

**REPORT TO THE POST OFFICE HORIZON IT INQUIRY**

**PHASE 4**

**INVESTIGATION, DISCLOSURE AND CRIMINAL PROSECUTION  
IN ENGLAND AND WALES AND  
INVESTIGATIONS AND PROSECUTIONS BY THE POST OFFICE 2000-2013**

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**VOLUME 1A**

1. This addendum report is prepared for phase 4 of the Post Office Horizon IT Inquiry, a statutory inquiry under the Inquiries Act 2005, which focuses on “action against Sub-Postmasters and others: policy making, audits and investigations, civil and criminal proceedings, knowledge and responsibility for failures in investigations and disclosure”. In volume 1 of my report, I have already addressed the legal framework for prosecution, both by the Post Office<sup>1</sup> and more broadly, and the framework relating to responsibilities of prosecuting authorities, investigations, charging decisions, prosecutions and disclosure. This involved consideration of applicable statutory provisions, codes of practice issued under statute, guidelines and guidance, caselaw and other material from a range of identified sources, and then consideration of such policy documents and guidance issued by and to the Post Office as engage those topics.
  
2. In this addendum, volume 1A, I am asked to address the following additional question:

*“Please provide an analysis of the duties of an investigator / prosecutor to provide information to an expert instructed by the prosecution about their duty to the court. In particular, was there a duty to inform such an expert i) of the fact that they owed a duty to the court; and ii) what that duty consisted of, in relation to the writing of their report, the researches undertaken and the evidence given to the court orally.”*

3. In order properly to answer this question, it is helpful to understand the legal principles that apply in general in relation to expert evidence, the duties of experts and disclosure of expert material. This is set out below. I shall then seek to answer the specific question as to what duties there are, or were in the Inquiry’s core period from 2000-2013, as to the provision to experts instructed by prosecutors/investigators. As with volume 1, I shall consider the policies produced by other prosecution authorities, in this context the Crown Prosecution Service (‘CPS’) and Health and Safety Executive (‘HSE’). I shall finally consider again the various iterations of investigation and prosecution policies produced by the Post Office which touch on these issues.

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<sup>1</sup> As in volume 1 of my report, I will throughout this report refer to the Post Office, so as to encapsulate a number of legal entities that have existed in the period with which I am concerned.

4. In summary, the duties identified in the question were recognised to apply to those called as expert witnesses within the Inquiry's period of focus, and certainly by 2005-6. The existence of a duty on a party instructing an expert to draw the expert's own duty to their attention is less clearly identified. However, a party seeking to rely on an expert would wish to ensure that the expert did satisfy their duties to the court so as to ensure that the expert's evidence was admissible. Such action would also be consonant with their duty, as a participant in criminal cases, under Part 1 of the Criminal Procedure Rules. The obligations of, and in relation to an expert were well appreciated by agencies such as the CPS and HSE, certainly by the end of the Inquiry period of concern. I have not identified any Post Office policy that addresses the duties on an expert, or the obligations to which this gives rise for a party relying on an expert. The duties on a party relying on an expert as to disclosure of any report and material underlying a report from an expert are well established. I have not seen any Post Office policy document that addressed this topic.

#### The admissibility of expert evidence

5. The general rule is that witnesses may only give evidence of fact rather than opinion. In *Turner*<sup>2</sup>, Lawton LJ identified the circumstances in which opinion evidence from an expert is admissible as follows: "*An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.*"
6. Applying the analysis in that case, it can be said that *expert* opinion evidence is admissible in criminal proceedings at common law if:
- (a) it is relevant to a matter in issue in the proceedings;
  - (b) it is needed to provide the court with information likely to be outside the court's own knowledge and experience;
  - (c) the witness is competent to give that opinion.

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<sup>2</sup> [1975] QB 834, at p.841

7. As to that third criterion, Thomas LJ said in *Reed*<sup>3</sup>: “Expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury. There is, however, no enhanced test of admissibility for such evidence. If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial.” Thomas LJ further observed: “As was set out by the Supreme Court of South Australia in *Bonython*<sup>4</sup>, the subject matter of the evidence must be part of ‘a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’. However, there is no closed category where evidence cannot be placed before a jury”.
8. Thomas LJ<sup>5</sup> also made reference with approval to the observations of Hughes LJ in *Atkins and Atkins* <sup>6</sup>“This case therefore does not raise any question as to the judge's power at common law to exclude evidence tendered as expert, if it be argued that the expert is insufficiently qualified or that his evidence is insufficiently based upon expertise. We say no more about that than that there can be no doubt that such a power exists. That is because he who asserts admissibility must demonstrate it. Evidence of opinion is not ordinarily admissible. Opinion based upon identifiable expertise outside the experience of the jury is one exception. If objection be taken to admissibility (though not otherwise) it must be determined by the judge. It is for him who tenders such evidence to establish the exception, viz the expertise and that it is the foundation of the opinion. The power to rule on admissibility applies equally to Crown and defence.”
9. The admissibility of expert evidence is also regulated by section 30, Criminal Justice Act 1988, which, in so far as is relevant in the period from 2000-2013, stated:
- (1)An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.
- (2)If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.

