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## **POST OFFICE LTD**

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### **GENERAL REVIEW**

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#### **A. INTRODUCTION**

1. The Post Office Ltd ("POL") has commissioned me to review past practice and make recommendations as to the future approach to the conduct of prosecutions.
  
2. Terms of Reference received from Bond Dickinson LLP ("BD"), solicitors advising POL, invited from me the following:

#### **Instructions & Output**

##### **A. Written Reports**

- 1 To prepare by 5 August 2013 an interim review of Cartwright King's current review process (as reflected principally in CK's document entitled "Draft Paragraphs for Insertion into Reply by CCRC" and to a lesser extent in Simon Clarke's Advice of 15 July 2013) (to be a non-publishable report as legally privileged and confidential).
  
- 2 To review, and advise POL in writing on or by a date to be agreed (but currently intended to be no later than 15 October 2013) – (also to be a non-publishable report as legally privileged and confidential) on:
  - (a) Its strategy and process for reviewing past and current criminal prosecutions in light of Second Sight's Interim Report of 8 July

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2013 and/or on the role of *Dr Gareth Jenkins (sic)*<sup>1</sup> and his impact on any possible appeals;

- (b) Its response to the CCRC, and any subsequent action required by it in dealing with, or responding to, any actual or potential appeals and/or in reaching the appropriate resolution of any CCRC investigation, and to advise POL about any further steps that may be required as regards any actual or potential appeals against conviction; and
- (c) The identification of any flaws in the process of, or from the evidence arising from, the review of a statistically significant number of past prosecutions in which Horizon has been an issue in the proceedings.

**B. Meeting/Reporting to the Post Office Audit Committee / Board**

- 1 At the first available opportunity to:
  - (i) Explain the background to the criminal appeal process including appeals, and how you intend to fulfil your remit, and
  - (ii) On the efficacy of the process set out in A(1) above.
- 2 On or by a date to be agreed (but currently intended to be no later than 15 October 2013) to report on the efficacy of past prosecutions including the preparation and conduct of past prosecutions set out in A(2) above.

**Process**

- 1 To meet with Post Office's criminal law team to gather further background and contextual information.
- 2 Refine the scope of and finalise these Terms of Reference.
- 3 To fully understand the Horizon system – reviewing training and materials.

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<sup>1</sup> I have found Gareth Jenkins frequently referred to as "Doctor" e.g. in Simon Clarke's Advice of 15 July 2013 and elsewhere, and therefore I had assumed up to now that he was appropriately referred to as "Doctor Jenkins". However, on closer analysis, he does not hold himself out as having a doctorate, and when he gave evidence in the Misra trial in late 2010 (Transcript of 14 October 2010 at pages 2F-3F), he did not hold himself out in evidence as having a doctorate either, and so I have assumed he is not entitled to use of the title "Doctor"

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- 4 To meet and interview as a fact-finding exercise anyone else you or POL consider relevant to the process of the investigation and commencement of prosecutions.
- 5 To review a statistically significant number of past prosecutions in which Horizon was an issue.

3. My Interim Review document of CK's current review process, dated 2 August 2013,<sup>2</sup> was submitted to POL through BD by email of the same date. In the Interim Review document, I made a series of interim recommendations to which Cartwright King ("CK") responded in writing on 13 August 2013.

4. Regarding the process by which I have been asked to conduct my review, and by reference to each in the above process list in chronological order:

Point 5: on 6 September 2013, I received a number of files from BD containing material in advance of the meeting on 9 September 2013. Among them there was a file containing 24 full case reviews performed by counsel employed by CK of cases passing the initial sift process, which I shall return to below. (On 30 September 2013, I received 6 more full reviews, and on 9 October 2013 I received one more by email.)

My Terms of Reference do not require me to review CK's decision-making or the individual judgments about the reviewed cases, merely to review their review process.

Point 1: on 9 September 2013, I met with POL (Susan Crichton, Rodric Williams and Jarnail Singh), CK (Simon Clarke, Harry Bowyer and Martin Smith) and BD (Gavin Matthews and Andy Parsons) at my chambers at 2 Bedford Row, London, WC1.

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<sup>2</sup> Section A(1) of the Terms of Reference

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Point 3: on 19 September 2013, I attended Guildford Classroom Training Office (“CTO”) where I received a day’s training on the Horizon system. Chris Gilding (Network Support Team Leader) trained me. Andy Holt (Business Relationship Manager) was on hand to assist and answer questions.

Point 2: on 23 September 2013, I received from Gavin Matthews of BD the final Terms of Reference by email, which I reviewed and agreed by return email the following day, having on 2 August 2013 refined an earlier draft in writing.

Point 4: at the time of writing I have not identified (or had identified to me) any other persons to meet and interview as part of a fact-finding exercise as relevant to the process of the investigation and commencement of prosecutions.

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**B. EXECUTIVE SUMMARY**

5. The following is a summary of the main findings and recommendations in the body of this review.

- (i) The 1 January 2010 start date for Cartwright King's review of Horizon Online disclosure is logical, proportionate and practicable in light of all the known circumstances.
- (ii) The scope of the review properly takes account, not just of those cases in which defendants have been convicted following a trial, but also where they have pleaded guilty, as well as where disclosure might have been material to the sentencing exercise.
- (iii) The scope of the review, which is to consider those cases, both past and present, in which disclosure of the Second Sight and Helen Rose reports should be made, appropriately also considers in past conviction cases the stance Post Office Ltd might take to any application for permission to appeal, or to any substantive appeal, should permission to appeal be granted, the question of the "safety" of the conviction being inexorably linked to the question of disclosure.
- (iv) I advise that individual sift reviews and full reviews should not be undertaken by anyone who was professionally involved at any stage with the case being sifted or reviewed, in order to ensure and preserve independence and objectivity.
- (v) The statistical position of the number of sifts and reviews presents a confused picture, which needs to be rectified in order to ensure an audit trail of reviews that is robust.
- (vi) The Wednesday hub conference call meetings are a sensible next step, and may benefit further from consideration being given to the establishment of a dedicated mailbox for the sharing of information among the participants at the meetings, as well as from the

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identification of a person who is nominated to take responsibility for its management.

(vii) Should any new information emanating from the hub meetings be considered to affect, or possibly affect, any previously sifted or reviewed cases, consideration will have to be given to broadening the criteria for review, and to re-sifting and re-reviewing cases already considered.

(viii) Any future successful defence challenge in any Horizon Online-based case will have to be considered for future possible general disclosure.

(ix) Cartwright King should exercise supervisory control over the dissemination of information and material during the mediation process, and should remain alive to the possibility of having to make case-specific disclosure in the course of that process, or even making additional general disclosure in the course of its current review depending on the nature of any new information.

(x) I agree that Gareth Jenkins is tainted and his position as an expert witness is untenable. Thus, a new expert should be identified as soon as is practicable.

(xi) Post Office Ltd has responded to the Criminal Cases Review Commission appropriately in my opinion, but should the Commission continue to show interest in these cases there might have to come a time when Post Office Ltd considers sharing Cartwright King's review findings with the Commission, and cooperating with the Commission.

(xii) Overall, my view, as expressed in my Interim Review document is that Cartwright King's review is fundamentally sound, and I have not detected any systemic or fundamental flaws in the review process, or in the evidence arising from it, but because the review is a continuing process, and Post Office Ltd has a continuing duty of disclosure (not only in cases subject to the Criminal Procedure and

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Investigations Act 1996 but in practice should also adopt a similar or identical approach to past conviction cases falling within the current review), Post Office Ltd and Cartwright King must be prepared to keep under review, and reconsider, past case reviews and disclosure decisions.

- (xiii) Where, as part of the review process, Cartwright King considers the stance that should be adopted in any possible appeal process, they should not adopt any over-rigid or robust approach, and must remain alive to changing circumstances and the need always to reconsider their stance.
- (xiv) Any new or revised Post Office Ltd prosecution policy document must consider the retention and treatment of case files.
- (xv) Post Office Ltd must ensure that Fujitsu Services Ltd retains all Horizon data.
- (xvi) There should be an analysis for reconciliation purposes of all Second Sight's spot reviews with those Cartwright King cases that have been subject to sift and full review.
- (xvii) If there is any Horizon-related civil litigation between any present or former sub-postmaster and Post Office Ltd, Cartwright King should be given complete visibility of the litigation in case this should affect any decisions they are making about criminal cases.

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**C. BASIS OF THE REVIEW**

6. Before coming to the focal point of this review document, it is necessary, simply by way of introduction, for me to deal with the following relevant discrete topics:

- (i) POL's prosecution role;
- (ii) The Horizon system;
- (iii) Horizon training and support;
- (iv) Second Sight's inquiry;
- (v) Gareth Jenkins; and
- (vi) The Helen Rose report.

**(i) POL's prosecution role**

7. On 1 April 2012, the shares in POL were transferred from the Royal Mail Group Ltd ("RMG") to Royal Mail Holdings plc ("RMH"), since which time POL has had an existence independent of RMG. Now, POL is a wholly owned subsidiary of RMH. The Secretary of State for Business, Innovation and Skills ("BIS") holds a special share in POL. RMH and BIS, through the Shareholder Executive ("ShEx"), have however no involvement in POL's day-to-day operations.<sup>3</sup>

8. Prior to POL's separation from RMG, RMG conducted the prosecution of criminal offences allegedly committed by sub-postmasters and/or staff in their employ. Following the separation out of POL's business from RMG, POL has assumed and retained the prosecution function hitherto enjoyed by RMG prior to separation, although I am told RMG still retains a prosecution function.

