

## **POST OFFICE LTD**

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### **REVIEW OF POST OFFICE LTD PROSECUTION ROLE**

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#### **A. INTRODUCTION**

1. In light of criticisms of past prosecutions, the Post Office Ltd (“**POL**”) has commissioned me to review past practice and make recommendations as to its 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 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. Meeting/Reporting to the Post Office Audit Committee / Board**

- 1 On or by 31 October 2013 to give your 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(1) above.<sup>1</sup>

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<sup>1</sup> The date for submission of this review document has been extended at the request of POL

**Process**

- 1 To fully understand the Horizon system – reviewing training and materials.
  - 2 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.
  - 3 To review a statistically significant number of past prosecutions in which Horizon was an issue.
3. As regards the process by which I have been asked to conduct my review, and by reference to each point in the list above, in point order:

**Point 1:** on 19 September 2013, I attended Guildford Classroom Training Office, 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 9 September 2013, I met with POL representatives Susan Crichton, Rodric Williams and Jarnail Singh, Cartwright King (“CK”) representatives Simon Clarke, Harry Bowyer and Martin Smith, and BD representatives Gavin Matthews and Andy Parsons in my chambers at 2 Bedford Row, London, WC1.

On 4 October 2013, I participated in a telephone conference with Rodric Williams and Jarnail Singh of POL, Martin Smith and Simon Clarke of CK, and Gavin Matthews of BD in order to discuss issues surrounding the scope of CK's review.

On 17 October 2013, I participated in a telephone conference with Rob King and Andy Hayward together with Gavin Matthews of BD in order to discuss issues regarding POL's investigation structure and function.

Further to these conferences, I have not identified (or had identified to me by POL) anyone else I should meet or speak to as relevant to the issues I am asked to review. I have however received written answers to a variety of questions I have asked or issues I have raised by email in the course of my review.

**Point 3:** 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 an initial sift process. On 30 September 2013, I received 6 more full reviews, and on 9 October 2013 I received one more by email. I have therefore reviewed 31 case reviews in total.

**B. EXECUTIVE SUMMARY**

4. This review is a legal review only. Accordingly, I must emphasise that it is no part of this review or my function to make recommendations about commercial, reputational or other non-legal strategic factors in favour of, or militating against, the retention of POL's investigative or prosecutorial role.
5. The following is a summary of the main findings and recommendations in the body of this review.
  - (i) I have seen no evidence to suggest that Post Office Ltd exercises its investigations and prosecution function in anything other than a well-organised, structured and efficient manner, through an expert and dedicated team of in-house investigators and lawyers, supported by Cartwright King solicitors and their in-house counsel, as well as external counsel and agents where required.
  - (ii) Post Office Ltd has a unique commercial relationship with Fujitsu Services Ltd with whom it has contracted for the supply and maintenance of the Horizon Online system. I have found no evidence that any commercial conflict of interest has caused or contributed to the current problems.
  - (iii) The Horizon data integrity issue was an exceptional instance of Post Office Ltd prosecutorial failure of serial non-disclosure in breach of Post Office Ltd's disclosure obligations as prosecutor. Although the relevant information about the Horizon Online integrity issues was allegedly not revealed to Post Office Ltd or to Cartwright King when it ought to have been, Post Office Ltd is and remains accountable for prosecutorial failure, and must (and does) accept ultimate responsibility for this failure.
  - (iv) Post Office Ltd has taken appropriate steps to ensure that past and current criminal cases potentially affected by Horizon Online are properly addressed by establishing a thorough, complete and continuing review of the question of disclosure to include issues of Horizon Online integrity, training and support.

- (v) Post Office Ltd's prosecution role is perhaps anachronistic, but Post Office Ltd has undoubted expertise in investigating and prosecuting the nature and volume of cases it handles annually, which provides it with a unique specialism, inevitably leading to good and efficient use of resources, as well as efficacy.
- (vi) Moreover, Post Office Ltd has the distinct advantage of understanding intimately its products, its customers, its operations, and the business of those it employs and contracts with as agents, and, in general terms, it understands its data systems and its functions. Furthermore, Post Office Ltd inevitably benefits from central oversight of cases arising nationwide. Divestment of its investigative and/or prosecutorial role to police and/or another public prosecuting authority would result in little or no central oversight, thus risking an inconsistency of approach, which would ultimately be detrimental to the organisation.
- (vii) It is against the background of all these considerations, and I re-emphasise within the narrow context of the issues I have been asked to consider, that I have concluded that there is no good reason to recommend that Post Office Ltd should discontinue its prosecution role, and seek to assign it to another public prosecution authority; indeed, there are many good reasons to retain it.
- (viii) For identical reasons, I see no advantage, and only disadvantage, to a hybrid regime, whereby POL reserves its investigative function, while divesting itself of its prosecutorial role.
- (ix) However, there is scope for improvement, and I, therefore, make the following recommendations:
  - a) From everything I have heard and read, I am quite satisfied that Post Office Ltd's general approach to investigation and prosecutorial decision-making in past and current prosecutions has been appropriate and robust. Nonetheless, it remains important that if Post Office Ltd is to reserve its prosecution role it should review the entirety of its historical investigations and prosecution policy documentation in order to ensure that the documentation

being produced by or on behalf of its Security and Compliance and Legal Departments completely and accurately reflects Post Office Ltd's policy going forward.

- b) Once this has been achieved, the documentation should be submitted to the Board for approval as reflecting Post Office Ltd investigation and prosecution policy.
- c) Following Board approval, Post Office Ltd should consider publishing its policy documentation on its intranet, as well as otherwise ensuring that its employed and agency staff are made aware of Post Office Ltd policies in this area in order to achieve a greater measure of transparency.
- d) For the same reasons, Post Office Ltd should consider publishing its policy documents, or a summary of its prosecution policies, on its website.
- e) Each and every prosecution policy document should be provided with an annual review date, and reviewed on or before the annual review date, or following any material changes, whichever be the sooner, and the Board should approve any such material changes.
- f) Consideration should be given to including, within its prosecution policy, criteria detailing the range of factual or legal circumstances in which Post Office Ltd may decide to hand over cases to the police and/Crown Prosecution Service.
- g) To the extent this is not already in hand, (which I understand may be the case), Post Office Ltd should consider drawing up a protocol or a memorandum of understanding between it and any third party supplier of its IT system, (presently Fujitsu Services Ltd), setting out the duties and obligations Post Office Ltd has as a prosecutor, and the nature and scope of the data that Post Office Ltd necessarily relies upon for the prosecution of its cases, and seeking the third party's understanding and agreement to revealing any and all material or information that might

undermine the integrity of the system, and to the requirement for the disclosure of such material or information in the course of criminal proceedings, as may be required.