<sup>3</sup> [2009] EWCA Crim 2698, at para.111

<sup>4</sup> (1984) 38 SAAR 45

<sup>5</sup> *Reed*, para.113

<sup>6</sup> [2009] EWCA Crim 1876, at para.9

(3) For the purpose of determining whether to give leave the court shall have regard –

(a) to the contents of the report;

(b) to the reasons why it is proposed that the person making the report shall not give oral evidence;

(c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(d) to any other circumstances that appear to the court to be relevant.

(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence....

(5) In this section “expert report” means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

10. An issue associated with the application of section 30 is the proof of the facts upon which an expert’s opinion is based, In *Turner*<sup>7</sup>, Lawton LJ addressed this issue: “Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.”

11. It will be necessary to call evidence to prove those facts. This requirement has been circumscribed since April 2005 by section 127, Criminal Justice Act 2003, which, in so far as is relevant, states:

(1) This section applies if –

(a) a statement has been prepared for the purposes of criminal proceedings,

(b) the person who prepared the statement had or may reasonably be supposed to have had personal knowledge of the matters stated,

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<sup>7</sup> [1975] QB 834, at p.840

(c) notice is given under the appropriate rules that another person (the expert) will in evidence given in the proceedings orally or under section 9 of the Criminal Justice Act 1967 (c. 80) base an opinion or inference on the statement, and

(d) the notice gives the name of the person who prepared the statement and the nature of the matters stated.

(2) In evidence given in the proceedings the expert may base an opinion or inference on the statement.

(3) If evidence based on the statement is given under subsection (2) the statement is to be treated as evidence of what it states.

(4) This section does not apply if the court, on an application by a party to the proceedings, orders that it is not in the interests of justice that it should apply.

(5) The matters to be considered by the court in deciding whether to make an order under subsection (4) include –

(a) the expense of calling as a witness the person who prepared the statement;

(b) whether relevant evidence could be given by that person which could not be given by the expert;

(c) whether that person can reasonably be expected to remember the matters stated well enough to give oral evidence of them.

(6) Subsections (1) to (5) apply to a statement prepared for the purposes of a criminal investigation as they apply to a statement prepared for the purposes of criminal proceedings, and in such a case references to the proceedings are to criminal proceedings arising from the investigation.

### The duty of an expert

12. The duty of expert was described by Lord President Cooper in *Davie v Magistrates of Edinburgh* as “to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of those criteria to the facts proved in evidence “. This involves the expert to be full and transparent, including material such as formulae and statistics so that the basis on which any conclusion has been reached is fully set out, and the reliability of that conclusion therefore open to assessment<sup>8</sup>.

<sup>8</sup> T (*Footwear mark evidence*) [2010] EWCA Crim 2439

13. In *Harris*<sup>9</sup> the Court of Appeal was invited to give general guidance in relation to the duties of experts in the context of a set of fresh evidence appeals relating to allegations of baby shaking. Gage LJ said: *“It may be helpful for judges, practitioners and experts to be reminded of the obligations of an expert witness summarised by Cresswell J. in the National Justice Cia Naviera SA v Prudential Assurance Co Ltd (Ikarian Reefer)*<sup>10</sup>. *Cresswell J. pointed out amongst other factors the following, which we summarise as follows:*

*(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*

*(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.*

*(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.*

*(4) An expert should make it clear when a particular question or issue falls outside his expertise.*

*(5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.*

*(6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court.”*

14. It was emphasised in *B(T)*<sup>11</sup> that the duties thus identified were owed to the court, and overrode any obligation to the person who had instructed the expert, or any organisation for which the expert worked. As a part of ensuring the independence of the expert, it was confirmed in *Toth v Jarman*<sup>12</sup> that there was a duty on a party who wishes to call an expert with a potential conflict of interest – financial, personal; connection, obligation – to disclose details of that conflict at earliest opportunity so that the court can decide if material or significant and whether evidence be allowed.

<sup>9</sup> [2005] EWCA Crim 1980, [2006] 1 Cr. App. R. 5(55), at 271.