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<sup>3</sup> Annual Reports and Financial Statements 2012-2013, page 42

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9. POL is the only commercial organisation (albeit Government owned) I can think of (apart from RMG who retains a residual prosecuting function) that has a prosecution role, and it is, to that extent, exceptional if not unique. Separate Terms of Reference invite me to consider the future of POL's prosecutorial role.
10. In England and Wales POL's prosecutorial role is exercised by POL's in-house legal department and through the instruction of CK, CK's in-house advocates as well as by external counsel and agents. Prosecutions are conducted both in the Magistrates' Courts and the Crown Courts, and appeals are prosecuted in the Court of Appeal.
11. In Northern Ireland the Public Prosecution Service ("PPS") prosecutes POL cases albeit with input and assistance from POL investigators. In Scotland it is the Procurator Fiscal who prosecutes POL cases. Representatives of CK were in Scotland the week before we met in conference in order to discuss with the Procurator Fiscal's office the recent interim findings by Second Sight Support Services Ltd ("SS"). Currently, cases stand adjourned in Scotland, where, as I understand it, POL has been granted special agency status.
12. I understood in our meeting that CK had not yet spoken to the PPS in Northern Ireland. CK acknowledged the need for them to visit the PPS. However, to date there had been only two prosecutions in Northern Ireland, neither of which involved allegations surrounding Horizon.

**(ii) The Horizon system**

13. Horizon is the name given to the computer system provided to POL under contract by Fujitsu Services Ltd ("FSL"), formerly ICL. It is the system used in all POL Crown offices, sub-post offices and agencies.

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14. I take the brief history of the Horizon contract with POL and the Horizon system from part of the content of a witness statement prepared by the Horizon expert Gareth Jenkins dated 15 January 2013. The witness statement was prepared for the case of Khayyam Ishaq, the case file of which I have read.
15. Much, perhaps all, of the parts of the witness statement I quote from below appears based upon the content of two documents entitled “Horizon Data Integrity” dated 2 October 2009 and “Horizon Data Integrity for Post Office Ltd” dated 2 April 2012, which are marked respectively as Mr Jenkins’ exhibits GIJ/1 and 2, and are exhibited to his 15 January 2013 statement.<sup>4</sup>
16. Although there are issues about Mr Jenkins’ independence and objectivity (with which I deal below), I am content to rely on Mr Jenkins’ witness statements (based as they appear to be in whole or in part on the Horizon integrity reports) for these purposes as providing a reasonably adequate, and almost certainly accurate, summary of the Horizon system.
17. According to Mr Jenkins, FSL was originally awarded a contract in 1996 to provide a Horizon system to POL. The most recent rollout of Horizon was, says Mr Jenkins, Horizon Online (internally known as HNG-X) in 2010, which was, according to Mr Jenkins (who was one of its architects), “a complete re-implementation of Horizon of the business functionality at the counter and utilised a central database to hold details of all transactions rather than the MessageStore used by the original Horizon system.”
18. Mr Jenkins says that all POL branches migrated from the original Horizon system to Horizon Online between January and September 2010. Again, according to Mr Jenkins, “The Horizon system was designed to store all data

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<sup>4</sup> At page 11

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locally on the counter's hard disk in what is referred to as the MessageStore. Once the data has been successfully stored there it is then replicated (copied) to the hard disks of any other counters in the branch (and in the case of a single counter branch to the additional external storage on the single counter). Data is also passed on from the gateway counter to the Horizon data centre using similar mechanisms where it is stored in the MessageStore.”

19. Mr Jenkins then describes how the replication process is designed to capture data that fails to copy immediately (for instance due to a failure of the local IT network in the branch or another counter being switched off or the branch being disconnected from the data centre). In such a case further attempts are made to replicate the data at regular intervals until it is finally copied successfully. Once the data reaches the data centre a further copy is taken by the “audit agent”, which writes it to an audit file, which is added into the audit trail where it is available for retrieval for up to 7 years. Moreover, the data in the audit trail is “sealed” with a secure checksum (“CRC”) that is held separately to ensure that it has not been tampered with or corrupted.
20. Mr Jenkins adds that every record written to the transaction log has a unique incrementing sequence number so it is possible to detect if any transaction records have been lost, and while customer sessions are in progress, transactions for that customer session are normally held in the computer's memory (known as the “stack”) until the session is settled. When that happens all the transaction details (including method of payment) are written to the local hard disk and replicated (as described before).
21. Any failures to write to the hard disk (after appropriate retries) will result in the counter failing and needing to be restarted, and so any such failures would be visible to the user.

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22. Where data is retrieved for audit enquiries a number of checks are carried out: (1) that the audit files have not been tampered with; (2) the individual transactions have their CRCs checked to ensure they have not been corrupted; and (3) a check is made that no records are missing.
23. Mr Jenkins then deals with Horizon Online data flows, describing how the system is designed to store all data in an online database known as the branch database (“**BRDB**”). Transactions are carried out locally on counters, and a basket is built up during a customer session. Once the transactions have been processed, so that the value of the basket is zero, the entire basket is sent to the data centre as a “branch access layer” (“**BAL**”) message where the BAL processes the message and all the accounting lines are recorded and committed to the BRDB as part of a single Oracle commit (i.e. all or none of the transactions in the basket are written). Once successfully committed, a response is returned to the counter indicating the transactions have been successfully committed, which then allows any receipt to be printed.
24. The Oracle commit also includes an audit of the data originally transmitted from the counter to the BRBD, which is the record used to provide extracts of transactions used for litigation support.
25. Any auditable message from the counter is stored in the “audit table” (known as the “message journal”) in the BRBD. After midnight, files from the previous day are copied from the BRBD to a number of serial files, which, following certain checks, are then copied to an audit system where they are digitally sealed and held for 7 years for retrieval purposes. The audit record may also include application events at the counter since the last auditable message was sent to the data centre; data regarding other major activities affecting the branch are also audited.

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26. The transactions in a basket are constructed using double-entry bookkeeping meaning that in addition to accounting lines relating to business transactions, separate accounting lines are generated also for the tender items such as cash or credit or debit cards, resulting in all accounting lines in the basket totalling zero. If the net value of all accounting lines does not total zero when the basket is written to the BRBD an alert is raised and the basket is discarded and an error response sent to the counter.

**(iii) Horizon training and support**

27. Because Horizon training is one issue that has been raised I requested sight of Horizon training materials. However, what I was provided with was information and materials regarding the training currently received on Horizon, and, because it is current, and may have been revised given recent events, it is important to exercise a degree of caution about it, as the materials may not reflect the precise nature and extent of the training that was offered to those who have fallen within SS's review, or fall within CK's review. Consequently, I cannot conclude that the training and follow-up support detailed below is necessarily reflective of that provided to those falling within the review period.

28. According to the materials I have been provided with, the training given to a Horizon operator depends on the operator's current level of experience and the nature of the post office to be run. I have been provided with a number of so-called "Training Offers", which show, for instance, the training offered to a new post office "local" operator,<sup>5</sup> involving total training and/or support of between 15 and 17 days, in broad terms, comprising:

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<sup>5</sup> I understand from Andy Holt that a "local" post office is a smaller branch not offering a full range of products as distinct from a "main" post office, which might offer a full range of goods. I am told by Andy Holt that training offers 1 and 2 are relevant to new sub-postmasters

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- Distance learning in the operator or the operator's staff's own time prior to transfer or conversion,<sup>6</sup> including a written foundation module;
- CTO for classroom training;
- On-site induction of 2 x 3 hour sessions for all members of staff;
- On-site training and support lasts from 6 days to 8 days depending on the number of members of staff.

29. The support thereafter consists of:

- Follow-up schedule at a balance one week following the on-site training;
- Post-transfer call from a Field Team Leader within 1-2 weeks of the transfer for feedback on the Field Support Advisor or on the training and support;
- Post-transfer visits after 1 month and 3 months, respectively;
- Post-transfer audit 6-9 months (the trainee operator is not informed of this).

30. The new entrant will receive a variety of hand-outs as part of the classroom training, covering subjects taught during the course attended. Copies of such hand-outs sent to me include "Horizon Cash Declarations – Top Tips Guide", "Daily Procedures and Horizon Reports", "Priority Service Despatch", and "Balance Procedure". New operators also receive a list of useful telephone numbers including the number for the Network Business Support Centre ("NBSC") and the options from the main menu, which includes, I note, "Option 1" for Horizon Online system queries or fault reporting.

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<sup>6</sup> Andy Holt has informed me that "transfer" and "conversion" are terms relating to moving branches on to the new models presently being introduced by POL, and it is before or after transfer or conversion that progress calls are made; I am told that although this is a fairly new addition to the formal support process, many Field Support Advisers would contact the agent under the former regime

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31. A Performance Standards Assessment (“**PSA**”), also copied to me, is a record of what the new entrant has been trained on and how the individual is performing. It is begun during classroom training (or on-site if no classroom training is given) and is completed during the on-site training. An action plan is produced, which is discussed and agreed with the new entrant. The new entrant also receives a copy of it.

**(iv) Second Sight’s inquiry**

32. Following discussions in June and July 2012 between POL senior management, Rt Hon James Arbuthnot MP and Alan Bates and Kay Linnell representing the Justice for Sub-postmasters Alliance (“**JFSA**”), SS was engaged to perform a review into alleged problems with POL’s Horizon system.