## **C. HISTORICAL BACKGROUND**

### *Introduction*

6. 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 no involvement in POL’s day-to-day operations.<sup>2</sup>
7. 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 RMG retains a residual prosecution role.
8. In England and Wales, POL’s prosecutorial role is exercised by POL’s in-house legal department and through the instruction of CK solicitors, its in-house advocates as well as by external counsel and agents. It is supported by the security department, which is responsible for conducting investigations. The security department is accountable to the Corporate Services Director.
9. Prosecutions are conducted both in the Magistrates’ Courts and the Crown Courts, and appeals are prosecuted in the Court of Appeal. 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.
10. Representatives of CK had been in Scotland the week before our conference on 9 September 2013 in order to discuss with the Procurator Fiscal’s office the recent interim findings by Second Sight Support Services Ltd (“**SS**”).

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<sup>2</sup> Annual Reports and Financial Statements 2012-2013, page 42



Currently, cases stand adjourned in Scotland, where, as I understand it, POL has been granted special agency status.

11. I understood in the conference of 9 September 2013 that CK had not yet spoken to the PPS in Northern Ireland. CK acknowledged the need for them to visit the PPS. However, there had been only two prosecutions in Northern Ireland, neither of which involved allegations surrounding Horizon.

*History of Royal Mail and Post Office prosecution role*

12. I have in my possession two documents, one an updated version of the other, entitled **A Brief History of Investigations, Prosecutions and Security in Royal Mail**, that have provided invaluable insight into the long and colourful history of the prosecution by the Post Office and Royal Mail of offences generally affecting the mail. This historical account helps explain the rationale behind POL's prosecution role.
13. One of the versions of the paper I sourced from the internet; the other was provided to me by POL. The version that was forwarded to me by POL was copyrighted by RMG in 2010; the internet version purports to be "an amended, corrected and updated version of an earlier draft" (I have assumed of the one sent to me by POL).
14. In terms of authorship, the copyright notice in the internet version gives thanks to Alan Baxter, former Head of Corporate Security, Post Office Security & Investigation Services, and the late Peter Jeffers, former Investigation Officer, Post Office Investigation Department, and later a senior manager at BT, for their research and correction of previous errors. The copyright notice attributes the document copyright to "Royal Mail and/or Alan Baxter."
15. For the sake of completeness, I should add that I have also been provided with a PowerPoint presentational document that is entitled **Investigations & Prosecutions – A Brief History**, which by its content suggests that it was

created after POL's separation from RMG in April 2012, but in fact adds nothing to the Baxter document.

16. Baxter's updated version sets out in some detail the history of RMG's investigative and prosecutorial role, which can be traced back as far as 1683, when the Attorney Richard Swift was appointed Solicitor to the General Post Office, which he served for 30 years and in respect of which he had "care of managing of all Law proceedings wherein the Office has been concerned." The narrative thereafter is quite literally of historical interest only.
17. With the creation of separate businesses under the Post Office banner, and following a review in 1996, and restructure, the Post Office Security & Investigation Services Department became responsible for conducting criminal investigations and providing specialist advice and services to each of the Post Office businesses.<sup>3</sup>
18. There was a further reorganisation in 1999 that saw the number of Post Office business units increase, and an equal number of smaller security teams formed in order to support those business units. Simultaneously, the three main businesses: POL, Royal Mail Letters, Parcelforce Worldwide began developing their own investigation teams to complement their security teams, for which they drew on Security & Investigation Services staff to resource their criminal investigations. Leadership and standards however were directed by the central Corporate Security Group, which was led by the Group Security Director.
19. Further restructurings and a name change to RMG saw the number of businesses reduce to four including POL, Royal Mail Letters, Parcelforce Worldwide and General Logistics Services, Royal Mail's international parcel operation. However, within Royal Mail's Group Centre, Group Security was to continue to provide strategic direction, governance and performance supervision, and maintained formal links with the Home Office and the

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<sup>3</sup> Letters, Counters and Parcels

Ministry of Justice, as well as Police and Law Enforcement Agencies and other Governmental departments. POL, Royal Mail Letters and Parcelforce Worldwide maintained their operational security and investigation teams led by heads of security and staffed by professional investigators and security managers.

20. Royal Mail investigators were trained to rigorous standards and operated in accordance with legislation including the Police and Criminal Evidence Act 1984, the Regulation of Investigatory Powers Act 2000, and the Postal Services Act (which, given the apparent date of the paper, I take to mean the Postal Services Act 2000 rather than the Act of 2011).
21. Security managers normally had experience in a wide range of operational and commercial areas, and developed technical competence in fields such as crime risk management and modelling, physical and electronic surveillance, and behavioural security. In 2010 there were a total of 287 investigators and security managers employed within RMG.
22. However, although RMG investigators would enjoy access to police facilities and to criminal records and communication networks, they had no special powers. Suspects would be interviewed and searched on a voluntary basis, and, where arrests were required, the support of police officers or other statutory law enforcement officers was usually sought.
23. Royal Mail Legal Services, which was the successor to the Post Office Solicitor's Office, would prosecute on RMG's behalf in England and Wales.
24. Outside England and Wales, pre-separation Royal Mail Security teams reported alleged criminal activity to the Procurator Fiscal in Scotland and to the PPS in Northern Ireland, following the same processes as the police services in those two countries.
25. As indicated above, to this day, RMG retains a residual prosecution function covering its own areas of business, such as theft by postmen.

*Private prosecutions*

26. While it is true that POL is a private prosecutor, POL is a public authority for other purposes, and so it enjoys a curious hybrid existence.<sup>4</sup> But it is quite unlike the private prosecutor of an isolated case given the volume of cases it handles annually. It has a security department, a compliance and legal team in-house, and it instructs on a regular and retained basis a nationwide firm of solicitors to prosecute for it in England and Wales, who also instruct external counsel and agents.
27. POL is thus the only commercial organisation (albeit Government owned) I have been able to identify (apart from RMG that retains a prosecution function) that has a commercially based, sophisticated private prosecution role, supported by experienced and dedicated teams of investigators and lawyers. To that extent it is exceptional if not unique
28. By way of useful contrast, POL is unlike organisations such as FACT (the Federation against Copyright Theft), which is a trade organisation protecting its members' intellectual property through private prosecution, or the RSPCA, a charitable organisation, protecting the welfare of animals by private prosecution. Although Virgin Media successfully launched a private prosecution in or about 2011 for commercial fraud involving set-top boxes, that was likely to have been an isolated and exceptional instance of the company exercising the private right to prosecute.
29. Like those other organisations, however, POL may and does work in partnership with police and other enforcement agencies. But other than cases in which there are concerns about violence or belligerence or the threat of violence to POL personnel by the suspect or others,<sup>5</sup> I remain unclear when and in what circumstances POL will consider a case should be handed over to the police and/or the Crown Prosecution Service ("CPS"). Nothing I have

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<sup>4</sup> See Part VI of Schedule 1 to the Freedom of Information Act 2000

<sup>5</sup> See Flowchart appended to draft **POL Criminal Enforcement and Prosecution Policy** as Annex 1

read provides any real guidance or criteria to be followed for such an eventuality; thus any such decision appears to be one made arbitrarily on a case-by-case basis.

