

## Written evidence from Criminal Cases Review Commission CCRC (PPS0026)

### Background

1. The Criminal Cases Review Commission (CCRC) is the statutory body created in 1997 to investigate alleged miscarriages of justice and refer appropriate cases for appeal. Our jurisdiction covers the criminal courts of England, Wales and Northern Ireland. Since starting work 23 years ago, the CCRC has so far referred 700 cases to the appeal courts.

2. Between 26<sup>th</sup> March and 3<sup>rd</sup> June 2020 we decided to refer to the appeal courts 47 cases<sup>[1]</sup> where Post Office Ltd had brought private prosecutions and obtained convictions for theft, false accounting and/or fraud against post office workers – mostly subpostmistresses and subpostmasters. We refer to these as Post Office Horizon cases because in all cases the defendants / applicants say that errors in the Post Office's Horizon computer system were ultimately behind the offences for which they were convicted. The CCRC have several other such cases yet to decide. We are also aware that the 61 applications we have so far received represent a fraction of the number of cases where the Post Office brought such prosecutions.

3. On 3<sup>rd</sup> June 2020 CCRC Chairman Helen Pitcher wrote to Sir Bob Neil to draw the attention of the Justice Select Committee to the CCRC's Post Office Horizon referrals and to suggest that, in light of them, it would be appropriate for there to be a formal review of the circumstances and safeguards where an organisation is allowed to act as a prosecutor when it is also the victim and the investigator of an alleged offence, as the Post Office was in these cases.

### The Post Office Horizon cases and abuse of process

4. The Post Office Horizon cases we have referred so far have been sent for appeal on the basis of an abuse of process argument<sup>[2]</sup>.

5. Essentially, abuse of process refers to something being wrong in the legal process that led to a conviction that means the conviction was not fair. In the Post Office Horizon referrals, in broad terms the CCRC is saying the thing that went wrong in the legal process was that the defendants were unaware of significant problems with the Horizon computer system.

6. During the process of considering the Post Office Horizon applications, those involved in the cases became concerned that the Post Office's combined status as victim, investigator and prosecutor of the offences may have been at the root of the what we believe went wrong in these cases. This raised questions about whether any entity or individual in that position could be considered sufficiently objective to take appropriate prosecutorial decisions. Specifically, our concern was whether, in such circumstances, there could be sufficient confidence that key decisions on matters such as what steps should reasonably be taken by way of investigation, whether to pursue a prosecution, and what to disclose to the defence, would be appropriately free from conflict of interest and conscious or unconscious bias<sup>[3]</sup>.

7. The CCRC Statements of Reasons in these cases set out our reasons for referring them. The issues that gave rise to our suggestion that there should be a review of such prosecutions are discussed in the Statement of Reasons sent in most cases between

paragraphs 63 and 78. The most relevant sections are summarised here for the benefit of the Committee:

8. At paragraph 63 we say: *“There are a number of findings in both the Horizon Issues judgment and the Common Issues judgment which indicate that it was the default position of POL and Fujitsu to hold SPMs [subpostmasters / subpostmistresses] responsible for shortfalls, and that this assumption operated in the place of an objective and fair investigation.”*

9. Paragraph 64 says. *“The judgments describe POL and Fujitsu adopting a form of tunnel vision on this issue, which ultimately turned into “institutional obstinacy or refusal to consider any possible alternatives to their view of Horizon, which was maintained regardless of the weight of factual evidence to the contrary” (paragraph 928, Horizon Issues judgment).”*

10. At paragraph 65 of the Statement of Reasons we say that we have: *“serious concerns as to whether POL carried out thorough and objective criminal investigations in the cases of those SPMs who were prosecuted on the basis of Horizon data in connection with shortfalls at their branches.”*

11. The CCRC observes that the Criminal Procedure and Investigations Act 1996 (“CPIA”) applies to POL investigators who are investigating whether a person should be charged with an offence and also applies to POL prosecutors. Section 23(1)(a) of the CPIA requires the Secretary of State to prepare a code of practice designed to ensure that “where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued”. The CPIA Code of Practice (published in 2005 and revised in March 2015), also applies to POL investigators.