<sup>10</sup> [1993] 2 Lloyd's Rep. 68 at 81.

<sup>11</sup> [2006] EWCA Crim 417

<sup>12</sup> [2006] 4 All ER 1276

15. The Court in *B(T)*<sup>13</sup>, which included both Gage LJ, who had delivered the judgment in *Harris*, and Creswell J, whose summary of the duties of experts in *Ikarian Reefer* had there been quoted with approval, identified the following as “*necessary inclusions in an expert report*”:

*“1. Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.*

*2. A statement setting out the substance of all the instructions received (with written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.*

*3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.*

*4. Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.*

*5. Relevant extracts of literature or any other material which might assist the court.*

*6. A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgment that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.*

*7. Where on an exchange of experts' reports matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.”*

#### Disclosure in relation to expert evidence

16. As a precursor to the consideration of specific requirements for disclosure in relation to experts, it is important to stress, as the CPS Disclosure Manual does<sup>14</sup> in this context, that “*the test for disclosure of unused material is the same in relation to material*

<sup>13</sup> [2006] EWCA Crim 417, at para.177

<sup>14</sup> CPS Disclosure Manual, as refreshed October 2021, chapter 36



*generated by an expert as for all other types. If unused material relating to an expert witness is relevant, it must be disclosed to the defence, or a PII application made”.*

17. Expert evidence and material underlying expert evidence in the hands of the prosecutor is therefore susceptible to the provisions of the Criminal Procedure and Investigations Act 1996<sup>15</sup> (“CPIA”) as any other material in its possession. This is illustrated, for example, by the fact that the CPIA Code, as originally issued in 1997, included in a list of material embraced by the duty to retain<sup>16</sup> *“communication between the police and experts such as forensic scientists, reports of work carried out by experts and schedules of scientific material prepared by the expert for the investigator, for the purposes of criminal proceedings”*.
18. Similarly, the requirements imposed on investigators and prosecutors as to third party material<sup>17</sup> to take steps to investigate whether third parties have material that would meet the disclosure test and to take steps to secure that material, also apply in the expert context. That is illustrated, for example, by the fact that the 2000 version of the Attorney General’s Guidelines on Disclosure’s list of examples of third parties<sup>18</sup> who an investigator might need to approach included *“providers of forensic services”*. Duties of disclosure in relation to expert evidence has been addressed by the CPS, as will be seen below, since at least 2006, and by the HSE since at least 2011.
19. Section 81 of the Police and Criminal Evidence Act 1984 (‘PACE 1984’) requires advanced notice to be given of expert evidence in the Crown Court. As originally enacted, it stated:
 

*(1) Crown Court Rules may make provision for – (a)requiring any party to proceedings before the court to disclose to the other party or parties any expert evidence which he proposes to adduce in the proceedings; and (b)prohibiting a party who fails to comply in respect of any evidence with any requirement imposed by virtue of paragraph (a) above from adducing that evidence without the leave of the court.*

<sup>15</sup> The CPIA disclosure provisions are addressed in Volume 1 from para.219

<sup>16</sup> The duty to retain is addressed in Volume 1 at paras.102 and 230. The list appears at para.5.4, CPIA Code.

<sup>17</sup> Third party disclosure is addressed in Volume 1 from para.294

<sup>18</sup> AG’s Guidelines on disclosure (2000), para.30 – it also appears in the 2005 version at para.51 and the 2013 version at para.56

*(2) Crown Court Rules made by virtue of this section may specify the kinds of expert evidence to which they apply and may exempt facts or matters of any description specified in the rules.*

20. The Rules at the start of the Inquiry's core period in place under this enactment were The Crown Court (Advance Notice of Expert Evidence) Rules 1987<sup>19</sup>. In particular, these rules required a written statement of findings or opinion which it was proposed to adduce from an expert to be disclosed as soon after committal as possible, along with provision of a copy of any tests and other experiments. These essential rules for advanced disclosure in relation to experts were set out in rules 3-4, which in so far as is relevant stated:

Rule 3:

- 1) *Following the committal for trial of any person, or the making of an order for his retrial, if any party to the proceedings proposes to adduce expert evidence (whether of fact or opinion) in the proceedings (otherwise than in relation to sentence) he shall as soon as practicable, unless in relation to the evidence in question he has already done so—*
- (a) furnish the other party or parties with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence; and*
  - (b) where a request in writing is made to him in that behalf by any other party, provide that party also with a copy of (or if it appears to the party proposing to adduce the evidence to be more practicable, a reasonable opportunity to examine) the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure had been carried out.*
- (2) *A party may by notice in writing waive his right to be furnished with any of the matters mentioned in paragraph (1) above and, in particular, may agree that the statement mentioned in sub-paragraph (a) thereof may be furnished to him orally and not in writing.*