30. The right to bring a private prosecution is preserved by section 6(1) of the Prosecution of Offences Act 1985. POL is under no duty to inform the CPS that a private prosecution has commenced. However, POL may notify the CPS, particularly if in due course POL considers that the CPS should prosecute the matter.
31. It is open to the CPS to take over any private prosecution in certain circumstances. Although POL does not have to inform the CPS that a private prosecution has commenced, it is open to POL to notify the CPS especially if it might be the case that the CPS is invited to prosecute the matter. The CPS can take over a private prosecution in certain circumstances, but the CPS would need to be satisfied that: (1) the evidential sufficiency stage of the “full Code test” is met;<sup>6</sup> (2) that the public interest stage of the “full Code test” is met; and (3) that there is a particular need for the CPS as a public authority to take over the prosecution.<sup>7</sup>
32. The last consideration is designed to cover the position where the investigative authorities with whom the CPS usually deals, such as the police, have not brought the case to CPS attention, and yet it is a case that merits the prosecution being conducted by a public prosecuting authority rather than by a private prosecutor. The CPS might consider taking over a case where the offence is serious, where there are detailed disclosure issues to resolve, or the prosecution requires the disclosure of highly sensitive material.<sup>8</sup>

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<sup>6</sup> The two stages of the “full Code test” in the CPS Code for Crown Prosecutors are (1) whether the evidence provides a realistic prospect of conviction, and (2) whether it is in the public interest to prosecute

<sup>7</sup> Section 6(2) of the Prosecution of Offences Act 1985

<sup>8</sup> See CPS website [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05)

33. The CPS may even take over a private prosecution only to stop it, even where the full Code test is met, for instance where the prosecution may damage the interests of justice such as by interfering with the investigation or prosecution of another criminal offence or charge, or where the defendant has been promised that no prosecution will follow.<sup>9</sup>
34. As I have commented above, it is unclear when POL will invite the CPS to intervene, and I have no statistics to inform me how many POL prosecutions, if any, have been taken over by the CPS, and, if so, on what grounds.

*POL investigation and prosecution process, procedure and rationale*

35. I have recently received a document entitled **Conduct of Criminal Investigation Policy**,<sup>10</sup> from which I have extracted (and in some places paraphrased) the following passages, which explain, from POL's perspective, the rationale underlying its investigation and prosecution role, and in very broad terms the type of considerations that apply, the variety of cases that may be raised, as well as the applicable investigation and prosecution structure and regime. Those passages state:
- (a) Properly conducted investigations form a key part in POL strategy in protecting assets and reducing loss. If poorly managed, an investigation can lead to increased risk of future loss and significant damage to the corporate brand. In commencing any investigation POL needs to consider the impact in terms of the protection of business assets and limiting potential liabilities weighing against the reputation of the organisation or damage to the brand should the investigation fail.
  - (b) POL Security is almost unique in that unlike other commercial organisations it is a non-police prosecuting agency, and is therefore

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<sup>9</sup> See CPS website [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an06](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an06)

<sup>10</sup> See also paragraph 72 below



subjected to the Codes of Practice and statutory requirements of the Police and Criminal Evidence Act.

- (c) Moreover, there is another anomaly that sets POL aside from other commercial investigators. Of its 11,800 branches, only 370 of them are staffed by employees of POL. In the majority of cases, branches are either franchisees or agents who receive remuneration. As neither is deemed to be in the employ of POL, the usual practices and procedures of an employer/employee investigation do not apply.
- (d) In cases where fraud is uncovered and good evidence of criminality exists, a criminal investigation will invariably commence. At the same time POL Contract Advisors have the responsibility of ensuring that any contractual breaches are investigated and any impact on the business is minimised. As a result, close communication needs to be maintained between the Security Manager investigating the criminal investigation and the Contract Advisor who needs to maintain POL services.
- (e) The department must be seen, internally, as well as externally, to be acting fairly, appropriately and within the law. The investigation needs to be properly conducted to establish evidence that will support a successful criminal prosecution.
- (f) Prior to commencing an investigation the Security Manager will have to consider:
  - The seriousness of the allegation
  - The level of criminality
  - Any contractual, compliance or regulatory concerns
  - The potential to damage the reputation of POL
  - The expectations of key stakeholders.

- (g) Cases may be raised from various sources. In each instance the information is passed to the relevant operational Team Leader who will evaluate the allegation and decide whether or not a case should be raised. Cases may be raised by a shortage at audit, or Post Office Card Account holder complaints of fraud, or from any one of its client bases: DVLA, Royal Mail, DWP etc.
- (h) The course of action decided upon must be proportionate and necessary. Consideration may be given to other action that that will not necessarily lead to a criminal investigation, such as pursuing a civil enquiry for breach of contract or civil debt recovery.
- (i) If the decision is to proceed with the prosecution case, the file is forwarded to CK, for advice on charges. However, in some instances Post Office Legal and Compliance Team (“**POLCT**”) will decide on charges.
- (j) CK will prepare advice and charges for the case (or advise no further action if appropriate). If further enquiries are required they contact the Security Manager direct, copying in the Team Leader and send an Advice detailing the further enquiries. The Advice along with charges and case file is then sent back to casework.
- (k) The file is then forwarded to the designated prosecution authority (“**DPA**”) for authority to proceed, who will review the case file and decide whether to proceed with the advice from POLCT and CK, or whether to take a different course of action.
- (l) If advice from CK or POLCT is to prosecute and the Head of Security has given authority to proceed, then the Security Manager obtains a summons. The Security Manager makes contact with the relevant Magistrates’ Court to set a date for the suspect’s first appearance at court. Summonses are also applied for. Upon receipt



of the summonses the Security Manager will serve the summonses by way of posting them to the person concerned.

36. Although POL may handle a variety of cases, the cases that have been the subject of CK's review typically involve the prosecution of sub-postmasters or those working for or under them in sub-post offices. I do not believe of the case reviews or files sent to me I have seen a single prosecution case involving a Crown Post Office employee or an agent in the sense of an employee of a Co-op or a WH Smith for instance. The typical offence with which individuals are charged is theft and/or false accounting, though fraud by false representation often features.
37. Jarnail Singh, POL's in-house criminal lawyer, informs me that in 2012/2013 239 cases were raised, of which 48 were prosecuted.<sup>11</sup> In that year, compensation or confiscation sums amounted to in excess of £1.5 million, while the cost of prosecuting those cases was running at £217,000.
38. It is important to understand that POL's prosecuting role is not founded in any statutory power, and, as observed above, like RMG its predecessor, its investigators are accorded no special powers. Thus, when POL prosecutes it prosecutes purely as a private prosecutor.
39. An email from Charles Colquhoun, the Head of Corporate Finance, details the value of prosecuting in safeguarding network cash (by which I understand him to be arguing why POL should continue to conduct such prosecutions rather than assign it to any outside agency). He sets out three principal arguments for retaining its prosecution function:
- i. POL's prosecution function provides a clear signal to the whole network that offences of dishonesty will be taken seriously both by POL and the courts. Given the publicity such cases receives, the

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<sup>11</sup> I am however unclear what the breakdown is as regards the nature of case and offence charged

network would quickly realise if there were a change in policy, which might increase the temptation for some agents.