12. The CCRC further observes in the Statement of Reasons that POL prosecutors are under a corresponding duty to ensure that all reasonable lines of inquiry have been pursued.

13. In paragraph 67 of the Statement of Reasons we say: *“In the light of the above High Court findings, the CCRC is concerned that POL investigators did not pursue all reasonable lines of inquiry, but instead routinely assumed a theory of the case which was adverse to the SPMs under investigation without putting that theory to the test. The CCRC is also concerned that POL investigators did not pursue all reasonable lines of inquiry with Fujitsu, and did not give adequate scrutiny to the quality and thoroughness of Fujitsu’s own enquiries into Horizon problems. The CCRC is further concerned that POL prosecutors did not ensure that all reasonable lines of inquiry which might have pointed away from the SPMs’ guilt had been pursued before the decision to prosecute was made.”*

14. And in paragraph 68 we say: *“In the light of these findings – and in the context of POL’s combined status as victim, investigator and prosecutor of the offences in question – the CCRC considers that there are reasons for significant concern as to whether POL at all times acted as a thorough and objective investigator and*

*prosecutor, ensuring that all reasonable lines of inquiry were explored. The CCRC further considers that this concern applies to POL's approach throughout the period 2001 to 2013, that is, the timespan of the convictions which are considered in this Statement of Reasons. Although general awareness of problems with the Horizon system has undoubtedly increased in recent years, the CCRC considers that POL was on notice regarding alleged problems with Horizon throughout the period in question. Accordingly, POL was under a duty to make all reasonable inquiries into those alleged Horizon problems, in order to satisfy itself that it was bringing criminal prosecutions based upon sound evidence as to branch accounts.”*

15. It is important to stress that, while these concerns are discussed in the Statements of Reasons sent by the CCRC to the applicants in the referred cases, and to the appeal courts and to Post Office Ltd, they do not form part of the legal basis on which CCRC referred the cases for appeal. Rather they form part of the context for the abuse of process argument which is the basis of our referral.

#### **Caselaw**

16. We are not aware of any caselaw that is directly analogous to the situation of concern described here. There are, however, some cases that have dealt with questions of prosecutorial objectivity and that may be of interest to the Committee.

17. In *R v Milton Keynes Magistrates' Court ex p Roberts* [1995] Crim LR 224, the Divisional Court recognised that “if a prosecutor makes himself the creature of a private interest in exercising his powers, then the conduct would at least be prima facie abusive”.

18. In *R v Leominster Magistrates' Court ex p Aston Manor Brewery Co* (1997) The Times, January 8, DC, the Divisional Court decided that proceedings were an abuse of process where the claimant in civil proceedings controls criminal proceedings against the same defendant to the extent that the prosecution are unable to exercise independently their prosecutorial duties.

19. A similar argument was applied in *R v Gloucester Crown Court, ex p Jackman* [1993] COD 100, where the defendant asserted that the prosecution was oppressive because it was being used as a means of pressuring the defendant to accept settlement terms in the civil proceedings.

#### **The CCRC's call for a formal review**

20. It is not part of the CCRC statutory role<sup>[4]</sup> to provide feedback to the justice system from lessons learned in the course of our work, but we do seek to raise awareness of issues in the criminal justice system when we think it is necessary to do so. The situation as regards private prosecutions in circumstances where the prosecutor is also the investigator and victim is one such instance.

21. This is not a situation where the Commission has observed issues across a range of different cases and over a number of years, as was the case, for instance, when we repeatedly voiced concern about problems with the pre-trial disclosure of evidence.

22. Rather, the situation here is that we have observed a troubling common feature in the group of Post Office Horizon cases that we think is in need of some scrutiny.

23. The CCRC has not so far dealt with very many private prosecutions and we have not had cause to raise this concern before. However, our suggestion of a review in this area is intended to be proactive in that it is informed in part by the broadly accepted premise that the number of private prosecutions has increased in recent years and is likely to increase further in the years ahead. We hope that scrutiny applied at this stage may prevent miscarriages of justice in private criminal prosecutions from occurring in the future.