33. SS’s remit was “to consider and to advise on whether there [was] any systemic issue and/or concerns with the “Horizon” system, including training and support processes …”.<sup>7</sup> For this purpose, SS took POL’s Information Manager’s definition of “Horizon” as embracing the software, computer hardware and communications equipment installed in branch and central data centres, as well as software used to control and monitor the systems, and testing and training systems.<sup>8</sup> The inquiry was open to sub-postmasters, POL employees, contractors and agency staff; it was therefore open to all groups.<sup>9</sup>

34. SS had been asked to investigate 47 cases submitted to it either by James Arbuthnot MP or by the JFSA.<sup>10</sup> All were said to be highly critical of the

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<sup>7</sup> Appendix to SS report (“The Second Sight Inquiry – the Detail”, page 1)

<sup>8</sup> SS report paragraph 1.6

<sup>9</sup> See page 1 of “Raising Concerns with Horizon”, annexed to the report

<sup>10</sup> SS report paragraphs 2.1-2.3: 29 cases were submitted through James Arbuthnot MP’s constituency office and 18 cases of a total of 60 were submitted via the JFSA, which were considered suitable for investigation with a cut-off date of 28 February 2013 (“Raising Concerns with Horizon”, paragraph (B)2)

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Horizon system operated by POL, and the way in which POL had dealt with the matters reported.<sup>11</sup>

35. By way of context, in its report, SS observed that the Horizon system had approximately 68,000 users, processing over 6 million transactions a day. The whole population of over 11,800 branches had been notified about SS's proposed investigation resulting in only a further 14 cases being accepted for notification.<sup>12</sup> I have also received a PowerPoint presentation, entitled "The Post Office – An Insight", which provides invaluable insight into the scale of Horizon transactions. One of the slides states that Horizon handles 47 million transactions a week, 22 million banking transactions every month, and 2.5 billion transactions a year with a cash value of £100 billion. Given the scale of the transactions Horizon is handling, it seems to me that the complaints and issues around Horizon are comparatively small.
36. The provisional result of the inquiry resulted in SS's Interim Report together with four sample spot reviews,<sup>13</sup> which were annexed to the main report, an accompanying document entitled "Raising Concerns with Horizon" (a document setting out the steps to be taken by current or past sub-postmasters who felt concerned or affected by issues with Horizon), and annexed to that was a document setting out further detail of SS's inquiry.
37. SS's interim report, which is dated 8 July 2013, was posted to POL's website the same day at <http://www.postoffice.co.uk/post-office-statement-horizon> and is accompanied by a statement from POL's Chief Executive, Paula Vennells.

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<sup>11</sup> SS report paragraph 1.10

<sup>12</sup> SS report paragraph 1.11

<sup>13</sup> Spot reviews 1, 5, 21 and 22

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38. The central conclusion to result from SS's review was that there was "no evidence of system wide (systemic) problems with the Horizon software."<sup>14</sup> The report identified only two "defects" with Horizon Online, which, according to SS, POL had disclosed it had discovered in 2011 and 2012, and which had impacted 76 branches:<sup>15</sup> first, the so-called "Receipts and Payments Mismatch Problem", which had impacted 62 branches, and amounted to a total discrepancy of £9,029 (the largest single shortfall being £777, and the largest surplus being £7,044). POL had addressed each of them with no loss to any sub-postmaster; the second, referred to as the "Local Suspense Account Problem", affected 14 branches only, and involved total discrepancies of £4,486, with a temporary shortfall of £9,800 at one branch and a surplus of £3,200 at another. Amounts of less than £161 affected the remaining 12 branches. POL only became aware of this defect a year after its first occurrence in 2011, when it reoccurred. Because the cause of the defect could not be identified, POL wrote off the amount. FSL investigated the issue in 2013 and corrected the defect.
39. It seems that it was Gareth Jenkins who had informed SS of the existence of the two defects, although, in their report, SS do not attribute the information to him.<sup>16</sup>
40. Several other issues with Horizon had, however, been reported to SS by multiple sub-postmasters as being of particular concern. Training and inadequate user / Helpdesk support were identified as two such concerns.<sup>17</sup>
41. The SS report expresses itself to be interim, expresses its conclusions as "preliminary" and states there is "much work still to be done".<sup>18</sup> I must

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<sup>14</sup> Paragraph 8.2(a)

<sup>15</sup> Paragraphs 6.4-6.9

<sup>16</sup> See paragraph 1 of Simon Clarke's 8 July 2013 Advice, and paragraphs 30-31 of Simon Clarke's 15 July 2013 Advice

<sup>17</sup> Paragraph 7.2(e) and (h)

<sup>18</sup> Paragraphs 8.1 and 8.2

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proceed therefore on the basis that the SS report remains an interim report, and, therefore, the conclusions I arrive at in this document are necessarily subject to further consideration of any additional or different conclusions SS might reach in the future.

42. In addition to SS's report and appendices, I have received under separate cover the underlying material to spot reviews 1, 5, 6, 10, 11, 12, 13, 21, 22 and 23, four of which (1, 5, 21 and 22) are reproduced, albeit anonymised, in the spot reviews annexed to the SS report. Each review file contains a *pro forma* sheet for completion by SS, providing the detail of the review reference number, sub-postmaster name, any loss to the sub-postmaster, the issue, the branch name, the status of the review, the date, the FAD (branch) code, and the category (one of 4 check boxes) which had been intended by SS to categorise where, apparently, the fault for the loss lay, but I am told the box categories fell into disuse and are no longer relied upon.
43. The *pro forma* sheet then sets out what the sub-postmaster says happened, the investigative work done by SS, POL's response to the claim (which is enclosed with the review file) and occasionally SS's preliminary conclusions. Some of the review files (by no means all) contain documentary evidence and exchanges of correspondence.
44. Clearly, I have only seen a fraction of the spot reviews done by SS.

**(v) Gareth Jenkins**

45. Any challenge to the integrity of the Horizon data underpinning any given prosecution case has required expert evidence to defeat the challenge, the burden and standard of proof being on the prosecution throughout.

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46. Gareth Jenkins, who has been involved in the Horizon project for many years, has been the sole expert instructed to speak to the integrity of the system. In his sample witness statement, to which I have made reference above, Mr Jenkins deploys (as he must) his expert credentials in order for him to be received by the court as an expert witness. In essence those credentials are that he graduated from Cambridge University in mathematics in 1973 and was awarded an MA in 1997; he says he is employed by FSL who are contracted to POL to provide Horizon systems operating in post offices nationwide; he was first employed by ICL in 1973, the forerunner to FSL before a name change; in the late 1990s he became a “Distinguished Engineer” with ICL; he provides detail of his memberships and associations - he is a member of the British Computer Society (MBCS), a Chartered Engineer (CEng) and a Chartered IT Professional (CITP); he says that since 1996 he has been working on the Horizon project in association with POL, and details his involvement with it; he states he understands his role as an expert, despite being in the employ of FSL.

47. Mr Jenkins was accepted as an expert, without apparent challenge, in the Misra trial (which pre-dates the current review, the theft having occurred between June 2005 and January 2008).<sup>19</sup> It appears that this was the first and, I am informed, only time he has ever given evidence in support of a POL prosecution, but has attended court in preparedness to give evidence.<sup>20</sup> However, Mr Jenkins has made several witness statements in various cases. Simon Clarke’s Advice of 15 July 2013 lists a sample few he has made in cases ranging between October 2012 and April 2013.<sup>21</sup> I shall return to Gareth Jenkins below.

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<sup>19</sup> Misra Transcript of 11 October 2010 pages 27H-28A

<sup>20</sup> Misra Transcript of 14 October 2010 page 3F

<sup>21</sup> Paragraph 16

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**(vi) The Helen Rose report**

48. The Helen Rose report is a draft report by Helen Rose, a POL security fraud analyst, of 12 June 2013, which deals with one Horizon issue concerning unexplained reversals at the Lepton sub-post office.<sup>22</sup>
49. In summarising the facts in her report, Ms Rose describes a transaction occurring at Lepton on 4 October 2012 at 10.42 (*sic*) for a British Telecom bill payment for £76.09,<sup>23</sup> which was paid for by a Lloyds TSB cash withdrawal of £80. Change of £3.91 was given. At 10.37 the same day the British Telecom bill payment was reversed out to a cash settlement. The branch was issued with a transaction correction for £76.09, which was settled.
50. The draft report is based on an exchange of emails between Gareth Jenkins and Helen Rose during the period 30 January 2013 to 13 February 2013. Helen Rose's recommendation was that the system had functioned as it should, but that the available data was capable of misinterpretation, requiring the data to be presented differently so as to ensure that all system-created reversals were clearly identifiable. Again, I shall have to return to this.

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<sup>22</sup> This is SS's spot review SR01

<sup>23</sup> I note that SS's spot review SR01, which relates to this reversal, describes a different sequence of events with the payment of the bill at 10.32, and the session receipts not being printed until 10.36. There is support for this timing in POL's response to the spot review, which gives a recovery time as 10.37 (09.37 GMT), which suggests to me that Helen Rose cannot be right when she says that the first transaction took place at 10.42

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**D. THE TERMS OF REFERENCE**

51. It is against that background that I now confront the Terms of Reference set out above,<sup>24</sup> namely:

- (a) POL's strategy and process for reviewing past and current criminal prosecutions in light of Second Sight's Interim Report of 8 July 2013 and/or on the role of Dr Gareth Jenkins and his impact on any possible appeals;
- (b) Its response to the CCRC, and any subsequent action required by it in dealing with, or responding to, any actual or potential appeals and/or in reaching the appropriate resolution of any CCRC investigation, and to advise POL about any further steps that may be required as regards any actual or potential appeals against conviction; and
- (c) The identification of any flaws in the process of, or from the evidence arising from, the review of a statistically significant number of past prosecutions in which Horizon has been an issue in the proceedings.

**(a) POL's strategy and process of review**

52. POL's strategy and process was the subject of my Interim Review document of 2 August, at which time I had a relatively imperfect knowledge and understanding of CK's review process. I had, however, seen and read two full case files in the cases of Khayyam Ishaq and Lynette Hutchings. Since that time I have had the benefit of reading Harry Bowyer's response to my Interim Review document, at the time of writing I have read 31 full reviews,

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<sup>24</sup> Section A(2)(a)-(c)

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and, as noted above, I have seen in conference POL senior management and representatives of CK, and BD, in which I was able to seek further particulars of POL and CK's review process.