- ii. Retention of its prosecution role assists POL with its relationship with its insurers in that POL has one of the largest crime policies on the London market, which is underwritten by over 20 insurers. POL has an excess of £1m so most branch cash is self-insured, but POL's insurers are impressed by how seriously POL takes any leakage in network cash, so a change in its prosecution policy might worsen its relationship with its insurers.
- iii. POL's current policy reassures its employees (from the Board to its front-line security teams) that securing company assets is taken seriously. Changing this policy would put some employees in a difficult position. If, for example, POL chose not to prosecute agents, it would be interesting to see how it would deal with Crown employees responsible for cash leakage.

40. I return to these arguments below, and welcome any further observations on these issues from POL.

*POL investigation and prosecution policy documentation*

41. In the course of this review, I enquired after any POL prosecution policy documentation and, although I was sent documents purporting to be policy documents, I was surprised to learn that, a year after separation, POL's prosecution policy was based on RMG prosecution policy documents, and that its policy documentation remained in draft, and had not been submitted to the Board for ratification. However, I was encouraged to hear that CK has been in the throes of substantially rewriting the prosecution policy documentation for POL, and I have received their very recently drafted document entitled **Post Office Prosecution Policy – England and Wales**, which is expected to form the basis of POL's prosecution policy. Similarly, the document I have already referred to above - **Conduct of Criminal**

**Investigation Policy** - has recently been finalised; it is detailed and complete but focuses on the POL investigations regime only.

42. The documents I have received are:

- (i) **Investigation Procedures** – Version 2.0 – May 2002
- (ii) Royal Mail Group Ltd - **Criminal Investigation and Prosecution Policy** – December 2007
- (iii) **Royal Mail Group Prosecution Policy** - Version 3.0 - April 2011
- (iv) **Royal Mail Group Policy Crime and Investigation (S2)** – Version 3.0 – April 2011
- (v) **Royal Mail Group Policy Prosecution (S3)** – Version 3.0 – April 2011
- (vi) Post Office Ltd – **Security Policy [Theft and Fraud by Sub Office Assistants]** – Version 1.0 – February 2002
- (vii) Post Office Ltd – **Security & Audit Policy [Enquiries at Sub-Post Offices owned by Multiple Partners]** – Version 1.0 – undated
- (viii) **Post Office Prosecution Policy** – Version 1.0 – April 2012
- (ix) Post Office Ltd - **Internal Protocol - Criminal Investigation and Enforcement** – undated
- (x) Post Office Ltd - **Criminal Enforcement and Prosecution Policy** – undated
- (xi) **POL Criminal Enforcement and Prosecution Policy** and Appendix 1 flowchart – undated<sup>12</sup>
- (xii) **Post Office Prosecution Policy – England and Wales** – November 2013
- (xiii) Post Office Ltd - **Conduct of Criminal Investigation Policy** – August 2013.<sup>13</sup>

43. **Investigation Procedures** (listed at (i)) above) is not expressed to be an RMG/POL document, although the “Post Office” is referred to in the body of

<sup>12</sup> Referred to in the document as “Annex 1”

<sup>13</sup> There are two versions: one I have been told was drafted for Board purposes and the other as a working guide to investigators. They are to all intents and purposes identical

the document.<sup>14</sup> The document is effective from May 2002, and was therefore current 10 years before separation, and is directed at “Consignia Security Managers undertaking investigations”. I have not been supplied with any updated version. Accordingly, I disregard it as irrelevant.

44. Also, I ignore the document listed at (ii) above, as this is several years out of date and appears to me superseded by more recent documents. The document at (iv) appears to be derivative, and an updated version, of the document at (iii), and so I deliberately disregard document (iii) also.
45. The documents listed at (iv) and (v) above, **Royal Mail Group Policy Crime and Investigation (S2)** and **Royal Mail Group Policy Prosecution (S3)**, are high level policy documents, respectively setting out the principal perceived criminal risks to RMG and its investigation response, and RMG’s policy to prosecute those who have been investigated and who are believed to have committed a criminal offence against RMG.
46. Document (vi), **Post Office Ltd – Security Policy [Theft and Fraud by Sub Office Assistants]** is dated February 2002, and document (vii), **Post Office Ltd – Security & Audit Policy [Enquiries at Sub-Post Offices owned by Multiple Partners]**, is not dated. In so far as I am able to judge they appear to be investigation policy documents. Both are expressed to be POL security policy documents, but **Post Office Ltd – Security Policy [Theft and Fraud by Sub Office Assistants]** is of course pre-separation, and I have not been provided with any updated versions of either, and therefore can only assume they have fallen into disuse.
47. The **Post Office Prosecution Policy** document (document (viii)) is derivative of the **Royal Mail Group Prosecution Policy** document (document (v)) but it has clearly been adapted to suit POL’s needs and field of business. It deals with the decision-making process and it provides that in England and Wales decisions to prosecute will be made by POL Head of

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<sup>14</sup> Paragraph 3.2

Security taking advice from POL Legal and HR “as appropriate and relevant”, which I fail to understand as the decision to prosecute should surely be a legal one, not a security department one.<sup>15</sup> I observe that the term “as appropriate and relevant” renders the hierarchy of prosecutorial decision-making completely uncertain, fails to define roles clearly, and fails to make clear where and at what level exactly the discretion or judgment lies from whom to take advice “as appropriate and relevant”.

48. POL’s document provides also that in the event of any issue or disagreement arising in relation to any investigations or prosecutions, the matter is to be referred to the Director of HR & Corporate Services to provide guidance and advice to ensure that POL maintains a consistent prosecution policy.<sup>16</sup> I note that the Royal Mail policy document has the identical provision,<sup>17</sup> but RMG’s provision, from which POL’s is derived, is expressly based on the fact that, “It is a requirement of the Royal Mail Group Conduct Code, fully outlined in paragraph 8.4 of the Royal Mail Group Crime and Investigation Policy that in reaching decisions on conduct code actions the Human Resources Director or his or her representative must liaise with those handling any criminal investigation or prosecution.”<sup>18</sup>
49. The same provision of the RMG policy document then deals with what is to happen in the event of “any disagreement about prosecution advice in England and Wales, or inconsistency between prosecution and conduct decisions anywhere in the United Kingdom”, in which case the Head of the Criminal Law Team and the Head of the Investigation Team will consider the case and provide guidance and advice to ensure that Royal Mail maintains a consistent prosecution policy.
50. Whether or not POL has the same decision-making hierarchy and Conduct Code as RMG, to which express reference is made in RMG’s policy

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<sup>15</sup> Paragraph 4.1; I assume (possibly incorrectly) that Head of Security is a non-legal but investigative role; and see footnote 20

<sup>16</sup> Paragraph 4.4

<sup>17</sup> Paragraph 4.5

<sup>18</sup> I have not seen RMG’s **Crime and Investigation Policy** document, nor RMG’s **Conduct Code**

document, is unclear. The fact that the identical POL provision avoids reference to any POL Conduct Code rather suggests that it may not, and, if not, highlights the problems of adapting RMG's policy provisions without consideration of POL's structure.