24. While we are not aware of any official data on the number of private prosecutions,<sup>[5]</sup> being brought in recent years in England, Wales and Northern Ireland, the general trend reported in the media is that numbers are increasing and will likely continue to do so. (A selection of relevant media coverage is included in the appendix at the end of this document).

25. This is consistent with the views expressed in the judgment in *R (Virgin Media) v Zinga* [2014] EWCA Crim 52, where the then Lord Chief Justice, Lord Thomas of Cwmgiedd, said: “...*there is an increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions...*”.

26. It also agrees with the view of the Private Prosecutors’ Association<sup>[6]</sup> who, on their website, state that in recent years “*there has been a rise in the number of private prosecutions before the UK courts... Continued growth in this field is anticipated given the budget and resource constraints faced by the police, prosecution and enforcement agencies.*”<sup>[7]</sup>

#### **Areas of specific concern in private prosecutions.**

27. It is for the Justice Select Committee to decide what should be subject to its scrutiny. However, in case it assists the Committee, in our view areas that could usefully be considered include:

- The desirability of a formal record of private prosecutions which could enable greater scrutiny of: the absolute number of prosecutions; the number of prosecutions brought by a single entity, or in relation to a particular offence or issue; and the levels of sentences imposed.
- The duty of the prosecutor / investigator / victim to disclose material that might assist the defence or undermine the prosecution.
- The duty of the prosecutor / investigator / victim to ensure that all reasonable lines of inquiry are pursued.
- How often and under what circumstances the Crown Prosecution Service (CPS) steps in to take over private prosecutions, and how often prosecutions are continued / discontinued.

In August 2014, *The Independent* reported that private prosecutions were “on the increase” with David Rosen, an associate law professor at Brunel University, quoted as saying that it was a “growing market”. The article cited an estimate by an unnamed “leading firm” that up to 250 cases were being handled by the private sector (including the RSPCA and the music and film industries) at that time.[\[8\]](#)

Similar sentiments were expressed in *The Times* in September 2015 when a solicitor opined that “Private prosecutions are definitely a growing market because of the gap in resources of enforcement agencies.”[\[9\]](#)

A July 2016 article in *Legal Futures*, quoted barrister Quentin Hunt as saying that this was “a growing area as the CPS and the police get squeezed”.[\[10\]](#)

In 2018, the Federation Against Copyright Theft (FACT) and Sky (a member of FACT) successfully prosecuted a number of pub owners for illegally broadcasting Premier League football contrary to the Copyright Designs and Patents Act 1988. A lawyer acting for FACT commented afterwards that he anticipated seeing “many more” private prosecutions being brought by organisations to protect property rights.[\[11\]](#)

Also in 2018, Allseas, an off-shore engineering company, successfully prosecuted Paul Sultana for his part in a £88 million investment fraud committed against them.[\[12\]](#)

An article in *The Times* in May 2019 quoted a Ministry of Justice spokesman as saying that that private prosecutions were “rare”, although a partner in a law firm which handled only private prosecutions, stated that they had grown “enormously”, with her firm prosecuting 100-120 cases a year.[\[13\]](#)

*The Telegraph* reported in June 2019 that firms who deal with such cases had seen an “enormous” rise in numbers[\[14\]](#) and, in the December, *The Law Society Gazette* noted that one particular chambers had seen a 3,000% increase in enquiries for advice on private prosecutions.[\[15\]](#)

Also in 2019, the Royal Mail brought a private prosecution against the owner of a dog which had attacked a postal worker.[\[16\]](#) *The Leicester Mercury* reported that in response to an increase in such attacks, the Royal Mail said that it would seek to launch a private prosecution in any case where the police decided against bringing criminal proceedings.[\[17\]](#)

The threat of a private prosecution was sufficient to convince an alleged fly tipper to pay the costs of clearing an area of common land in Wales. Following their success in early 2020, the BBC reported that members of the Coity Wallia Commoners' Association were urging others to take private legal action, to cover the cost of clean-ups and to punish and try to stop people from fly-tipping on common land.[\[18\]](#)