53. Since the Horizon issue has arisen, CK has conceived a review strategy of all suitable cases meeting certain criteria. This applies both to past prosecutions resulting in conviction, after a contested trial, and to cases following pleas of guilty.
54. POL tends to prosecute sub-postmasters for three or four types of offence: theft and false accounting under sections 1 and 17 of the Theft Act 1968, and fraud by false representation or by abuse of position under sections 2 and 4 of the Fraud Act 2006. Typically, the investigation and eventual prosecution of such cases is dependent on the data output of Horizon. Naturally, the data supporting any prosecution needs to be explained and presented to a bench of justices or a jury, and it must not lack integrity, and, so far as it can be, the evidence about it must be unimpeachable.
55. Given the adverse publicity about Horizon thus far, it would be unsurprising if a "bandwagon" effect were soon to be evident (if not already so) and even in those cases where Horizon was not in issue at trial or before a plea of guilty may, following a process of post-rationalisation, suddenly become Horizon issue cases.
56. CK's experience of prosecuting these cases suggests that Horizon cases involve challenges, either expressly or by implication, to the Horizon system itself. Where the defendant admits fraud or false accounting, they do so because Horizon failed in some way, and all they had done was to cover up shortfalls that could not be explained by them. Moreover, defendants often complain also about inadequate Horizon training and support and rely on their own incompetence to explain what has happened.

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57. POL, having accepted that in light of SS's interim inquiry report appropriate action had to be taken by it towards cases that might be impacted by their findings, has instructed CK to review past and indeed present cases.

*Nature and scope of CK's review*

58. The nature and scope of the review was defined in Simon Clarke's 8 July 2013 Advice, which coincided with the day of the publication of SS's report. The advice was that cases affected included RMG cases pre-separation, and the areas of concern were the proper functioning of Horizon, Horizon training and customer support.

59. Mr Clarke sought to distinguish between two issues:

- (1) The impact of the preliminary findings on past successful RMG prosecutions and on past and pending (or indeed future) POL successful prosecutions (whether on conviction or by guilty plea) as regards prosecution duties of disclosure; and
- (2) Issues of the "safety" of convictions (which is the test applied by the Court of Appeal).

60. Mr Clarke had no doubt that the SS report fell to be considered for disclosure. Consequently, Mr Clarke's advice was, "Where it is determined that the Second Sight interim report and contents fits within the scope of the CPIA<sup>25</sup> as disclosable to the defence, defence solicitors will be so informed. Thereafter, it is a matter for those defendants as to what course they take, POL's duty being satisfied by the conduct of a review process and the informing of those whom ought to have been informed had the matters

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<sup>25</sup> Criminal Procedure and Investigations Act 1996

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contained within the Second Sight interim report been available when prosecuted.” He advised that similar considerations applied to cases pending prosecutions but had yet to reach the trial or plea stage.

61. There was also consideration to the start date for this review. Horizon Online was migrated into all post office branches between January and September 2010. Thus, the advice given was that the start date for the review process should be 1 January 2010, that is to say the earliest date for the Horizon Online rollout. Mr Clarke advised that in advising upon this date, he had in mind issues of proportionality, resourcing, transparency and POL’s reputation.
62. Simon Clarke’s view was that any sub-postmasters prosecuted under the former Horizon data regime would have served any sentence of imprisonment, or performed any unpaid work requirement or paid a fine; and at all events the publicity from SS’s report would put those defendants on notice.
63. Indeed, the SS report and the appendices to it are posted on POL’s website and so it and its content are available to any member of the public without the need for recourse to a formal approach to POL. But I am afraid I do not see that those who have served their sentences, or those who had imposed on them community-based or financial sentences, should, for that reason, be excluded from the review. They have an interest if their conviction was unsafe, and there must be people who fall within CK’s current review who have been released from their sentences or had non-custodial sentences imposed on them. Resourcing and POL’s reputation are also beside the point.
64. When I queried the rationale behind the cut-off date, I was told, and entirely accept, that, prior to each branch rollout, a cash audit was done so that each

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branch balanced. I advised in the conference and repeat here that although POL has no positive duty to seek out individuals before the 1 January 2010 start date for a review of their case, nonetheless if POL was approached it would need to make *ad hoc* case-specific decisions about the need for disclosure.

65. The Misra case is an example of the type of case I have in mind that might surface. Although the Misra case was tried in October 2010, the allegation related to events between 2005 and 2008, long before the rollout of Horizon Online. However, the issues raised in the case, which were made late by the defendant in one or more defence statements, were very similar to those generally being raised currently in relation to the Horizon Online system: the defendant, Seema Misra, was eventually to claim the approximate £75,000 deficit in her post office was due to a technical error or her own incompetence, having initially sought to blame her employees for the theft.
66. There is no information that Mrs Misra is now seeking to appeal her conviction on the basis of the Horizon technical fault she claimed at her trial, though she is, I am informed, one of those seeking to apply to participate in the mediation process, which has recently been set up and permits those even convicted of crime to participate in the process, subject to a decision about suitability.<sup>26</sup>
67. I am informed that there are currently 12 or 13 conviction case applicants of a total of 38 people who have registered their interest so far for the mediation process (the closing date being 18 November 2013). Some, if not many, of these cases pre-date Horizon Online; some may even be cases that were discontinued or where there were acquittals following a trial.

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<sup>26</sup> See Part I: Application Phase of the draft Mediation Pack

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68. In this regard, I have considered SS's inquiry, and I note that SS's inquiry is not time-limited. The only date given is 28 February 2013, now long past, as the latest date for any submission to SS's inquiry.
69. The definition of "Horizon" that SS relied upon is in fact widely drawn, and, despite the fact that that definition was provided to SS in May 2011, and on one interpretation appears to be focused on the system then installed in branch and the central data centres, the definition was not expressly limited to Horizon Online, and evidently SS did not take it that way.<sup>27</sup> Indeed, of the several spot reviews I have seen, many of them involve Horizon issues pre-dating the 2010 rollout of Horizon Online. The earliest I have seen (SR012 Hamilton) goes as far back as 2004-2006.
70. Despite the open-fronted nature of SS's inquiry, it is important to recognise that SS has so far only discovered and reported upon two Horizon defects respectively occurring in September 2010 (which I assume to be a defect with Horizon Online) and in 2011.<sup>28</sup>
71. In my judgment, the 1 January 2010 start date for CK's review is both a logical and practicable approach to take. That is not to say however that if a case pre-dating the rollout of Horizon Online presents itself POL and CK should exclude it from consideration. There may be cases that raise genuine thorny technical issues, which are not unrelated to issues concerning Horizon Online (which after all is next generation Horizon), and, if they arise, they will have to be dealt with as required on a piecemeal basis. If it got to the stage where the floodgates of pre-Horizon Online cases began to open, then POL and CK will have to remain alive to the possibility of commencing a subsidiary review.

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<sup>27</sup> See paragraph 1.6

<sup>28</sup> See paragraphs 6.4-6.9 and 8.2(b)

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72. During a telephone conference held on 4 October 2013, in which representatives of POL, BD, CK and myself participated, it was agreed by all that the 1 January 2010 start date for the CK review was logical and proportionate, and there should be no change to it.
73. In terms of the geographical scope of the review, as I have set out above, POL and CK prosecute in England and Wales, whereas the PPS of Northern Ireland conduct POL prosecutions, whereas in Scotland it is the Procurator Fiscal's office, which conducts POL prosecutions. There have been discussions between CK and Scottish prosecutors about SS's findings. Current Scottish prosecutions remain adjourned. CK is yet to discuss the issues with the PPS but there had only been two prosecutions in Northern Ireland, neither involving Horizon issues. Thus the real focus of CK's review has been England and Wales.
74. CK see the review issue as one of disclosure under the CPIA, the Code of Practice made thereunder, the Protocol for the Control and Management of Unused Material in the Crown Court, and the Attorney General's Guidelines on Disclosure.<sup>29</sup>
75. The question they have posed is: "Had POL been possessed of the material contained within the Second Sight interim report during the currency of any particular prosecution, should / would we have been required to disclose some or all of that material to the defence?" It is that question that CK state has defined their approach to the issue.
76. The scheme CK has devised and adopted for their review involves two principal stages – a sift review and a full review. The original sifts are now

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<sup>29</sup> See CK's "Draft Paragraphs for Insertion into Reply to CCRC" at page 2

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also subject to a second sift process, which has been written into CK's scheme, as a sensible control of the original sift review process.<sup>30</sup>

77. Essentially, the scheme involves CK identifying every case within the review period in which the primary or main evidence against the defendant is based on Horizon data. Once such a case is identified, then CK's senior in-house prosecutors (from the reviews I have read they are exclusively Simon Clarke and Harry Bowyer) review the case fully for a determination of the question that CK has posed.
78. CK has deliberately set the threshold low for a determination of the posed question, so as to ensure that those affected receive proper disclosure of the material. CK has been identifying cases (1) where the only evidence against the defendant is the Horizon data, such as unexplained transaction reversals or shortages; (2) where the main evidence is Horizon-based but there is some other supportive evidence, such as admissions or even demonstrable lies in interview or transfers of money into non-POL or personal accounts; and (3) any case in which CK has served expert evidence relating to Horizon. This is said to be a non-exhaustive list.
79. CK has also been identifying cases where the defendant has explicitly or implicitly raised a Horizon issue. This will include situations where the defendant suggests that he was only asked to do as he did by POL or a customer, or does not directly criticise Horizon but cannot explain the shortfall, and it embraces those defendants who allege a lack of, or inadequate, Horizon training, and a lack of any or any sufficient Horizon customer support.
80. CK have made clear, correctly, that the review process is not limited to those found guilty following a trial but includes those who have pleaded guilty