Rule 4:

- (1) *If a party has reasonable grounds for believing that the disclosure of any evidence in compliance with the requirements imposed by rule 3 above might lead to the*

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<sup>19</sup> (SI 1987 No.716). Rules to the same effect for the Magistrates' Court were also introduced as then *Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997*

*intimidation, or attempted intimidation, of any person on whose evidence he intends to rely in the proceedings, or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that evidence.*

*(2) Where, in accordance with paragraph (1) above, a party considers that he is not obliged to comply with the requirements imposed by rule 3 above with regard to any evidence in relation to any other party, he shall give notice in writing to that party to the effect that the evidence is being withheld and the grounds therefor.*

21. Section 81, PACE was amended by the Courts Act 2003 so that the rules to which it referred were the Criminal Procedure Rules. The rules quoted above were translated in almost the same terms into Part 24 of the Rules issued in 2005, with rule 3 becoming rule 24.1 and rule 4 becoming rule 24.2. Rule 24.3 made clear that *“A party who seeks to adduce expert evidence in any proceedings and who fails to comply with rule 24.1 shall not adduce that evidence in those proceedings without the leave of the court.”*

22. A practical illustration of this rule as to the consequences of breach of rules by late service was provided in *Ensor*<sup>20</sup>, where the Court of Appeal upheld the trial judge’s exclusion of a defence expert report served during the trial. Aitkens LJ summarised the combined effect of the rules<sup>21</sup> as follows:

*“...it is incumbent upon both prosecution and defence parties to criminal trials to alert the court and the other side at the earliest practicable moment if they are intending or may be intending to adduce expert evidence. That should be done if possible at a Plea and Case Management Hearing (PCMH). If it cannot be done then it must be done as soon as the possibility becomes live. The nearer the start of the trial, the greater the urgency in informing the court and other side of the possibility of adducing expert evidence so that appropriate steps can be taken by the court and the other side to manage the expert evidence in an efficient way.”*

23. The other aspect of the Criminal Procedure Rules that ought to be considered in this context is the overriding objective, and the duties imposed on participants in

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<sup>20</sup> [2010] 1 Cr.App.R 255

<sup>21</sup> [2010] 1 Cr.App.R 255, para.30

criminal proceedings pursuant to this objective. Rule 1.1, when introduced in 2005 (and has effectively remained since), was in the following terms:

*“(1) The overriding objective of this new code is that criminal cases be dealt with justly.*

*(2) Dealing with a criminal case justly includes –*

- (a) acquitting the innocent and convicting the guilty;*
- (b) dealing with the prosecution and the defence fairly;*
- (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;*
- (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;*
- (e) dealing with the case efficiently and expeditiously;*
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and*
- (g) dealing with the case in ways that take into account – (i) the gravity of the offence alleged, (ii) the complexity of what is in issue, (iii) the severity of the consequences for the defendant and others affected, and (iv) the needs of other cases.”*

24. This was supplemented by the duty imposed on participants in criminal cases (CrimPR 1.2) which, both in 2005 and since, reads as follows:

*“(1) Each participant, in the conduct of each case, must –*

- (a) prepare and conduct the case in accordance with the overriding objective;*
- (b) comply with these Rules, practice directions and directions made by the court; and*
- (c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.*

*(2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule.”*

25. Rule 1.2 makes it clear, in the present context, that the overriding objective, and the Criminal Procedure Rules, apply both to the prosecutor and to any expert relied on by the prosecution. The combination of rules 1.1 and 1.2 imposes an obligation on both to ensure compliance with the Rules, and to deal with cases fairly and efficiently. This carries with it, in my view, an obligation to meet the obligations imposed by law on expert witnesses, given that the requirements identified in cases such as *Harris* and *B(T)* are designed to ensure fairness and efficiency, and an obligation of the party instructing an expert to ensure that they do so. I say at once that this is my analysis, rather than something defined in those terms by the Rules themselves.