51. The POL document, mirroring the RMG document, appropriately applies "the full Code test" in the CPS Code for Crown Prosecutors to any decisions made to prosecute.<sup>19</sup>
52. The **Internal Protocol for Criminal Investigation and Enforcement** (document (ix)) "describes how POL ensures that all enforcement decisions arising from criminal investigations are taken in accordance with POL's Enforcement and Prosecutions Procedure." It is designed "to specify the role of POL's Enforcement and Prosecutions Procedure ("**EPP**") in the making of enforcement decisions by POL." "Enforcement" means "all dealings with staff, sub-postmasters or other members of the public resulting in prosecution and/or commencement of confiscation proceedings." The document is, however, a single page document, it is undated, and I am unconvinced it is complete. It purports to annex to it (as Appendix A) a flowchart, which, if it exists, is missing from the documentation sent to me.
53. **Post Office Ltd - Criminal Enforcement and Prosecution Policy** (document (x)) is an important document. I take this to be the EPP referred to in the Internal Protocol (to which that document occasionally refers). It aims "to ensure a fair and consistent approach to criminal enforcement decisions by POL nationally, provide POL security managers and legal advisers with guidelines enabling them to reach enforcement decisions in line with government guidance/standards, and inform the public and businesses of principles applied by POL, which guide enforcement decisions."
54. Under the "Introduction" section, the document sets out the underlying policy, namely, that POL's role is to provide affordable and reliable services

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<sup>19</sup> That is to say the two-stage test involving the evidential and public interest stages



to the public through its retail operation. It continues, “POL is mindful that criminal acts against its business (in particular theft, fraud and false accounting) result in increased costs to the taxpayer, impact on its customers and challenges the viability of services.”

55. It sets out how it intends reducing criminal acts against its business: by advice and education, fully investigating reported concerns, taking action (criminal or civil enforcement and disciplinary action) in appropriate cases, and in other instances (which are not specified) handing over investigations to the police to consider enforcement action.
56. The four guiding “Principles of Enforcement” are said to be proportionality; a fair and consistent approach; transparency; and enforcement to be focused where it is needed most. Each is then developed separately.
57. The document thereafter sets out POL’s “Enforcement Options”. The application of the options available to POL is said to “depend on the impact on the integrity of POL and the services it provides to the community, risks to people or to the environment, the past history and attitude of the offender, the consequences of non-compliance and the likely effectiveness of various enforcement options.” In particular, POL will consider:
  - The seriousness of any offence and extent of harm
  - Duration of the offence
  - The suspect's age, physical and mental condition
  - Any voluntary disclosure or confession made by the suspect
  - Previous convictions or evidence of offending
  - Any breach of trust
  - Other social factors
  - Any delays in an enforcement decision being reached.
58. The document also outlines the actions, which are available outside the criminal process, which includes informal action, disciplinary proceedings, and civil proceedings.

59. Under the heading “Criminal Enforcement”, the document states:

**Prosecution** will be brought where the circumstances warrant it and where the alternative enforcement options are considered to be inappropriate. Any decision to prosecute will take account of the criteria set out in the Code for Crown Prosecutors.

There must be:

- Evidence of guilt sufficient to give a realistic prospect of success in criminal proceedings, and
- A prosecution must be deemed in the public interest.

Where there is a realistic prospect of conviction and formal action is in the public interest, circumstances, which warrant a prosecution may include:

- Where the alleged offence has resulted in significant losses or impact on POL and the public
- Where the alleged offence involved a flagrant or intentional breach of the law
- Where there is a history of similar offences
- Where the offender has refused to accept wrongdoing despite significant evidence to the contrary
- Where the offender has failed to repay or make amends for any significant wrongdoing

POL will consider the following circumstances when deciding whether or not to prosecute in addition to those above:

- The seriousness and effect of the offence
- The deterrent effect of a prosecution on the offender and others
- Any mitigating factors

The decision to proceed with a prosecution will be taken by the Head of Security of POL, upon legal advice.<sup>20</sup>

60. The document goes on to deal with such matters as confiscation proceedings, appeals and complaints, adherence with the policy (said to be mandatory, and advising that any departure must be exceptional and capable of justification).

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<sup>20</sup> This reflects the hierarchy about which I have commented above as regards document (viii). Provision for the Head of Security (DPA) to authorise prosecutions is found in document (xiii) at paragraph 20.9 and in the introductory flowchart at page 4 of document (xiii) (see also paragraph 35(k) above)



The document requires periodic review. Although there is at the foot of the last page of the copy document sent to me a box allowing for insertion of the date of implementation of the policy, the date for its review, and the date of its formal approval, each is blank.

61. I am left totally unclear of the current status or origin of the **Internal Protocol for Criminal Investigation and Enforcement** (document (ix)) and the more impressive and detailed **Criminal Enforcement and Prosecution Policy** (document (x)) and how they, particularly document (x), are intended to fit within the new policy regime.
62. The document, clearly in draft, and undated, and entitled **POL - Criminal Enforcement and Prosecution Policy** (document (xi)) which annexes as Appendix 1 a flowchart, describes itself as “intended to be the new public facing policy under which Post Office will conduct all future investigations of alleged criminal activity against the Post Office”. It states that it follows a review of current policy, which was largely based on previous RMG policy.<sup>21</sup>
63. How, if at all, it is, or was, designed to sit with the far fuller and detailed namesake **Criminal Enforcement and Prosecution Policy** (document (x)), to which I have made extensive reference above, I know not. The draft document sets out in short form and in basic terms over a mere two pages some of the policy ideas found elsewhere.
64. It is probable that that draft has been superseded by the document entitled **Post Office Prosecution Policy – England and Wales** (document (xii)), which by its projected effective date (November 2013, with a review date in November 2014) is clearly the most recent prosecution policy document I have read. Simon Clarke of CK has authored it. It sets out POL’s policy in eight sections, and appears to me to have been modelled in some respects on the CPS Code for Crown Prosecutors. All its terms will require some very

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<sup>21</sup> Paragraph 1.2

careful consideration before it becomes final policy. It is important that POL's prosecution policy documentation includes criteria that accurately reflect POL prosecution policy and its guiding principles.

65. While it is not the principal function of this review to critique a draft document that may in time be submitted to the Board for approval as reflecting POL prosecution policy, nonetheless, I do have some preliminary comments to make about it.
66. Paragraph 1.3 in the "Introduction" section states, "This Policy statement is intended to explain the way in which Post Office Ltd will deal with allegations of crime committed against our assets in England and Wales". Footnote 1 makes the bold claim, "Post Office Ltd is a recognised prosecutor by the Ministry of Justice; currently Post Office Ltd delegates the prosecuting function to Messrs Cartwright King Solicitors." An identical claim was made for RMG in the document **A Brief History of Investigations, Prosecutions and Security in Royal Mail**.<sup>22</sup> I am unconvinced that this is or has ever been an accurate statement. The right to prosecute privately is conferred by section 6(1) of the Prosecution of Offences Act 1985, and I would be surprised if POL or RMG has ever been "recognised" by the Ministry of Justice to prosecute privately in any official sense.
67. In section 2, the scope and aims of the policy document are set out; it explains that POL is a public body catering for a wide range of essential public and commercial services; that POL carries a heavy responsibility for the guardianship of public and private assets, and emphasises the incumbency on POL to ensure its integrity and reputation is protected.<sup>23</sup> Accordingly, the document states POL will, subject to the terms of the policy document, prosecute those alleged to have committed criminal offences against it, whether employee, non-employee, contractor or customer.<sup>24</sup>