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<sup>30</sup> See generally the "Initial Sift Protocol" devised and employed by CK for the review process

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also. It also includes consideration of sentence and the impact of non-disclosure, as has been advised in one reviewed case.<sup>31</sup>

81. Once identified for review, the case is considered and the disclosure decision documented in a full review in writing by those CK counsel.
82. From my reading of the full reviews, which have been made available to me, counsel do not always limit themselves to making decisions on disclosure. In reviews of pending or current cases, in effect, they review the test, which POL adopts from the Code for Crown Prosecutors, namely, whether, in light of the disclosure, there remains “a realistic prospect of conviction”.
83. At the time of writing, reviews of pending or current cases have thus resulted in the termination of four cases: Jishaan Patel, Brown, Wylie and Knight (typically due to the nature of the issue raised by the defendant, and the fact no replacement expert has yet been identified for Gareth Jenkins, the Horizon technical expert). While some of the decisions might, objectively, be regarded as generous, I do not suggest that these were decisions that no reasonable prosecutor could have made, applying his mind to the relevant test.
84. In reviews of past convictions counsel tend also to provide advice about what POL or CK’s stance should be to possible appeals by offenders to the Court of Appeal, which must mean consideration of the “safety” of the conviction, thus the likely stance to any application for permission to appeal the conviction based on the disclosed material and/or to any substantive appeal, if permission is granted.<sup>32</sup> I made it clear to CK in conference that they must be alive to changing circumstances. They must therefore not adopt an over-rigid approach; each case must be approached on a case-by-case basis.

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<sup>31</sup> Case review of Sefton and Nield in light of the judge’s sentencing remarks

<sup>32</sup> I have noted, however, that, typically, case reviews expressly assert that the purpose of the review is not to determine whether or not the conviction is unsafe

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85. The process intentionally encompasses both Magistrates' Court and Crown Court cases, but the process is a different one in the Magistrates' Court, where in the first instance, any appeal on conviction is to the Crown Court.
86. In order to standardise their approach, CK have compiled a document entitled "Initial Sift Protocol", which explains the review process through its stages, sets the parameters for the process, and is designed to direct the sifter's attention to the appropriate questions to be asked when deciding whether a given case should go to full review. The document annexes four appendices. In summary, Appendix 1 describes the sifting process, Appendix 2, the process of full review, Appendix 3, the required qualifications of the reviewer, and Appendix 4, the single page "Initial Sift Result Sheet", which synthesises the relevant questions to be asked by the sifter with boxes for the details of the decision to be recorded; this document is to be attached to the front of the relevant file. I have also seen and read through three sample files, which were sifted but did not go to full review.
87. The two essential questions asked in the sift review are:
  1. "Was or might Horizon reasonably have been more than just the information provider?"
  2. Irrespective of the plea, did the defence raise at any stage:
    - a) Alleged or implied Horizon failings, however expressed, general, nebulous or ill-defined; or
    - b) Alleged or implied lack or inadequacy of training by POL; or
    - c) Alleged or implied lack or inadequacy of Horizon customer support (i.e. sub-postmaster) by POL.
88. If the answer to both questions is or may be "Yes" then the case is submitted for a full review. The protocol sets out the type of considerations and criteria

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that sifters should be addressing in seeking to answer the questions in any given case.

89. I did find the first question to be somewhat cumbersome. I take it to direct the sifter's attention to the significance of the Horizon data as underlying the particular case under review. However, there are adequate checks and balances in the scheme, including the second control sift, to satisfy me that the focus of the question may be sufficiently understood so that deserving cases do not fall through the net.
90. Appendix 1 "Sift Reviews" addresses, among other things, the issue of guilty pleas, the fact that the threshold for moving from an initial sift to a full review has been set very low and the proper approach in borderline cases. Importantly, the Appendix ends by stating that at the conclusion of the sift review process, in all cases where the sifter has advised there should be no full review, senior in-house counsel will themselves sift those cases so as to ensure and preserve a uniformity of approach and to check the correctness of the original reviewer's decision. As indicated above, this process has now begun.
91. Appendix 2 "Full Reviews" addresses the analysis that is expected at this stage of the process. The sole question is said to be: "Would the Second Sight and Helen Rose material have been disclosable during the currency of the prosecution?" The instruction provided that it is not necessary to consider whether or not a conviction may be said to be "safe", which is a consideration for the Court of Appeal, appears to me generally to be ignored.
92. Appendix 3 "Reviewer Qualification" addresses the level of reviewer for the sift process and for the full review. Among other things, those solicitors and counsel involved in the process were obliged to attend an induction meeting during which the protocol document was explained in full.

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93. On this topic, I have been told that the sifters include CK solicitors Martin Smith and Andrew Bolc, who have been involved in sifting some of their own cases. Some of the barrister reviewers have occasionally had some input into cases, which were prosecuted by external counsel, such as advising on charge or evidence.
94. At the conference I did make the observation, which was foreshadowed in my interim review,<sup>33</sup> that lawyers should not be engaged in sifting or reviewing a case if they were responsible for conducting the case at trial, so as to ensure a proper level of objectivity and independence in the process.
95. In his response to my Interim Review document, Harry Bowyer suggests that if I felt the process was, to that extent, flawed then those cases that were not put up for a full review might be re-sifted by lawyers wholly independent of the case, and those full reviews that were reviewed by in-house counsel, who had some input into the case, can be re-reviewed, the numbers affected being relatively small.
96. I have considered the position. It seems to me that the control sift by senior counsel of all the original sift reviews, which were not recommended for full review, ought to ensure an independence (and indeed standardisation) of approach, so far as the sifting process is concerned. However, it would be better if those cases were not re-sifted by counsel if they were involved in prosecuting the case at trial or advising on any aspect of it. The same approach ought to be adopted towards negative full reviews. In my view, this recommendation is sufficient and proportionate to resist any later challenge to a decision not to disclose as based on bias.

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<sup>33</sup> Paragraph 6

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97. I did hesitate at suggesting that any counsel who had any input at an earlier stage of a case, but did not later prosecute it at court, should not be involved in the full review, but, on balance, feel that it must be a logical and necessary step to ensure an entirely independent approach to the case that such a person should not be involved in the review.
98. I recognise also that there is always going to be the possibility of the suggestion of a commercial conflict of interest, given CK's professional relationship with POL and the fact that the very counsel and solicitors making decisions about POL cases are those who rely on CK and POL for this work.
99. I have considered this issue with some care and, having met with representatives of CK, and having considered the many Advices and other material I have seen emanating from CK representatives, I have seen no evidence other than a professional and independent approach to this review. Consequently, on the material available to me, I would reject any suggestion that CK's solicitors and counsel cannot act, or have not acted, with an independent and professional approach to the Horizon issues, which have arisen, and to their review.
100. Appendix 4 "Initial Sift Result Sheet" is an essential means by which the result of the sift review can be completed and attached to the case file. Like the full case review document, which goes with the case file, these are absolutely necessary to provide a full audit trail of every action taken as regards these cases.
101. One other issue occurs to me, and that is how long such files ought to be retained. I am unaware of POL or CK policy for the archiving of prosecution files. I understand that POL prosecution and enforcement policy is/are in draft, and has not been approved by POL's Board, and that hitherto POL has

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simply relied upon RMG policy as informing their prosecution policy. Indeed, a document entitled “Post Office Prosecution Policy”, effective from 1 April 2012 and reviewable on 1 April 2013, (although I know not if it was reviewed on that date), appears to be largely derived from the wording of RMG’s prosecution policy document of April 2011.

102. Equally, I understand that CK is in the throes of advising upon, and redrafting, the policy for POL’s purposes. I have read through the several (sometimes overlapping) draft policy documents that have been sent to me. None I have seen provides for any POL policy about the retention and treatment of case files. POL must have a policy dealing with such matters, if none is already written. POL is subject to the Data Protection Act 1998, and it is a public authority by virtue of Part VI of Schedule 1 to the Freedom of Information Act 2000. Thus it must comply with the data protection principles. It is also open to FOI requests.
103. POL may envisage liability under these statutes as applying only in the course of its ordinary business, but they may apply equally to its prosecution role, which places an onus on it to have policies in place that inform, among other things, its case file retention policy.<sup>34</sup>

*The case reviews*

104. I have been sent a table setting out the statistics of the review thus far, which shows that as at 26 September 2013, CK had sifted 197 case files, second sifted 17 cases, fully reviewed 28 cases (in which disclosure was advised in 9 cases), and has discontinued four cases (as mentioned above). CK has, I am

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<sup>34</sup> I have not overlooked the fact that in its recent draft Protocol on disclosure, CK has provided, at clause 4.5.6.iv, for a retention period, but this is not the same as an internal retention policy for all case files, because, by the definition provided, it applies only to “all material to which clause 6 applies”, which, by clause 6, is limited to the “identification of equipment and material subject to this protocol” [My emphasis]

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told, 18 cases yet to be fully reviewed. It is unclear to me whether any cases are still subject to a first sift.

105. I have had to query these statistics, because I was sent 24 full case reviews ahead of the conference I had with POL and CK on 9 September 2013. I have recently received an extra 6 reviews by email of 30 September 2013 (some of them being RMG cases) but all of those 6 case reviews post-date the 9 September 2013 date of the conference and they pre-date 26 September 2013, which means I had by on or about 30 September seen and read a total of 30 full reviews.
106. However, at the conference I was told by CK that by that date CK had in fact conducted 27 full case reviews. I had seen only 24 by then and so if that was accurate there were 3 case reviews missing from the number I had seen and read by the time of the conference, but those missing 3 could not be any of the 6 case reviews I have recently received because none of them (the 6) pre-dates 23 September 2013 or post-dates 26 September 2013. This suggests to me that CK must have reviewed at least 30 cases by 26 September 2013, and if there were 3 other case reviews missing from those sent to me in advance of the conference then they should have conducted 33 case reviews, not the 28 mentioned in the table.
107. Since then I have received information in an email from Martin Smith to Jarnail Singh of 2 October 2013 that over and above the 24 case reviews I was sent and reviewed in advance of the conference, 3 other cases had indeed been reviewed by CK by the time of the conference. They are Brown, Chrystal and Knight, all apparently submitted to POL in July and apparently Chrystal and Knight were submitted to BD on 5 September 2013. Knight and Brown have been discontinued (as mentioned above, assuming it to be the same “Brown”). At the time of writing I have not seen these reviews. The

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case of Patel was reviewed and terminated verbally in light of the urgency of the case.