In March 2020, a private prosecution was brought against a shoplifter on behalf of the high street chain Boots by a company called TM Eye.[\[19\]](#) TM Eye is the parent company of “My Local Bobby” (MLB) a company which, according to *The Times*, “provides neighbourhood policing to residents, firms and shops”. Earlier in the year, MLB had announced that they would

start bringing private prosecutions for minor offences including shoplifting and thefts, because the police had “given up” on taking offenders to court.<sup>[20]</sup>

A recent (June 2020) private prosecution, brought by the insurance company Allianz, was described by a spokesman as “the first of many to come”<sup>[21]</sup> and in the same month, Exchange Chambers in Manchester announced that they were launching a new “private prosecutions team”. In a press release, their Chief Executive noted that “Private prosecutions are becoming increasingly commonplace as businesses seek to achieve justice, and recoup their losses in a cost effective and efficient way”.<sup>[22]</sup>

## June 2020

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[1] Forty-one Crown Court convictions have been referred to the Court of Appeal; six cases have been referred to the Crown Court as the convictions in those cases arose in magistrates courts.

[2] The CCRC’s abuse of process argument arises out of two civil court judgments – the Common Issues Judgment of the 15th March 2019 (*Bates v Post Office* [2019] EWHC 606 (QB)), and particularly the Horizon Issues Judgment handed down on the 16th December 2019 (*Bates v Post Office* [2019] EWHC 3408 (QB)).

[3] The Justice Select Committee may be aware that in 2017 the House of Commons Environment, Food and Rural Affairs Select Committee recommended that the RSPCA should “withdraw from acting as a prosecutor of first resort” in animal welfare cases because of conflict of interest issues. The BBC reported the issue here <https://www.bbc.co.uk/news/uk-37987213>. The Committee’s report can be found here: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news-parliament-2015/animal-welfare-report-published-16-17/>

[4] The CCRC’s statutory function is defined in the Criminal Appeal Act 1995.

[5] See, for example, <https://www.thetimes.co.uk/article/private-prosecutions-justice-only-for-the-highest-bidder-6jtw0tk97>

[6] A “membership organisation for professionals with expertise in bringing private prosecutions and academics with an interest in this field” who publish a voluntary code of conduct (see: <https://www.thetimes.co.uk/article/code-drawn-up-to-prevent-abuse-of-private-prosecutions-jb89gpf89>)

[7] <https://private-prosecutions.com>

[8] <https://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html>

[9] <https://www.thetimes.co.uk/article/cuts-lead-to-growth-industry-in-private-prosecutions-nqjlnv88ffz>

[10] <https://www.legalfutures.co.uk/latest-news/barrister-launches-direct-access-private-prosecutions-practice>

[11] <https://www.thetimes.co.uk/article/pubs-fined-327k-in-private-prosecution-for-illegal-football-broadcasts-z9jknpgxr>

[12] <https://www.bbc.co.uk/news/uk-44447254>

[13] <https://www.thetimes.co.uk/article/private-prosecutions-justice-only-for-the-highest-bidder-6jtw0tk97>

[14] <https://www.telegraph.co.uk/news/2019/06/08/lack-confidence-cps-leading-rise-private-prosecutions-qc-says/> [paywall]

[15] <https://www.lawgazette.co.uk/news/private-prosecutions-to-cause-surge-in-professional-negligence-work/5102439.article>

- [16] <https://www.leicestermercury.co.uk/news/local-news/jack-russell-jumped-up-latched-3385589>
- [17] <https://www.leicestermercury.co.uk/news/leicester-news/huge-increase-dog-attacks-postal-3391673>
- [18] <https://www.bbc.co.uk/news/uk-wales-51388797>
- [19] <https://www.thetimes.co.uk/article/boots-makes-legal-history-after-police-let-thief-go-3d8jfd0vq>
- [20] <https://www.standard.co.uk/news/uk/my-local-bobby-private-crime-patrols-thieves-court-a4325531.html>
- [21] <https://www.lawgazette.co.uk/news/insurers-private-prosecution-of-false-pi-claimant-first-of-many/5104499.article>
- [22] <https://www.exchangechambers.co.uk/exchange-chambers-launches-private-prosecutions-team/>