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<sup>22</sup> Page 7

<sup>23</sup> Paragraph 2.1

<sup>24</sup> Paragraph 2.3

68. In the section headed “General Principles”,<sup>25</sup> the test to be applied to the decision to prosecute is appropriately expressed to be the two-stage test within the Code for Crown Prosecutors (“the full Code test”),<sup>26</sup> in addition to which POL will apply the further considerations set out in the policy document.
69. The decision-taker is to be a qualified lawyer independent of any POL department having a direct financial or other interest in prosecution.<sup>27</sup> This is said to mirror CPS practice. I have however detected two difficulties: (1) this provision seems to me to be in conflict with the identification of the Head of Security as the ultimate decision-taker (the DPA) as revealed in other policy documents including the very recently drafted **Conduct of Criminal Investigation Policy** document (document (xiii)),<sup>28</sup> and (2) in logic, this provision might exclude any POL in-house lawyer or the Director of HR & Corporate Services (if the hierarchical dispute resolution envisaged in **Post Office Prosecution Policy** (document (viii)) is, or is to be, written into POL policy) and such a provision might even exclude CK and its lawyers, as they are arguably excluded by the terms of paragraph 3.3.ii. The decision-making hierarchy and this provision therefore needs reconsideration.
70. The section headed “The Decision to Prosecute” then sets out factors, which it is said POL will apply, in addition to the full Code test. But the list of factors are not expressed to be non-exhaustive, which, in my judgment, might also require reconsideration. “Disclosure” is confronted in section 6, and the “Acceptance of Guilty Pleas” in section 7, albeit no reference is made to the Attorney General’s Guidelines on the Acceptance of Pleas, which does have some application, in particular, “Section C. The Basis of Plea”.

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<sup>25</sup> Section 3

<sup>26</sup> The test is however never set out in terms in the document

<sup>27</sup> Paragraph 3.3

<sup>28</sup> See paragraph 47 above and footnote 20

71. Moreover, the comment I have made about document (xi) above applies with equal if not more force to document (xii), namely, the lack of reference in the newly drafted document to POL's draft EPP as set out in the **Criminal Enforcement and Prosecution Policy** document (document (x)), the status of which is entirely obscure but ought reasonably to form a basis of policy. Furthermore, while the draft document (document (xi)) annexed to it a flowchart, the new document is silent about it.
72. I have been informed that the **Conduct of Criminal Investigation Policy** document (document (xiii)) was prepared as a working guide for POL investigators and another similar version was prepared for POL's Board. I understand the document to have been prepared in-house by Rob King and others, but was considered, or contributed to, by Hugh Flemington, Jarnail Singh as well as Martin Smith of CK. I understood from my telephone conference of 17 October 2013 with Rob King and Andy Hayward that the document was only finalised this year. Its focus is clearly criminal investigation and not criminal prosecution. I note that, in addition to the passages I have extracted above,<sup>29</sup> the document makes reference to the SS Interim Report and Horizon issues as they affect current investigations.<sup>30</sup>
73. The current state of affairs is unsatisfactory. POL separated from RMG in April 2012, yet, despite the recently CK draft policy document **Post Office Prosecution Policy – England and Wales** (document (xii)), and the **Conduct of Criminal Investigation Policy** document (document (xiii)), emanating from POL's Security Department, the position in late 2013 is that there exist several enforcement and prosecution policy documents, whose precise status, origin and currency are uncertain, and there is none still that is official POL policy.
74. I have made recommendations about this above, which include a complete review of all historic draft POL policy documentation to ensure that the recent draft policy documentation, (which I also recommend be submitted to

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<sup>29</sup> See paragraphs 35(a)-(l) above

<sup>30</sup> Paragraphs 6.7, 12.6, 12.7, 12.8, 24.1 (using the working guide version numbering)

the Board for ratification), completely and accurately reflects POL policy in this area. Moreover, in the interests of complete transparency, such policy documentation should be widely promulgated within the organisation on POL's intranet, and consideration should be given to their publication on POL's website. After all, if POL's enforcement and prosecution policy is to "Provide POL security managers and legal advisers with guidelines enabling them to reach enforcement decisions in line with government guidance/standards", and "Inform the public and businesses of principles applied by POL, which guide enforcement decisions"<sup>31</sup> then there is every reason to publish those guidelines within the organisation as well as externally so that the wider public may be fully informed about them. As a public prosecuting authority, the CPS publishes its policies on its intranet and on its website. There is no reason POL should not do the same.

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<sup>31</sup> **Criminal Enforcement and Prosecution Policy** (document (x)), page 1, first paragraph, second and third bullet points

**D. DISCUSSION OF THE CASE FOR AND AGAINST THE  
RETENTION BY POL OF ITS PROSECUTION ROLE**

*The arguments*

75. The principal arguments for the retention by POL of its investigative/prosecutorial role are visibility and the effect of deterrence, “a clear signal” that POL will not tolerate dishonesty across its network. Thus, to assign an important function, for example, to the CPS, would be to send out the wrong message.
76. I would remain confident that if POL were to divest itself of its prosecutorial function, any such change would be managed in a way that the network knew that this was not a change of policy signifying POL was relaxing its view on dishonesty, but rather a change of approach, so that POL’s network of staff and agents would realise that dishonesty would continue to be viewed extremely seriously and would, in appropriate cases, be reported to police.
77. Indeed, I suspect it is hardly likely that those working for POL (whether employees or agents) would suddenly regard a change of policy as a temptation to offend when previously they would not. A change of POL policy in this regard would not mean a change in the criminal law, and all staff and agents must surely know that theft and false accounting are contrary to the criminal law, and will be reported and prosecuted, whoever’s function it is to prosecute such criminal offences. All should be aware of POL’s expectations through training, contractual documents and operation manuals, if POL’s **Criminal Enforcement and Prosecution Policy** is (or is to be) an accurate statement of policy.<sup>32</sup> Therefore, with respect, I do not agree that a change of prosecuting function, properly handled, would unavoidably send out the message Mr Colquhoun fears.