Part 33, Criminal Procedure Rules 2010

26. The rules in Part 24 of the 2005 Criminal Procedure Rules were replaced by Part 33 of the 2010 Criminal Procedure Rules, which sought to bring together the principles identified in the caselaw above as to the duties of an expert and the requirements for reliance on an expert's report. These rules were later supplemented by the Consolidated Criminal Practice Direction, but that did not occur during the Inquiry's period of focus, and that Practice Direction is thus not addressed here.
27. The expert's duty to the court is addressed at rule 33.2, which seeks to replicate *Harris*<sup>22</sup>. It reads as follows:
- (1) An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.*
- (2) This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid.*
- (3) This duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement.*
28. The rules then address, at rule 33.3, the content of an expert's report. This rule seeks to replicate *B(T)*<sup>23</sup>. It should be read in conjunction with Part 27 of the Rules, which

<sup>22</sup> [2005] EWCA Crim 1980, and the *Ikarian Reefer* case before that, see para.13 above

<sup>23</sup> [2006] EWCA Crim 417, see para.15 above

contains rules about witness statements. Declarations of truth in witness statements are required by section 9 of the Criminal Justice Act 1967. Rule 33.3 itself states:

- (1) *An expert's report must –*
- (a) *give details of the expert's qualifications, relevant experience and accreditation;*
  - (b) *give details of any literature or other information which the expert has relied on in making the report;*
  - (c) *contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;*
  - (d) *make clear which of the facts stated in the report are within the expert's own knowledge;*
  - (e) *say who carried out any examination, measurement, test or experiment which the expert has used for the report and –*
    - (i) *give the qualifications, relevant experience and accreditation of that person,*
    - (ii) *say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and*
    - (iii) *summarise the findings on which the expert relies;*
  - (f) *where there is a range of opinion on the matters dealt with in the report –*
    - (i) *summarise the range of opinion, and*
    - (ii) *give reasons for his own opinion;*
  - (g) *if the expert is not able to give his opinion without qualification, state the qualification;*
  - (h) *contain a summary of the conclusions reached;*
  - (i) *contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and*
  - (j) *contain the same declaration of truth as a witness statement.*
- (2) *Only sub-paragraphs (i) and (j) of rule 33.3(1) apply to a summary by an expert of his conclusions served in advance of that expert's report.*

29. In *Reed*<sup>24</sup> Thomas LJ described rule 33.3(1) as “... providing a very important safeguard. This requires at sub-paras (f) and (g) each expert to identify where there is a range of opinion on the matters dealt with in his report. In such a case, the expert must summarise the scope

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<sup>24</sup> [2009] EWCA Crim 2698, at para.129

*of opinion and give reasons for his own opinion. If the expert cannot give his opinion without qualification, he must state the qualification. Compliance with this obligation will identify for the other party an area where there is a range of opinion; it is particularly important that this rule is followed in the expert report obtained by the Crown.”*

30. The 2010 rules then seek to address the service of an expert’s report in much the same way that the 2005 rules had done. Rule 33.4 states:

- 1) *A party who wants to introduce expert evidence must –*
- (a) serve it on – (i) the court officer, and (ii) each other party;*
  - (b) serve it – (i) as soon as practicable, and in any event (ii) with any application in support of which that party relies on that evidence; and*
  - (c) if another party so requires, give that party a copy of, or a reasonable opportunity to inspect –*
    - (i) a record of any examination, measurement, test or experiment on which the expert’s findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and*
    - (ii) anything on which any such examination, measurement, test or experiment was carried out.*
- (2) A party may not introduce expert evidence if that party has not complied with this rule, unless– (a) every other party agrees; or (b) the court gives permission.*

31. Rule 33.5 requires the party relying on the expert to notify them that their report has been served. If the service of the report is late, the party relying on it is required to apply to the court for permission, and to explain the delay (rule 33.9).

32. The Rules then go on to address the case management of expert material, by seeking to focus areas of dispute between experts, and to identify areas of agreement, and, where possible, to seek to reduce the amount of expert evidence where possible to one report. The importance of this was emphasised by Philips LJ in *Doherty*<sup>25</sup>: “... it is important that any issue of expert evidence should be identified and, if possible, resolved before trial and this area should be explored by the court in the pre-trial review.” This is done through rules 33.6 -33.8, as follows:

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<sup>25</sup> [1997] 1 Cr. App. R. 369, at 374

**33.6.** – (1) *This rule applies where more than one party wants to introduce expert evidence.*  
 (2) *The court may direct the experts to – (a) discuss the expert issues in the proceedings; and (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.*  
 (3) *Except for that statement, the content of that discussion must not be referred to without the court’s permission.*  
 (4) *A party may not introduce expert evidence without the court’s permission if the expert has not complied with a direction under this rule.*

**33.7.** – (1) *Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.*  
 (2) *Where the co-defendants cannot agree who should be the expert, the court may (a) select the expert from a list prepared or identified by them; or (b) direct that the expert be selected in another way.*