108. To complete the picture, on 9 October 2013, the case review of Robinson, dated 27 September 2013, was emailed to me. That means I have now seen and read 31 full reviews.<sup>35</sup>
109. I have also been provided with an Excel spreadsheet, which I am told is updated, and submitted to POL weekly, which purports to show current to 26 September 2013 the cases that have been reviewed. That spreadsheet, however, appears to me to show a total number of 175 reviews, and, according to Martin Smith, shows that as of that date CK has fully reviewed 28 cases, which is the number which has been inputted into the table I was originally sent. If I have understood Martin Smith's email correctly, the 6 further reviews are yet to be added to that weekly Excel spreadsheet (correct to 26 September) and therefore once added should make 34 full case reviews but I have no confidence that my assumptions are correct.
110. Thus, the statistical picture is confusing and I have been unable to reconcile the number of cases reviewed by CK with those seen by me. This needs rectification, if CK's audit trail is to be robust.

*Other initiatives*

111. I have been provided with an Advice written by Simon Clarke dated 2 August 2013, in which he advised on the question of disclosure and POL's duty to record and retain material. In it, he confirmed advice he had given POL at a meeting at POL's head office on 3 July 2013 that, "... there ought to be a single, central hub, the function of which was to act as the primary

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<sup>35</sup> Since committing these statistics to writing I have received a new table, now current to 10 October 2013, which shows there have been 278 initial sifts, 44 second sifts, 35 fully reviewed cases, 11 in which disclosure has been advised, and four cases discontinued (the same four identified above)

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repository for all Horizon-related issues. The hub would collate, from all sources into one location, all Horizon-related defects, bugs, complaints, queries and Fujitsu remedies, thereby providing a future expert witness, and those charged with disclosure duties, with recourse to a single information-point where all Horizon issues could be identified and considered.”

112. The rationale behind it is to put in place a mechanism to protect POL from future such issues. In the result a weekly Wednesday conference-call meeting has been established to meet the requirement. Attendees are expected to bring all Horizon-related issues to the meeting and minutes are kept. However, early teething and “cultural” problems arose as highlighted in Simon Clarke’s 2 August 2013 Advice,<sup>36</sup> and indeed to me in Harry Bowyer’s response to my interim review.<sup>37</sup>
113. However, the meetings have also produced information, which requires further investigation, and they and other future issues may highlight other Horizon-based issues, which POL was previously unaware of. CK must keep an open mind to any new Horizon issues as they arise and if it is considered that any information emanating from the hub meetings affects, or might affect, any of the cases previously sifted or fully reviewed, then CK will have to remain alive to the possibility of broadening the criteria for the review and having to re-sift or re-review cases already considered, both past and pending cases.
114. More recently, I have received from, and authored by, CK a document headed “Protocol”, which is a protocol for the Wednesday morning telephone conferences held for the purpose stated above. The document has been sent to me for any suggestions I may make as to its content and possible revision or alteration.

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<sup>36</sup> Paragraph 5

<sup>37</sup> Paragraph v)

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115. The document sets out the fundamental principles of the prosecutor's duty of disclosure, the purpose of the hub meetings, its Chairman and members' functions, their duties and responsibilities, the recording and retention of relevant material, and the group's constitution. The protocol is aimed at what the authors call the "front-line in the information gathering exercise."

116. I make two observations about the document:

- (1) In so far as the retention of material is concerned, as observed above at footnote 34, at clause 4.5.6.iv, the protocol provides for a retention period of not less than 6 years. The only observation I would make is that because, according to Gareth Jenkins, the data sent by the branch to the audit system of the data centre remain retrievable for 7 years, then the period of retention ought to be not less than 7 years;
- (2) The all-important clause 6, which sets out in great and comprehensive detail the identification of equipment and material subject to the protocol, defines the "Horizon Online system" sufficiently widely to capture the categories of material that are expressed to be subject to the protocol. The only further criterion that might be considered is any information, which might indicate that past or present Horizon training is inadequate or not fit for purpose, further to the criterion that provides for any information indicating there is "a requirement for further training of those operating the Horizon Online system."<sup>38</sup>

117. I have also advised in conference, and repeat, that it might be an idea for those seeking to manage the flow of information to set up a confidential and dedicated email inbox to be shared by the contributors to the hub meetings

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<sup>38</sup> Paragraph 6.2.1.v

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for the central receipt of information from those contributing to the Wednesday hub meetings, and as an adjunct to it, and to avoid the risk of relevant information being lost, as well as for an individual to be nominated to take responsibility for managing it.

118. As a cautionary warning, I have noted from the product of the hub meetings that there appeared to be possibly greater focus on the fix to a problem rather than focus on actioning the issue for the purposes of disclosure. While the hub meetings may well serve a dual purpose, the central point of the hub meetings must not be overlooked or marginalised.
119. It is important that now I emphasise and comment upon certain issues about POL's disclosure duties.

*POL's duty of disclosure*

120. On 2 August 2013, Simon Clarke produced his Advice setting out fairly extensively, and accurately, POL's duties to record, retain and disclose material under the CPIA etc.
121. I would however add this: POL's relationship with FSL is, in the context of its prosecution role, unique. The prosecution of the typical case of theft, fraud or false accounting tends to rely wholly or primarily on data from Horizon. At its simplest, FSL is contracted to POL to provide the Horizon system, but FSL is not part of POL. They are nothing more than contracting partners, and FSL is therefore a third party for disclosure purposes. I advised at the conference that I had considered whether or not FSL should be invited to participate in the Wednesday hub meetings, but upon mature reflection I considered they should not be, and should be kept at arm's length as a third party.

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122. Not unnaturally, FSL is likely to regard its Horizon system as commercially sensitive, and would not be likely to wish it exposed to challenge, but despite that natural inclination, I was told by Rodric Williams at the conference that FSL has not been resistant to cooperation with POL's review but they have been slow.
123. Thus, because FSL is a third party for disclosure purposes, POL, as prosecutor, has, in the ordinary case, an obligation to take such steps as it regards as appropriate to obtain third party material that it regards as possibly relevant to the prosecution case, and, if the third party fails to cooperate, the prosecutor's duty is to seek access to the material if need be enforced by a witness summons.<sup>39</sup>
124. Moreover, it is important always to bear in mind that under the head of "General Responsibilities" the Code of Practice made under the CPIA provides that in conducting an investigation the investigator should pursue all reasonable lines of enquiry whether they point towards or away from the suspect.<sup>40</sup>
125. There are two other issues as regards FSL, which I need mention. First, I understand that POL is currently re-procuring its IT system, and, second, that FSL was considering migrating their system to new servers. The first is a business issue for POL but, in tandem with the second, as the review process continues, it is imperative that POL remain alive to the fact that past convictions as well as pending or current prosecutions, which are Horizon-based, require it to ensure that the data is retained in order that POL can defend past convictions and prosecute current charges to conviction, and to receive assurances from FSL, whatever the future for their contractual relationship, to that effect.

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<sup>39</sup> Attorney General's Guidelines on Disclosure, paragraphs 52 and 52

<sup>40</sup> Paragraph 3.5

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126. Following the conclusion of the proceedings, POL has a general common law duty to act fairly and to assist in the administration of justice. The post-trial duty of disclosure falls outside the provisions of the CPIA but the duty of disclosure continues so long as proceedings remain, whether at first instance or on appeal. The situation here is different as there are (so far as I know) no appeal proceedings outstanding that relate to Horizon issues but POL has, in the special circumstances obtaining here, very properly acknowledged its duty to consider cases for disclosure, which is inevitably interlinked with considerations of the safety of convictions.<sup>41</sup>
127. Although the test for disclosure in past conviction cases is not that under the CPIA, at common law the issue is one of “materiality”, which is not a very different thing, and if CK has been conducting itself in the disclosure review exercise by applying the CPIA test even to past convictions, it is hardly likely to be criticised for doing so. The duty under the CPIA is a continuing duty of review, and it would be wise for POL and CK to apply a similar if not identical approach to past conviction cases falling within its current review, although, strictly, they fall outside any post-trial period criminal proceedings, where there remains a common law duty to disclose material that might cast doubt on the safety of the conviction.
128. Finally, in this regard, it must be borne in mind that any successful challenge to the Horizon system, defined in its broadest sense, whether in an on-going trial or on appeal, risks undermining other on-going cases as well as successful past convictions. Indeed, one successful challenge to the system on any basis will require CK to consider disclosure of that failure across the board and to re-review all previous decisions.

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<sup>41</sup> *Makin* [2004] EWCA Crim 1607; and see paragraphs 59-60 of the Attorney General's Guidelines (“... if material comes to light after the conclusion of the proceedings, which might cast doubt on the safety of the conviction, there is a duty to consider disclosure.”)

