73/4 77/2 77/16 |
| 79/8 79/9 79/13 83/7 | 127/4 127/10 128/9 | 144/19 144/20 145/20 | 107/3 109/4 109/5 | 78/23 80/9 83/11 89/6 |
| 83/10 83/10 85/17 | 129/22 130/16 130/22 | 146/22 147/16 147/24 | 110/5 110/8 111/8 | 89/11 89/15 90/11 |
| 89/15 90/22 91/7 | 130/24 131/9 148/24 | 147/25 148/1 148/1 | 114/24 128/11 130/22 | 97/21 99/1 99/13 |
| 91/24 94/7 96/1 96/23 | 149/11 154/15 154/18 | 150/10 153/7 153/8 | 132/4 132/13 144/4 | 101/6 105/3 105/6 |
| 97/7 97/22 97/22 98/4 | 158/12 160/2 162/21 | 153/10 154/9 156/1 | 155/18 156/11 159/16 | 106/3 107/20 107/22 |
| 98/16 98/19 99/24 | 175/10 178/22 179/22 | 157/3 157/3 158/8 | 162/13 166/17 175/2 | 108/1 108/6 109/13 |
| 99/25 101/14 102/15 | 182/12 189/19 | 158/25 163/15 163/15 | 175/4 177/5 182/11 | 109/15 109/18 112/19 |
| 105/6 105/13 105/18 | whereas [4] 53/9 | 168/5 169/1 169/21 | 184/7 184/11 185/19 | 113/19 122/23 123/4 |
| 108/20 110/12 112/9 | 77/10 104/22 161/12 | 170/11 170/16 170/17 | 193/12 193/14 | 123/9 123/11 123/25 |
| 118/9 118/11 118/12 | whether [60] 5/16 | 172/2 172/13 173/6 | win [1] 65/16 | 124/6 124/18 124/20 |
| 124/6 124/16 125/10 | 7/22 10/6 10/13 10/19 | 175/2 175/5 175/6 | winning [1] 118/10 | 125/12 125/25 126/6 |
| 127/1 128/20 128/25 | 10/21 14/13 20/19 | 175/12 176/12 176/13 | wisdom [1] 89/12 | 128/14 128/19 129/12 |
| 134/23 139/15 139/16 | 22/25 42/4 50/9 51/4 | 177/5 177/13 180/7 | within [22] 20/21 | 130/2 130/4 133/20 |
| 140/13 140/13 141/3 | 54/25 55/15 57/4 58/9 | 180/10 182/14 183/2 | 35/2 36/12 55/13 | 138/9 138/19 138/24 |
| 141/18 141/25 143/13 | 60/1 60/2 62/15 65/9 | 183/14 184/8 184/14 | 55/24 60/7 68/23 84/8 | 139/10 139/10 140/10 |
| 143/15 143/15 143/18 | 65/13 79/10 79/14 | 184/18 185/3 186/20 | 88/25 91/10 92/12 | 140/12 141/2 146/2 |
| 144/18 145/1 145/3 | 86/21 90/4 90/24 | 187/25 190/3 191/4 | 94/18 95/10 96/14 | 148/3 148/24 149/21 |
| 146/6 147/1 147/10 | 92/11 102/16 107/11 | while [1] 12/23 | 96/18 97/15 112/14 | 150/23 150/23 151/10 |
| 149/15 151/3 152/16 | 108/2 110/5 110/10 | whilst [6] 28/1 53/14 | 113/9 114/18 134/16 | 151/11 151/16 151/23 |
| 152/23 153/1 153/13 | 111/18 113/13 116/5 | 92/21 97/5 132/24 | 138/12 142/6 | 151/23 153/20 158/8 |
| 156/3 156/4 159/16 | 124/11 130/3 130/13 | 181/7 | without [11] 34/13 | 167/9 168/6 168/15 |
| 159/18 160/14 161/9 | 132/1 133/12 133/18 | who [50] 28/13 28/18 | 94/1 96/21 103/12 | 169/23 172/25 173/3 |
| 161/10 161/21 162/22 | 134/4 134/8 138/3 | 32/19 33/3 35/4 40/4 | 141/9 146/25 165/21 | 173/9 173/13 173/21 |
| 163/19 163/24 164/7 | 154/21 158/3 158/5 | 45/14 46/1 51/9 54/19 | 168/16 176/17 176/18 | 176/22 178/23 181/14 |
| 164/9 166/19 167/3 | 159/15 165/2 173/10 | 56/22 64/9 64/23 | 179/18 | 183/13 185/22 187/10 |
| 167/7 168/12 168/17 | 177/9 178/23 179/3 | 64/24 66/24 67/1 67/8 | witness [5] 4/18 7/23 | 187/10 187/13 187/14 |
| 168/20 172/21 173/14 | 181/24 184/13 187/14 | 76/10 88/25 90/20 | 9/3 63/19 120/1 | 187/15 187/17 187/19 |
| 173/18 176/18 177/3 | 189/3 189/15 189/20 | 91/3 91/15 91/16 93/2 | won't [5] 52/24 52/25 | 189/1 189/13 189/17 |