**33.8.** – (1) *Where the court gives a direction under rule 33.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.*  
 (2) *When a co-defendant gives instructions to the expert he must, at the same time, send a copy of the instructions to the other co-defendant(s).*  
 (3) *The court may give directions about – (a) the payment of the expert’s fees and expenses; and (b) any examination, measurement, test or experiment which the expert wishes to carry out.*  
 (4) *The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.*  
 (5) *Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert’s fees and expenses.*

33. In *Reed*<sup>26</sup>, Thomas LJ said of rule 33.6: “Under r.33.6(2) the court has power to direct experts to discuss expert issues in the proceedings and prepare a statement for the court of the matters on which they agree and disagree giving their reasons. If an expert does not comply with this, that party may not call the expert to give evidence without the permission of the court (r.33.6(4)).” That appeal concerned in particular the admissibility of low template DNA evidence, but Thomas LJ’s observations in relation to the use of rule 33.6 in that context inform its wider use. He said: “We would anticipate, even in such a

<sup>26</sup> [2009] EWCA Crim 2698, at para.130-132



*case, that, as was eventually the position in the present appeal, much of the science relating to DNA will be common ground. The experts should be able to set out in the statement under r.33.6 in clear terms for use at the trial the basic science that is agreed, in so far as it is not contained in one of the reports. The experts must then identify with precision what is in dispute – for example, the match probability, the interpretation of the electrophoretograms or the evaluative opinion that is to be given. If the order as to the provision of the statement under r.33.6 is not observed and in the absence of a good reason, then the trial judge should consider carefully whether to exercise the power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the judge may well exercise that power. A failure to find time for a meeting because of commitments to other matters, a common problem with many experts as was evident in this appeal, is not to be treated as a good reason. This procedure will also identify whether the issue in dispute raises a question of admissibility to be determined by the judge or whether the issue is one where the dispute is simply one for determination by the jury.”*

34. The overriding objective remained an effective touchstone for the application of the 2010 Criminal Procedure Rules as it had the 2005 Rules. It follows that from the introduction of the enhanced requirements set out in Part 33, the duty under rule 1.2 meant that an expert had to comply with Part 33 of the Rules. It did also involve a prosecutor in ensuring compliance by an expert they instructed with those rules, and a duty to alert other participants where this did not occur.

#### The instruction of an expert witness: CPS Guidance

35. The Crown Prosecution Service has issued legal guidance on expert evidence, which was last updated on 5<sup>th</sup> August 2022. This guidance includes details as to the approach to be taken in instructing an expert and the information that needs to be provided to the expert. I have been able to identify earlier guidance in relation to experts, and instructions to experts instructed by the police and/or CPS since 2006. It is of assistance, as a means of considering how duties relating to expert evidence were understood and what measures could be taken to ensure that participants in the criminal process, including the experts themselves, understood their obligations, to consider this material.
36. The earliest CPS guidance that I have been able to identify during the Inquiry’s period of focus dates from 2006. I have considered the “Guidance Booklet” issued

jointly by the CPS and the Association of Chief Police Officers ('ACPO'), "*Disclosure: Expert Evidence and Unused Material*". This Guidance is referred to in the Disclosure Manual. The Guidance Booklet was issued in March 2006, it appears that version remained in place in 2009<sup>27</sup>. The foreword<sup>28</sup> states that the purpose of the Guidance Booklet is, "*to provide a practical guide to disclosure obligations for expert witnesses instructed by the Prosecution Team. When properly applied, these instructions will assist expert witnesses, investigators and prosecutors to perform their disclosure duties effectively fairly and justly, which is vitally important to the integrity of the criminal justice system.*"

37. The introduction to the Booklet makes clear that it is addressed to those instructed to provide expert evidence. It states:

*"You are instructed by the Prosecution Team, which comprises the Police and Crown Prosecution Service, as an expert in this investigation. It is important that you understand the obligations placed upon you by this status. As an expert witness you have an overriding duty to assist the court and, in this respect, your duty is to the court and not to the Prosecuting Team instructing you. This will include obligations relating to disclosure. The obligations which apply to you as an expert are to assist in ensuring that the Prosecution Team can comply fully with their statutory disclosure obligations. These obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which you may belong. Your obligations... can be summarised in the key actions of retain, record and reveal."*

38. The Guidance Booklet referred experts to the Disclosure Manual and the Attorney General's Guidelines:

*"The Disclosure Manual (The Manual) contains the operational instructions on disclosure which have been agreed by the CPS and the Association of Chief Police Officers. It explains how the Prosecution Team have agreed to fulfil their duties to disclose unused material to the defence. These duties arise under statute and at common law.*

<sup>27</sup><https://webarchive.nationalarchives.gov.uk/ukgwa/20090116182838/http://www.cps.gov.uk/legaldto/g/>

<sup>28</sup> Signed by the Director of Public Prosecutions and the head of ACPO.