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<sup>32</sup> See page 2



78. The second point Mr Colquhoun makes goes to one aspect of the business case for retention, about which I am in no position to comment. My review is not to consider the business or reputational case for retention, which is another matter entirely, and beyond my remit; mine is to look at POL's prosecution role purely from a functional perspective to see if there is a better case for POL's prosecution arm being subsumed into the prosecutorial function of an existing public prosecuting authority such as the CPS.
79. As regards Mr Colquhoun's third point, while I accept that POL has assets to protect, and that POL takes seriously securing company assets, in that regard POL is no different to banks and other financial and business organisations, who have no prosecution function, and who rely on the police and other enforcement agencies and prosecuting authorities, such as the CPS or the Serious Fraud Office, to investigate and prosecute criminal offending against them.
80. It may indeed be anomalous that of POL's 11,800 branches only some 370 of them are staffed by employees of POL, but that does not mean that agents are any more likely to offend than Crown employees or others. The real distinction, if one is to be made, is that agents such as sub-postmasters are likelier to be working in smaller concerns, often as an adjunct to a self-owned business, with less or no on-site supervision, but I do not accept that the mere change of policy would affect the behaviour of otherwise law-abiding agents and staff.
81. I have struggled also to understand the point, in the context of the review I am conducting, that changing POL policy would put some employees in a difficult position. If the recommendation were that POL should assign its role of prosecuting POL agents only, then I might understand, but that is not what is at stake. I am not asked to consider splitting one part of POL's prosecution role while retaining another, and thereby recommending that POL adopt a differential approach towards employees as distinct from agents. If I were to recommend that POL should lose its prosecution function

that would have to apply across the board – not just to the prosecution of agents.

82. The **Post Office Prosecution Policy – England and Wales** document (document (xii)) emphasises POL's responsibility for, and guardianship of, its public and private assets, and the protection of reputation and integrity as important policy aims. The **Conduct of Criminal Investigation Policy** document (document (xiii)) argues that properly conducted investigations form a key part in POL strategy in protecting assets and reducing loss, and that, if it is poorly managed, an investigation can lead to increased risk of future loss and significant damage to the corporate brand, and in commencing any investigation POL needs to consider the impact in terms of the protection of business assets and limiting potential liabilities weighing against the reputation of the organisation or damage to the brand should the investigation fail.
83. What has potentially damaged POL's brand is the Horizon Online issue, which has shone a spotlight on POL, and its prosecuting function, as never before. The adverse publicity about it is also detrimental to public confidence in the criminal justice system in general and POL's prosecution capability in particular.
84. It is an irony that the Horizon issue was not something POL could have reasonably foreseen. The justifiable criticism that there have been possible miscarriages of justice in prosecutions based on Horizon Online data is directed at the integrity of the data system underpinning those cases, for which POL as the prosecutor is and remains accountable. The criticism also embraces Horizon Online training and support.
85. POL has taken appropriate steps to ensure that past and current criminal cases potentially affected by Horizon Online integrity, as well as training and support issues, are being properly addressed by establishing through CK a thorough and complete continuing review of the question of disclosure in these cases. A mediation scheme has also been established.



86. The difficulty that presents itself to POL now is that a number of convictions, as well as current and pending cases, are and have been reliant on the correctness of Horizon Online data and the integrity of the system, and, in the context of the prosecution process and POL's obligations, the proper disclosure of material that might reasonably undermine the prosecution case or assist the case for the defence. It is that, which is the focus of CK's review that is underway.
87. In light of the SS interim report of 8 July 2013, POL and CK are presently engaged in an on-going rigorous and robust process of sift and review of all affected past and present cases. The focus is on the alleged non-revelation to POL and CK of relevant material by the Fujitsu Services Ltd ("**FSL**") expert customarily relied upon by POL to support the integrity of Horizon Online data, which underpins its prosecutions.
88. In cases, which are subject to the disclosure regime under the Criminal Procedure and Investigations Act 1996 ("**CPIA**"), CK is applying the test for disclosure as provided in section 3 of the CPIA to the material it now has in its possession. In past cases, CK is asking itself the question whether had POL been in possession of the material at the time of the prosecution it would have disclosed it in compliance with its disclosure duties, recognising its obligation post-conviction to disclose any information that might cast doubt on the safety of the conviction.
89. Against that background, I have to determine whether there would be real advantage in these cases for POL to divest itself wholesale of its prosecution function. Focusing on the current issue, which brings about this review, in my judgment, were POL's investigative/prosecutorial operation to be handed over to the CPS, for example, as being the only viable public prosecuting authority able to prosecute them, the CPS would find itself in a comparatively disadvantageous position from which to advise on charge and to prosecute POL cases. It would be in a disadvantageous position, because there would inevitably not be the centralised oversight nationwide that POL

enjoys, or none as efficient as POL's. It would involve CPS branch or regional offices local to the commission of the offence (possibly also supported by the local police force) deciding on charge and, if charged, prosecuting the cases. Realistically, this would mean a fragmented approach, with little chance of central control or close oversight of these cases, or the issues affecting Horizon.

90. The claimed problems with Horizon Online would not disappear, but in my opinion decentralisation of the investigation and prosecution of these cases could only operate to exacerbate the difficulty, and would inevitably lead to an inconsistent approach and barely reconcilable decisions being taken. At all events, even were the CPS to assume the prosecutorial role in POL cases, inevitably POL would be called upon routinely to assist on issues such as disclosure (identifying, recording and retaining relevant Horizon material), so that POL could potentially find itself having a burden of investigation without control over the process.
91. Having considered the issues carefully, I can see no advantage to POL shedding itself of its private prosecution function, and in fact only disadvantage. If POL's policy is to operate a prosecuting policy that is fair, open and consistent, then I cannot see that anything other than retention of this role by POL will achieve that.
92. The real benefit to POL retaining its function, which in my opinion risks becoming totally diluted or lost if its function were assigned to a public prosecuting authority such as the CPS, is POL's undoubted expertise at investigating and prosecuting the very nature and volume of cases it handles annually, which provides it with a unique specialism inevitably leading to good and efficient use of its resources, as well as efficacy. That is not just of real benefit to POL but in my judgment it is also of real benefit to the general public and the communities POL serves.
93. Moreover, POL has the distinct advantage of understanding intimately its products, its customers, its operations, and the business of those it employs

and contracts with as agents; it understands its data systems and its functions, although, as recent events have proved, POL was unaware of, and left exposed by, allegedly relevant integrity issues with Horizon Online, and was unable therefore to meet its disclosure obligations towards those it was prosecuting where the Horizon Online system was or became an issue in the case.

94. In my opinion, there is no other organisation better placed than POL to perform this important function. Even if the police and the CPS had been carrying out the investigation and prosecution of those cases, which have become the subject of the current review, I do not see that they would have been in any better position than POL to appreciate the integrity issues, if, as is said to have happened, they were not revealed to POL by the FSL expert they instructed to report upon Horizon's integrity. Had that been the scenario, the CPS would have been in no better position to disclose the alleged Horizon Online defects or "bugs" than POL has been.
95. Although this is not a point that I have weighed in the balance in reaching my conclusions, nonetheless I think I should make the observation that if POL were to decide that it wished to free itself of its prosecution role to the CPS, in these times of budgetary restraint and depleted resources, from which the CPS has been far from immune, I think it unrealistic for POL to expect the CPS to welcome it, especially now.
96. The last consideration brings me also to consider one other hybrid possibility. Is there any sensible and rational argument to split POL's prosecution function from its investigations function? What is envisaged here is that while POL would continue to investigate the nature and number of criminal offences now investigated by it, the decision to charge in those cases, and the resultant prosecution of individuals so charged, would be in the hands of another public prosecuting authority such as the CPS. The effect would be to divorce the investigation of POL cases from the ultimate prosecution of them.