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*The mediation scheme*

129. During the telephone conference of 4 October 2013, the main topic of discussion was the extent to which CK should be involved in exercising a supervisory function over the criminal cases going to mediation, such as Mrs Misra's case. There is understandable concern that offenders might use the mediation scheme to gain information as a platform from which to launch a fresh or new appeal, and so CK wish to exercise a measure of control over the dissemination of information and material during the process.
130. As a precursor to the telephone conference, a question had been floated about the Falkirk issue, as one example, as potentially bearing on the mediation scheme. The Falkirk event was raised in the Misra case. In the course of Gareth Jenkins' evidence in Misra, Mr Jenkins gave evidence about a Horizon event, which had occurred at Callendar Square post office in Falkirk in 2005, whereby information recorded on one terminal was not being correctly passed to another terminal within the branch, creating a receipts and payments mismatch.<sup>42</sup> A software fix of the problem was distributed into the system in March 2006 as part of a fairly major functional change, and, therefore, post-March 2006, the Falkirk defect was no longer an issue. In my view it represents an isolated instance, which has no relevance to events falling within CK's review but if during mediation an individual complained of, for instance, the identical issue during the period before the 2006 fix, then the Falkirk event would almost certainly fall for disclosure as being a highly material issue in that case.
131. What I advised is that in exercising control over disclosure during the mediation scheme, CK must consider the approach it is to take with

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<sup>42</sup> Misra Transcript of 14 October 2010 at pages 46G-53A

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applicants. Mediation is not a formalised court process and the CPIA rules of disclosure do not apply. However, the mediation process in a particular case could give rise to the view that, mindful of its common law duties, case-specific disclosure ought to be made, and POL and CK must keep an open mind to this. The mediation process might even give rise to consideration of making further general disclosure within the current review, depending on the nature of the new information.

132. I recall being informed that SS is to be directly involved in the mediation process, which adds yet another dimension of possible uncontrolled dissemination of information and material. I have suggested that CK consider writing up a protocol or policy document to direct this part of their task so to ensure a uniformity of approach and to avoid too arbitrary an approach to cases going through the mediation process. That being said, I acknowledge that CK may have to take *ad hoc* decisions to cases, which fall outside the current review. I suspect however that such cases will be rare.

*Disclosure letter*

133. In those past conviction cases where, following a full review, CK advises that disclosure of the SS report and the Rose report be made, they send a *pro forma* letter, one copy of which I have seen in the Ishaq file. In on-going cases I suspect that CK simply sends the usual letter under section 3 of the CPIA or makes further disclosure in light of the evidence that is known to them, and in light of the content of any defence statement.
134. Focusing on the question CK has consistently posed itself, they write in the *pro forma* letter, “We have formed the view that had the prosecution been possessed of the material contained within the two reports during the currency of the prosecution of your client, we should and would have disclosed that material to you in compliance with our disclosure duties”, and

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they inform the recipient that they have reconsidered their duties under the CPIA 1996, the Code of Practice and the Attorney General Guidelines.

135. As I have observed above, although not strictly accurate, I do not think that the application of the test under the CPIA etc is necessarily misplaced in post-conviction cases. However, because technically the duty is at common law and not derived from the provisions of the CPIA, the reference to the CPIA might be regarded as otiose. In conference I suggested that the letter be revised to include a reference also to POL's duty to consider the disclosure of material, which might cast doubt on the safety of the conviction. I have seen from recent examples I have been sent that that is now done.

*Gareth Jenkins and his impact on possible appeals*

136. In his Advice dated 15 July 2013, Simon Clarke advised about the future use of Gareth Jenkins as an expert witness in support of POL prosecutions. In the body of the Advice document, Mr Clarke sets out the relevant principles regarding the duty of an expert.<sup>43</sup>
137. That Jenkins is an expert on Horizon issues cannot be seriously doubted. His independence was unsurprisingly called into question in cross-examination in Misra when it was suggested to him that he was employed by FSL who were under contract to POL.<sup>44</sup>
138. Although there is no impediment to an expert giving evidence even where he is employed by the party calling him, there is an inevitable risk of challenge to an expert like Gareth Jenkins when he is being called to give evidence about his area of expertise, especially, when, as here, he is employed by the company manufacturing and supporting the integrity of the IT system he is to

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<sup>43</sup> Paragraphs 6-9

<sup>44</sup> See Misra Transcript of 14 October 2010 at page 60B-C; and see pages 61A-C and 64E

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give expert evidence about, and his employer is contracted to the very organisation prosecuting the case in which he is a witness.

139. But a conflict of interest on the part of an expert witness does not operate so as automatically to disqualify him from giving evidence in the proceedings; the key question is whether his expression of opinion is independent of the parties and the pressures of litigation. It is the independence and objectivity of his opinion that is important.
140. Such a conflict will not infringe the requirement in Article 6 of the European Convention on Human Rights for an “independent and impartial tribunal”, which is concerned with the integrity of the tribunal, and does not require that the same tests of independence applicable to a judge be satisfied by an expert witness.
141. Of serious consequence is where the expert fails in his overriding obligation to provide an unbiased and objective opinion, as provided by Part 33 of the Criminal Procedure Rules 2013, or fails to disclose material within his knowledge, which might cast doubt on the correctness of the prosecution case or might assist the defence case.
142. Of grave concern is that Mr Jenkins informed the SS inquiry of the two defects, which they reported at section 6 of the report, suggesting that he knew of them in a period Mr Clarke argues in his 15 July 2013 Advice to be between 5 October 2012 and 3 April 2013, which are the dates of essentially five Jenkins witness statements Mr Clarke sampled. Yet in none of them is there to be found any reference to those two system defects.<sup>45</sup> On the contrary, his reports speak to the general integrity of the system.

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<sup>45</sup> Which, according to Simon Clarke in his 8 July 2013 and 2 August 2013 Advices, are technically characterised as “B14” and “B63”, although the numbering and their precise meaning remain obscure

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143. It was during a telephone conference CK representatives had with Mr Jenkins on 28 June 2013 that Mr Jenkins informed CK that it was he who had informed SS of the two defects.<sup>46</sup>
144. Support for the proposition that Mr Jenkins was aware of integrity issues as long ago as February 2013 is found in Helen Rose's report of 12 June 2013 in which she sets out an exchange of email correspondence between her and Mr Jenkins regarding the Lepton sub-post office reversal issue. In an email to him dated 13 February 2013, she says, "I know you are aware of all Horizon integrity issues ..." In isolation, this may not mean much, but coupled with the fact that it was Mr Jenkins who furnished the information about the two defects to SS, it lends itself to the reasonable interpretation that his true level of knowledge about the integrity of the system in general, and two defects in particular, was far greater than he was prepared to reduce to writing in his several witness statements during the material period of time.
145. Of course, it may be argued, possibly correctly, that the two defects that Mr Jenkins has divulged to SS do not amount to very much in terms of the overall integrity of the system, and why otherwise divulge them to SS if his intention had been to suppress them? But that would be to misunderstand the purpose of disclosure and the expert's duties. It is not for the prosecutor to make qualitative judgments about the utility or indeed the admissibility of the information to be disclosed, and it is not for the expert to make secretive judgments about such issues. So long as the material passes the test for disclosure it must be disclosed.
146. I agree that had this information been known about at the material time as regards any defendant who had properly raised the issue, it would, at the least, have been considered for disclosure, and in all probability disclosure of some kind would have followed. Because Mr Jenkins did not reveal his

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<sup>46</sup> Paragraph 30

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knowledge to the prosecution no consideration to the question of disclosure could be made.

147. Mr Clarke concludes that all this means that Mr Jenkins was in breach of his duty as an expert, that his credibility as an expert is accordingly fatally undermined, and that he could no longer be relied upon to give expert evidence. The consequence of this advice has been to lead to POL commissioning the current CK review of past and pending or current prosecutions, and indeed my review of CK's strategy and process.
148. I am not clear whether Mr Jenkins was challenged about the non-disclosure to POL and, if so, what the explanation was for it. But given the SS inquiry, based in part on his revelations, has led to the current review, Gareth Jenkins is to that extent tainted and his future role as an expert is untenable. It should be remembered that POL had been unaware of the existence of the second of the two defects revealed to SS by Mr Jenkins until a year after its first occurrence.<sup>47</sup>
149. As yet no new expert has been identified, far less appointed, to replace Mr Jenkins, who is and was uniquely placed to give evidence about Horizon, which is an unhappy state of affairs about which little can be done. The Jenkins problem, even when a new witness is found, may not be at an end, because he will doubtless still remain employed by FSL, yet not be asked to report on, or be called by POL as a witness to speak to, Horizon's integrity. How much real capital may be made of the fact that Mr Jenkins will always be a background figure in the Horizon story is impossible to predict. But what I think I can predict with a degree of confidence is that in the hands of capable counsel, more is bound to be made of the non-disclosure issue than the mere instruction of a new expert will resolve for future trials.