*The Manual contains practical guidance to the police and CPS practitioners which supplements the framework of the Act, the Code and the Attorney General’s Guidelines. The Manual can be found at: <http://www.cps.gov.uk>*

*The Attorney General’s Guidelines build on existing law to help ensure that the legislation is operated consistently and fairly by the Prosecution Team. They can be found at: <http://www.lso.gov.uk/guidelines.htm>*

39. In respect of the expert’s duties the Guidance Booklet states the following:

*“There are three key obligations arising for you, as an expert, as the investigation progresses. Your understanding of these obligations and delivering them is the key to you adequately fulfilling your disclosure obligations. The relevant steps are to retain, to record, and to reveal.”*

40. In keeping with these three “key obligations”, the Guidance Booklet details how the expert would adhere to the obligation to “retain”, “record” and “reveal” material to the prosecution team. For example, in relation to the duty to retain<sup>29</sup>, it states: *“You should retain everything, including physical, written and electronically captured material, until otherwise instructed and the investigator has indicated the appropriate action to take.”* It then provides more detailed guidance as to how long material should be retained. In relation to the duty to record<sup>30</sup> it states: *“The requirement for you to commence making records begins at the time you receive instructions and continues for the whole of the time you are involved”*. It goes on to list the types of information that need to be recorded, and how such records should be made.

41. In relation to the “reveal”<sup>31</sup> material to the prosecution team requirement, this is addressed by reference to the provision of a report, a formal statement (if required) and an index of unused material. Regarding the contents of an expert’s report, the guidance states the following:

*“The Report: Your report(s) should contain information relating to the following:*

<sup>29</sup> CPS Guidance Booklet para.3.1

<sup>30</sup> CPS Guidance Booklet para.3.2

<sup>31</sup> CPS Guidance Booklet para.3.3.2

- *details of your qualifications, experience or accreditation relevant to the work performed*
- *the range and extent of your expertise*
- *details of any information upon which you have relied in arriving at your opinion*
- *details of any statements of fact upon which you have relied in reaching your opinion*
- *clarification of which of the facts are within your own knowledge*
- *information relating to who has carried out measurements, examinations, tests etc and if under your supervision*
- *your opinion(s) and a justification for these*
- *where you have provided qualified opinions details of the qualifications*
- *a summary of all your conclusions*

42. In addition, it is made clear<sup>32</sup>: “You are required to confirm your understanding of your disclosure obligations to the court, as set out in the guidance given in this booklet, by signing a declaration (the Declaration) of understanding.”

43. I have reviewed the CPS website as archived in January 2009<sup>33</sup>. The Disclosure Manual as there retained contained a section entitled “Expert witnesses – Prosecution disclosure obligations” which included the following information:

1. *The obligations which apply to an expert are to ensure that the Prosecution Team can comply fully with the requirements of disclosure. These obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which the expert may belong. These obligations can be summarised in the key actions of record, retain and reveal.*
2. *An expert not employed by the police is a third party and is not bound by the obligations set out in the Criminal Procedure and Investigations Act 1996 as amended. The CPS seeks to impose these obligations as part of the contractual relationship with the expert.*
3. *The obligations are set out in a booklet known as **Disclosure: Experts' evidence and unused material** (the Guidance Booklet). It can be found at Annex K in this Manual.*
4. *When a member of the Prosecution Team instructs an expert in an investigation, it must be ensured that the expert understands the obligations placed upon them by this status. The expert witness has an overriding duty to assist the court and, in this respect, the expert's duty is to the court and not to the Prosecution Team. This will include obligations relating to disclosure.*

<sup>32</sup> CPS Guidance Booklet, para.4

<sup>33</sup>[https://webarchive.nationalarchives.gov.uk/ukgwa/20090116205603/http://www.cps.gov.uk/legal/d\\_to\\_g/disclosure\\_manual/#a251](https://webarchive.nationalarchives.gov.uk/ukgwa/20090116205603/http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/#a251)

5. *In addition to an explanation of the disclosure regime, the Guidance Booklet contains a flowchart which illustrates the process of revelation.*
6. *The Guidance Booklet also contains a sample of the index (the Index) of unused material that an expert will be asked to complete, describing all the unused material in their possession. The expert will not be expected to distinguish between sensitive and non-sensitive material. It is the responsibility of the disclosure officer in conjunction with the expert to identify any sensitive material.*