97. From the CPS perspective, the position would be no different in principle to the investigation of cases by the police in the ordinary run of criminal cases, and the submission of files to the CPS for a decision as to charge. Such a scheme would not be substantially different to those situations, which I expect must obtain now, where POL decides it should involve the police and CPS; POL investigators will retain involvement but the investigation itself is in partnership with the police (rather than the involvement of police being only for intelligence, arrest and/or search purposes), and, once complete, the file will be submitted to the CPS for a charging decision. I can see that there will be situations now where police involvement might be necessary, such as cases where there are concerns about the threat of violence or belligerence to POL staff by the suspect or others, or where the suspected offence or offender is such that the police and ultimately the CPS are considered better placed to deal with the case. But these must be rare or exceptional cases given the nature of the suspected offending POL typically investigates.
98. However, it is not the rare or exceptional case that the hybrid scheme envisages, but a wholesale divestment of the decision-making and prosecution function over cases POL investigates. While it may be argued there may be reputational or commercial advantage to POL in promoting such a scheme, (which I emphasise is not a matter for this review), first, it suffers the identical disadvantages I have highlighted above, and, second, the practical reality, to which I have also already adverted, is that the CPS is unlikely to be receptive to a request to assume ownership of the volume of cases raised and/or prosecuted by POL annually.
99. I recognise that I have to a large extent focused on Horizon issues that have given rise to the current review. I acknowledge also that the question whether POL should retain its prosecution role is a much wider question for POL, which includes strategic considerations of reputation, and the business case for retention that includes, but is not necessarily limited to, the current problems, which have understandably triggered this review. I do make clear that, although the current review has been a direct response to the criticism of prosecutions based on Horizon Online, the view I have arrived at is one

based on a general view of POL's role and is not limited to how it has dealt with Horizon Online cases. Consequently, these considerations apply equally to the ordinary investigation and prosecution of POL cases, even where no Horizon issues are involved.

*The potential for a conflict of interest*

100. One other issue, which I have necessarily considered with some care, is whether FSL's commercial relationship with POL, and the expert witness's employment with FSL, did create, or was capable of creating, a conflict of interest, incompatible with the prosecutorial duties and obligations POL has as a prosecutor.
101. There are bound to be quite understandable commercial sensitivities to FSL's systems, which I am confident it would ordinarily be loath to divulge to its competitors, as would any company in its position. FSL is in a contractual relationship with POL, and the expert relied upon to speak to the integrity of the system is himself employed by FSL, and he was one of its architects.
102. If commercial sensitivity about the integrity of a system were to lead to the non-revelation of adverse issues with the very system used to underpin POL criminal prosecutions, then that would be inimical to POL's prosecutorial duty to act fairly and to disclose relevant material. It would, if it existed, create an intolerable conflict of interest. The two positions would be entirely incompatible. I make perfectly clear that I have seen no evidence, and I have heard no suggestion, that what is said to have happened here was due to commercial sensitivity or any real or perceived conflict of interest between POL and FSL, or on the part of the expert, and I would reject any such suggestion if made. On the contrary, I am told that FSL has cooperated with the current review process, and I am informed that it was in fact the expert who brought to SS's attention the two defects or "bugs" they mention in their report at sections 6 and 8.

103. Although the duties to the court of an expert are plain and have been well rehearsed by the Court of Appeal, the Horizon expert relied upon by POL found himself called upon to give expert evidence about Horizon Online for no other reason than that he was (and is) if not the, then a, leading expert on the operation and integrity of Horizon Online. Thus, his depth of knowledge about the Horizon system of which he was an architect is and was unrivalled, and POL was justified in seeking his expert assistance in dealing with integrity issues affecting Horizon Online for court proceedings. Moreover, I note also that, although the Horizon expert who POL has customarily relied upon to speak to the integrity of the Horizon Online system has made several witness statements for a number of POL prosecutions, which rely on the integrity of Horizon Online data, he has only ever once given evidence before a court, and that was in October 2010, but in relation to a case dealing with events that took place between 2005 and 2008, and so unlike some experts who appear before courts regularly, he is far from being characterised as a professional witness.
104. The question remains whether the fact of the commercial relationship that must exist between POL and its IT provider, in the circumstances obtaining here, ought to make any or any substantial difference to POL's prosecutorial role. While in the type of situation here there is always the potentiality of a conflict of interest between POL's obligations as prosecutor and the commercial sensitivity of any third party IT provider upon whose data POL must rely for the prosecution and ultimate success of its cases, if the parties were to provide for POL's prosecutorial duties and obligations, by a protocol or memorandum of understanding between them, a situation like the present might be prevented from occurring in the future. I make recommendations about this above, although I understand that this is already in hand.



## **E. CONCLUSIONS**

105. It may be thought that POL's prosecution role is anachronistic, and highly problematic in light of recent events. Its prosecution role today is certainly based on the historical protection afforded to the mail, which I assume was itself founded upon the historical importance of protecting an important means of communication and commerce. The role today is couched in terms of guardianship, and the protection of assets, integrity and reputation.
106. However, the recent events have to be seen in their proper context. The serial non-disclosure of relevant material occurred in circumstances in which POL asserts that it and its advisers were wholly unaware that there might be disclosable material or information, and so, whatever the reason, were not placed in a position whereby they knew of its existence and could deal with it appropriately.
107. Because the only source of knowledge and information about Horizon Online and possible Horizon defects or "bugs" was exclusive to FSL and those who were knowledgeable about it, such as the expert (whose special knowledge inevitably led him to cross over from the commercial world to that of expert witness in criminal proceedings), POL was, inevitably, in a position where it was wholly dependent on FSL and/or the expert to reveal material so that POL could perform its prosecution duties, which in the event it was unable to do. SS has now reported its preliminary conclusions and POL has acted rapidly to put in place a full review of all impacted cases.
108. Therefore, POL, with its unique commercial arrangement with its IT supplier, also became somewhat hostage to it. I pass no judgment on what happened here and why; there is no evidence that permits me to do so, and it is beyond my remit. At all events I have not heard from FSL or the expert and so anything I did say would be unfair speculation. While the commercial relationship between POL as prosecutor and FSL as IT supplier may be unique, and potentially troublesome, it is by no means exceptional for there to be allegations of non-disclosure in criminal cases of every nature in all

types of situations. The Court of Appeal Criminal Division frequently hears appeals on conviction based on allegations of non-disclosure. In the event of there being any appeals to the Court of Appeal arising from Horizon Online integrity issues, it will be a matter for the court to determine whether any of those convictions have been unsafe.

109. I have concluded that the non-disclosure of material alleged here should not result in POL assigning its investigation or prosecution role to police and/or another public prosecuting authority, given that POL's investigative/prosecutorial function is well-organised and efficient, and, by the nature and volume of cases that it deals with annually, provides specialist knowledge, expertise as well as real benefit to POL and to the public generally, which would be otherwise diluted or lost. That is not to say that those within POL may not wish to consider the business case for retention, as well as any reputational issues that flow from it, as to which I expect there may be interesting argument. But, as I have indicated, they are not matters for this review.

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**GRO**

19 December 2013

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