| 177/23 181/2 181/12 | 190/18 | 93/10 93/17 93/20 | 70/25 133/1 193/10 | 189/23 193/15 |
| 181/14 182/16 182/23 | which [162] 4/2 4/10 | 101/19 107/17 109/11 | wonder [1] 148/12 | wouldn't [9] 52/23 |
| 182/25 183/4 183/10 | 6/20 9/5 9/6 9/11 12/4 | 109/15 113/19 115/19 | word [1] 159/2 | 60/19 105/8 105/12 |
| 183/12 186/7 186/13 | 14/8 14/17 15/6 15/10 | 121/8 121/14 131/17 | wording [7] 87/8 | 108/11 128/17 151/18 |
| 186/15 186/25 187/13 | 16/7 16/21 18/24 | 134/23 137/4 137/12 | 158/14 165/5 177/2 | 185/20 188/25 |
| 188/5 190/1 192/10 | 20/16 22/8 26/3 27/1 | 141/16 143/17 145/20 | 191/17 191/23 192/22 | wound [1] 90/13 |
| 192/24 193/15 | 28/23 29/23 30/14 | 147/18 148/8 157/6 | words [6] 154/18 | written [9] 13/2 22/4 |
| what's [10] 35/22 | 30/25 31/11 33/19 | 157/12 158/1 166/3 | 154/21 155/6 176/20 | 23/1 46/25 81/8 81/25 |
| 94/4 96/16 97/13 99/5 | 34/14 35/2 35/19 | 186/14 193/14 | 176/23 193/9 | 147/5 147/24 148/1 |
| 100/25 102/13 138/1 | 36/14 37/5 37/6 37/9 | who's [1] 102/23 | work [16] 3/1 6/4 | wrong [9] 41/1 70/21 |
| 147/3 178/17 | 37/20 38/5 41/14 | whoever [2] 31/21 | 15/18 17/7 32/9 35/4 | 96/16 97/8 99/25 |
| when [36] 9/4 9/18 | 43/19 44/5 45/24 | 93/14 | 40/19 44/17 55/17 | 100/25 102/13 162/12 |
| 29/25 36/2 37/24 | 55/14 55/23 56/3 | whole [2] 67/25 | 68/1 70/1 100/12 | 179/17 |
| 43/15 58/11 61/8 | 56/12 56/24 57/14 | 105/22 | 135/2 150/22 166/7 | wrote [2] 19/20 |
| 61/10 66/18 66/19 | 58/20 59/8 59/20 | whom [3] 92/25 | 179/13 | 142/10 |
| | 63/25 64/13 71/10 | 143/11 143/12 | workbook [1] 142/12 | |

| | | | | |
|--|---|--|--|--|
| <p>Y</p> <p>year [7] 4/25 18/3 21/16 44/5 76/3 76/4 117/8</p> <p>years [8] 1/23 2/2 15/16 17/21 21/8 67/17 104/22 172/13</p> <p>yes [290]</p> <p>yet [1] 3/3</p> <p>you [434]</p> <p>you'd [1] 144/2</p> <p>you'll [5] 10/15 26/23 27/2 29/1 154/18</p> <p>you're [23] 4/25 13/16 17/20 17/24 19/6 25/10 70/17 79/13 85/4 85/11 91/24 94/4 95/16 101/1 122/14 135/17 136/17 146/19 150/14 165/9 167/18 172/12 177/4</p> <p>you've [24] 1/17 3/10 5/4 5/5 10/13 17/11 26/24 39/11 41/8 50/24 66/10 89/15 90/22 100/21 104/19 127/12 133/9 136/13 171/3 171/4 171/12 182/2 182/9 184/17</p> <p>your [137] 1/6 1/13 2/5 2/20 3/4 3/5 3/13 3/22 4/11 4/16 4/24 4/24 5/6 5/12 5/13 5/14 6/3 7/12 7/13 8/1 8/8 9/2 9/10 10/14 11/22 12/6 12/8 12/14 12/17 13/8 13/11 13/14 13/16 14/12 15/12 15/15 16/11 16/15 17/22 18/14 21/18 21/21 23/9 23/25 24/3 24/4 24/6 24/6 24/10 25/14 26/25 28/21 29/25 30/6 32/11 33/21 33/24 34/22 35/24 36/21 40/13 42/18 46/19 46/22 47/3 47/17 47/25 49/25 50/25 51/1 51/18 52/20 52/21 53/25 55/6 61/8 62/25 65/8 66/14 68/10 69/2 69/15 69/20 71/22 73/13 76/17 77/19 79/1 80/14 82/6 82/8 85/3 85/5 87/11 91/23 92/4 95/11 101/6 102/22 103/9 103/11 103/16 106/16 110/22 114/3 115/17 116/3 116/16 119/3 130/7</p> | <p>135/14 135/15 138/19 138/24 139/18 141/6 141/6 142/10 143/6 144/14 151/25 152/14 155/1 156/5 160/1 160/5 162/11 162/12 162/14 164/12 176/1 180/11 186/7 190/2 191/3 193/8 193/11</p> <p>yourself [1] 11/25</p> <p>Youth [1] 11/15</p> <hr/> <p>Z</p> <p>Zinga [2] 27/24 120/24</p> | | | |
|--|---|--|--|--|