

LEGALLY PRIVILEGED AND CONFIDENTIAL

**TERMS OF REFERENCE FOR THE APPOINTMENT
OF BRIAN ALTMAN Q.C.**

OBSERVATIONS

Introduction

In reading through the draft Terms of Reference, I have found it easier to extract from them what I understand is required from me, and to set them out as a list as appears below.

Because it seemed to me that the ‘Instructions’ section of the overarching Terms of Reference overlapped in large part with the ‘Output’ section, I have simply conflated the two in drawing up my list, while seeking to remain faithful to the original wording.

To that extent, if it is felt appropriate, it may be easier to re-structure the overarching Terms of Reference (and to the extent this impacts on the shorter Terms of Reference, that document too) by conflating the ‘Instructions’ and ‘Output’ headings, producing the list below, albeit by removing from it anything considered to be repetitious or unnecessary.

I have borne in mind that the Terms of Reference are bound to form the introduction to the reports I write, and therefore will be reviewable by others if the reports are, or become disclosable, or are later published.

Instructions and Output

§A. I understand by the Terms of Reference that there should essentially be three written reports in the following order:

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- (1) To prepare by 5 August 2013 an interim review of Cartwright King's current 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);¹
- (2) To review, and advise POL in writing on or by [] 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 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;
 - 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.²
- (3) To review, and, if appropriate, to recommend changes to, the existing investigations and conduct of future prosecutions by POL, including, if appropriate, the investigative/prosecutorial role being undertaken by another authority (to be available for publication).

§B. I understand that I am to meet and report to the Board:

- (1) Generally to explain the background to the criminal appeal process including appeals, and how I intend to fulfil the remit, at the first available

¹ This document is completed and has been forwarded to Bond Dickinson

² The "statistically significant number" may be a moveable feast in terms of number and the period embraced by my review, and it may necessarily depend also on my view of Cartwright King's review process

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opportunity, and on the [efficacy]³ of the process set out in §A(1) above, at the first available opportunity;

- (2) On the [efficacy]⁴ of past prosecutions including the preparation and conduct of past prosecutions set out in §A(2) above, on or by [] October 2013.
- (3) My recommendations for any changes to the current investigation, process and conduct of future prosecutions by POL including, if appropriate, the investigative/prosecutorial role being undertaken by another authority set out in §A(3) above, on or by [] October 2013.

Process

Paragraph 2 of the 'Process' section of the overarching Terms of Reference (and in paragraph 2 of the 'Process' section of the abbreviated Terms of Reference for the shorter report, albeit bracketed) includes the possibility of my meeting Dr Jenkins. I note this is queried.

Not meeting and hearing him, where there may be questions potentially impacting on non-disclosure by him, and his role as an expert, risks exposing the final report to criticism. However, this is not a judicial or public inquiry with the formal receipt of evidence. This is something I shall need to think about carefully; at this very early stage I am not unnaturally undecided. For now it may be better for the Terms of Reference to remain silent about him.

³ The word is apt in my view

⁴ It is for POL and those instructing me to determine whether or not it is only the efficacy (i.e. effectiveness) of past *prosecutions* etc. that I am being asked to consider with the Board, or in fact the potential safety of past *convictions* following POL prosecutions (i.e. whether, in my judgment, the Court of Appeal is likely to "think that the conviction is unsafe": section 2 of the Criminal Appeal Act 1968). This is an important distinction. If it is the latter then the appropriate term is "safety of past convictions". I note in this regard paragraph 24 of Simon Clarke's Ishaq Case Review of 9 July 2013 and paragraph 14 of the Hutchings Case Review of 19 July 2013, which are identical in terms in each case, and narrow the scope of CK's review. The paragraphs read, "It is not the purpose of this review, nor of the review process overall, to determine whether or not any particular conviction is unsafe: that decision is reserved to the Court of Appeal only. The purpose of this process is to identify those cases where the material contained within the Second Sight Interim report would have met the test for disclosure ... had that material been known to Post Office Ltd. during the currency of the prosecution and accordingly would or ought to have been disclosed to the defence."

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At all events, paragraph 3, as generally worded, covers it, as is acknowledged in paragraph 2.3 of the covering email, and in my view should be the wording adopted for both the overarching and the abbreviated Terms of Reference documents.

Timing

May I suggest that the date in October for the presentation of the final draft report be set for a date to be agreed between us, and is made subject to the possibility of extension by further agreement to cater for all eventualities? One such eventuality is of course Second Sight's final report, which is a discrete topic I shall have to address, because the implication of Second Sight's 'interim' report is the expectation that there will be a final report, which will be bound to affect the conclusions at which I arrive in the interim.

Indeed, Second Sight's preliminary conclusions⁵ make plain that there is "much work still to be done" and that its conclusions will need updating "in the light of new information that arises as the investigation continues." So it is inevitable that my final report has itself to be characterised as 'interim'. If so, the report will have to make clear that it is subject to the outcome of Second Sight's final report.

Legal privilege and confidentiality

I agree, in principle, that the reports described in §A(1) and (2) above should remain privileged and confidential until such time as it is felt that privilege or confidentiality can no longer be maintained, or that legal privilege (which is POL's privilege) is no longer asserted and should be waived.

I agree with the reasons given in paragraphs 1.2 and 1.3 of the covering email for the treatment of the main report in this way. However, I can foresee circumstances in which the report would become disclosable to potential or actual appellants, and also to the CCRC, or to the Court of Appeal in the event of potential or actual appeals, if its content is considered to impact on the safety of individual convictions.

⁵ Paragraph 8.1

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We have to bear in mind that POL remains the prosecutor in these cases and in the post-trial period it has a general common law duty to act fairly and to assist in the administration of justice. The duty of disclosure continues so long as proceedings remain, whether at first instance or on appeal,⁶ so while it is right not to publish or reveal the detail of individual cases, if the effect of my review is to find flaws in the process, or cast doubt upon the safety of convictions in individual cases, then it will be POL's duty (through its criminal solicitors) to make it, or the relevant part of it, available to the court and/or the CCRC and/or to actual or potential appellants.

If the content so revealed is seen to criticise any person or organisation, the privacy and confidentiality of the disclosed material is almost certainly subject to an implied undertaking not to use the material for any purposes other than the proper conduct of the particular case.⁷

Brian Altman Q.C.
2 Bedford Row
London

2 August 2013

⁶ *Makin* [2004] EWCA Crim 1607

⁷ *Taylor v Director of the Serious Fraud Office* [1999] 2 A.C. 177, HL; and see *Attorney General's Guidelines on Disclosure* paragraphs 59 and 60