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<sup>47</sup> SS report paragraph 6.7

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150. I am asked to consider the impact of Gareth Jenkins on possible appeals. As I have pointed out above, he has only ever given evidence once in any case, and that was the pre-Horizon Online case of Misra, whose case is outside the scope of CK's review. However, he has made witness statements in several cases. I have only seen and read two only of his reports and those were for the Ishaq case; one was his principal report and the other was supplementary report. For the remainder, I have taken my knowledge of the general nature of his principal case reports from Simon Clarke's analysis in his Advice of 15 July 2013 of the sample number of Jenkins reports ranging between October 2012 and July 2013, which I assume to be a sufficiently representative cross-section.
151. Given the current review is predicated on the basis of Horizon non-disclosure, should any case go to the Court of Appeal on the basis that the conviction or the plea of guilty was unsafe in light of the non-disclosure, the Court may require some investigation of the circumstances behind the non-disclosure, which could require Mr Jenkins to provide a full explanation for not mentioning the two defects he revealed to SS for the purposes of their inquiry, and any other undisclosed issues that ought to have been revealed as relevant to any issues raised in the appeal.
152. For the purposes of any appeal, or of any application for permission to appeal, the Court has the power to "order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case." The Court is also empowered for the same purposes to "order any witness to attend for examination and be examined before the Court, (whether or not he was called in the proceedings from which the appeal lies)." <sup>48</sup>

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<sup>48</sup> Section 23(1)(a) and (b) of the Criminal Appeal Act 1968

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153. It would also be open to any such applicant or appellant to instruct an expert of their own to support the appeal, and to seek to introduce the report as fresh evidence.<sup>49</sup>
154. In such cases the Court of Appeal in arriving at the decision whether the conviction was unsafe will ask itself “whether there is a real possibility that the jury would have arrived at a different verdict had the necessary disclosure been made.”<sup>50</sup> Moreover, non-disclosure can lead to the quashing of a conviction even where there has been a plea of guilty.<sup>51</sup>
155. POL will simply have to confront any potential appeal cases as they arise on their own facts and on a case-by-case basis. There is no one-size-fits-all approach to cases, and POL will have to be mindful that any concessions made in one case may have a knock-on effect to others.
156. Finally, there is one further curiosity over which I have puzzled; this is paragraph 6.10 in SS’s report, which reads, “POL has informed us that it has disclosed, in witness statements to English Courts, information about one other subsequently-corrected defect or “bug” in the Horizon software.” I am unclear if this is a reference, albeit an inaccurate one, to the Helen Rose report or perhaps a reference to Gareth Jenkins’ witness statement in the case of Grant Allen where he conceded there had been an unusual “non-polling event” at Winsford Post Office over a 12 day period.

**(b) The response to the Criminal Cases Review Commission (“CCRC”)**

157. Ms Vennells the Chief Executive of POL received a letter from Mrs Berlin of the CCRC of 12 July 2013 enquiring about the number of criminal

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<sup>49</sup> Section 23(1)(c) of the Criminal Appeal Act 1968

<sup>50</sup> *McInnes (Paul) v HM Advocate* [2010] HRLR 17, SC

<sup>51</sup> *R v Smith* [2004] EWCA Crim 1626 (where the information could have had a causative effect on an abuse of process argument)

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convictions that might be affected by the Horizon issue they had become aware of through media reports and what POL's proposed course of action was. She noted that the Attorney General had been asked to set up an enquiry, and the CCRC had been in touch with his office.

158. The CCRC has a wide jurisdiction and can even refer cases without application to it.<sup>52</sup> The test the CCRC has to apply in making a reference is whether they consider that there is a "real possibility" that the conviction would not be upheld on account of some argument, or evidence not raised in the proceedings which led to it, and there must have been an appeal, or an application for permission to appeal, which has been refused. Failing these conditions, the CCRC may still make a reference if there appear to be "exceptional circumstances" for so doing.<sup>53</sup>
159. The CCRC may also refer a conviction from the Magistrates' Court to the Crown Court whether or not the person pleaded guilty.<sup>54</sup>
160. A response under the authorship of Susan Crichton, General Counsel, was sent to the CCRC on 24 July 2013, informing them that the case was under investigation. As I understand it, this was followed up by Ms Crichton in a letter dated 26 July 2013 setting out the steps POL had thus far taken, which included informing them of my appointment and my terms of reference in broad terms, as well as the instruction of CK to review potentially affected cases. Mrs Berlin responded on 30 July 2013, informing POL that the CCRC had not itself identified any impacted cases, and expressing her contentment to await my review before seeking further details. A holding response to the CCRC may have to be considered in due course.

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<sup>52</sup> Section 14 of the Criminal Appeal Act 1995

<sup>53</sup> Section 13 of the Criminal Appeal Act 1995

<sup>54</sup> Section 11 of the Criminal Appeal Act 1995

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161. After consideration, my remit was not broadened to encompass advice upon the “safety” of any of the Horizon-based convictions, and CK’s review has essentially been limited to the review of the question of disclosure in past convictions and in present and on-going prosecutions. Indeed, paragraph 2 of Appendix 2 to the “Initial Sift Protocol” document states, under the heading “Full Review”, “It is not necessary to consider whether or not a conviction may be said to be ‘safe’ – that is a decision for the Court of Appeal if the case gets there.”
162. As I have pointed out above, despite this, CK has terminated four pending cases and, in the course of full reviews of past indictable cases, where CK has advised disclosure must be made, CK has tended also to advise on its likely stance to any application for permission to appeal, or to any substantive appeal, should permission to appeal be granted. That amounts to consideration of the safety of the conviction.
163. Inevitably, the issue of non-disclosure does affect the safety of a conviction, or the “reliability” of it, as Simon Clarke put it in his 8 July 2013 Advice.<sup>55</sup> Inevitably, and sensibly also, in reviewing the case and the issue of non-disclosure, counsel has been asking the question whether the conviction is arguably not unsafe in light of all the other facts of the case, as informing their likely stance to any future appeal process; in other words “whether there is a real possibility that the jury would have arrived at a different verdict had the necessary disclosure been made.”
164. Against that background, it seems to me that there may have to come a time, if the CCRC maintains its interest, when POL, through CK, feels bound to share CK’s review findings with the CCRC and cooperate with it. POL’s approach and reaction at that stage will be better informed by the number of

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<sup>55</sup> Paragraph ii.(iv)

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cases, which have been fully reviewed and their outcome, and it will have a better understanding of the scale of the problem.

165. If the CCRC was minded to consider and refer any cases, then the matter would be out of POL's hands. However, I emphasise that no reference may be made by the CCRC unless there has been an appeal, or an application for permission to appeal, which has been refused, which, unless there appears to the CCRC to be "exceptional circumstances" for making a reference, must limit dramatically the number of Horizon-based convictions that would be amenable to CCRC intervention.
166. Recently, I was made aware of POL's consideration to appointing Sir Anthony Hooper to the Chair of the mediation working party. I was sent the notes of his interview with POL on 24 September 2013. I noted in particular that, at paragraph 4c, he suggested (quite firmly) that it might be more appropriate for cases that have been through the courts to be referred to the CCRC rather than go through the mediation scheme. It seems the mediation process and CK's review was explained to him, and it may be that his initial suggestion was tempered by the explanation that was given.
167. I should add that during my conference with POL on 9 September 2013, I made my views clear about permitting persons who had been convicted of crime against POL to engage in a mediation process with POL. I thought there lurked real dangers in it. But I understood the policy reasons for it. If a policy decision has been taken to permit those convicted of crime against POL to participate in the mediation process, then there is no case to refer convicted cases wishing to engage in mediation to the CCRC. I simply reiterate my advice above that POL through CK must exercise a measure of control over the dissemination of further information and material to guard against participants using the process as a platform to launch an appeal out of time.

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**(c) The identification of flaws in the review process**

168. As I have stated, I have now seen and read 31 full reviews, albeit all 31 were not past prosecutions, and not all of those that were past prosecutions raised Horizon issues requiring disclosure, as is clear by the decisions on disclosure that was made by counsel reviewing them. However, I am satisfied that I have seen for myself a statistically significant number of past prosecutions where Horizon was deemed to be an issue so as to determine whether or not the review process is flawed in any way.
169. Except in the cases of Khayyam Ishaq and Lynette Hutchings I have not seen the original case files, but I have seen the full case review documents written up by Simon Clarke and Harry Bowyer.
170. As observed in my interim review,<sup>56</sup> CK's approach to the review process is, as I have concluded, fundamentally sound. Thus, I have not detected any systemic or fundamental flaws in the process of review, or in any of the evidence arising from it.
171. From what I have seen, CK has initiated an organised and efficient regime of disclosure, which is being considered at an appropriate level within CK, and it is addressing the right tests.
172. The decisions made by counsel are inevitably fact-specific and are necessarily subjective judgments. I do not pretend that I would always have arrived at the same conclusion on all cases, but that is none to the point. So long as POL through CK recognise it is their continuing duty in pending cases to keep disclosure under review in light of new or different information, then POL will have complied with its duty, subject always to

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<sup>56</sup> Paragraph 15

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the intervention of the court. The same must apply to their consideration of past prosecutions, as I have suggested above.

173. Although this is no answer to POL's duty of disclosure, the practical reality is that anyone who wants access to the SS report can gain it through POL's website. The Helen Rose report adds very little, it seems to me, other than to point to a particular issue at Lepton, and the implication from the report that as early as February 2013 Gareth Jenkins was aware of integrity issues with Horizon, none of which he revealed. The SS report and the Rose report are the limit of the current disclosure regime. I am unaware of anyone being provided with anything more than this.
174. The threshold that CK has set itself has been set deliberately very low, and CK must be prepared to reconsider disclosure decisions as and when it is appropriate to do so, as it must as regards its stance to possible appeals. Thus, the review must remain an on-going process in which POL and CK keep their mind open to reconsidering its past disclosure decisions, as it is in second sifting the cases, which have gone through a first sift but not to a full review.
175. Although CK points out that it is unconcerned with the question of the safety of convictions, there is an inexorable link between the disclosure decisions it makes and the view it might take towards possible appeals, based on its view of the strength overall of the other evidence in the case. It is right to observe that even where there has been non-disclosure in a given case that does not mean that any appeal based on it is likely to succeed. But CK must not adopt any over-rigid or overly robust approach to any possible appeals, and should be prepared to adapt to the circumstances of individual cases.
176. Finally, I make two further recommendations:

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- (1) That there should be a reconciliation of all SS's spot reviews and those CK cases that have been subject to sift and full review, in order to check that there is no factual or other inconsistency between them as would affect CK's review. (I have been told that although there are around 30 SS spot reviews, only about 12 were ever sent to POL); and
- (2) If there is any Horizon-related civil litigation between any present or former sub-postmaster and POL related to any of the Horizon issues that are the subject of CK's review, then CK should be given complete visibility of the litigation, in case this affects any decisions they are making about Horizon criminal cases.

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**GRO**

15 October 2013