44. The CPS issued further guidance for experts instructed by the prosecution, "CPS Guidance for Experts in Disclosure, Unused Material and Case Management", last updated on 30 September 2019. The purpose of the guidance was set out in the Foreword:

*"The instructions contained in this guidance are designed to provide a practical guide to preparing expert evidence and to provide guidance on the disclosure obligations of expert witnesses instructed by the investigator and/or the Crown Prosecution Service (the Prosecution Team). These instructions will assist expert witnesses, investigators and prosecutors to perform their duties effectively fairly and justly, which is vitally important to the integrity of the criminal justice system.*

*The considered application of this guidance and appropriate management of the materials within the investigation by experts will enhance their credibility and promote confidence in the role of the expert witness within the prosecution process.*

*This guidance reflects the commitment of the Prosecution Team to working alongside expert witnesses and other agencies to ensure that case management and disclosure requirements are complied with fairly and properly."*

45. The guidance includes the following topics:
- i. Criminal Procedure Rules and the Overriding Objective,
  - ii. the disclosure obligations of all expert witnesses,
  - iii. the expert's obligations pursuant to Part 19 of the Criminal Procedure Rules and the Criminal Practice Direction Division V Evidence 19A-C<sup>34</sup>,

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<sup>34</sup> Part 19 replaced Part 33 of the Criminal Procedure Rules as those relating to expert evidence. The Practice Direction has itself since been replaced.

- iv. the disclosure obligations of prosecution experts: with reference to the CPS Disclosure Manual, the CPIA and Code of Practice (including retain, record and reveal), the Attorney General’s Guidelines on Disclosure,
- v. the Expert’s self-certificate,
- vi. Streamlined Forensic reporting and Disclosure of Unused Material.

46. The CPS legal guidance on expert evidence, as most recently updated, is dated 5<sup>th</sup> August 2022. The section which addresses “instructing an expert” begins:

*Whether the expert is instructed before or after charge it is desirable for the decision to instruct an expert to be agreed between the investigator(s) and the prosecution. The advantage of this approach is that:*

- *The most appropriate expert can be identified from the outset, i.e. as close to the start of the investigation as practicable in any given case; and*
- *The prosecutor can ensure that there is clarity as to what the expert is being asked to provide an opinion on. This is particularly important in cases which involve complex legal issues, for example causation.*

*This approach should reduce the potential for misunderstanding and delay caused by unnecessary work being undertaken by experts who have been provided with inaccurate or inadequate instructions.*

47. The guidance makes clear that the instruction to the expert should address:

- (a) The duties of the expert and in particular their duties as to disclosure. In this regard, it states: *“The investigator or prosecutor should ask the expert to complete this in all cases to provide assurance that the expert understands his obligations to the court and his obligations as to disclosure”;*
- (b) How the expert’s report should be prepared. In this regard the guidance says: *“If the expert is instructed by the prosecutor, then the prosecutor should clearly identify the work to be undertaken in the terms of reference. This will involve explaining the background to the work and specifying the issues, including a clear exposition of all relevant legal elements, on which an opinion is sought. In some cases, it may be necessary to limit the information given to the expert to avoid the risk of their conclusions being affected by confirmation bias, whereby the expert tests*

*their hypothesis and conclusions by reference to confirming evidence, such as the prosecution's belief as to the identity of the suspect, as opposed to considering potentially conflicting evidence."*

48. The guidance then has a section on the drafting of the terms of reference for the expert, and what these should include<sup>35</sup>. This section appears to be informed by such earlier guidance as the Protocol for the Instruction of Experts to give Evidence in Civil Claims, which was issued by the Civil Justice Council in 2005<sup>36</sup>. It is worth setting these out in their entirety.

*The Terms of Reference should include the following:*

- *The extent of the expert's remit i.e. precisely the issues, and/or the suspects, we want the expert to focus upon;*
- *The standard to which the expert is being asked to apply. For example, if being asked to address causation, the expert needs to be given clear guidance on the level of certainty the criminal court requires, and the need to avoid 'percentage' conclusions;*
- *Where the existing evidence of fact contains disagreement or ambiguity, the Terms of Reference should include an overarching narrative which sets out how the prosecution would propose to put the case in that regard, and ask the expert to provide his assessment based on that narrative. Alternatively, depending on the circumstances, the expert could be asked to advise based on a number of different scenarios. The key point is to ensure that the expert sets out clearly the factual basis upon which the opinion is based;*
- *If the material being sent to the expert contains reports from another professional then, insofar as the expert might wish to clarify any issue in the other professional's report, any discussion should be arranged through the investigator. Any discussion should be documented to ensure an auditable trail for disclosure purposes;*
- *The expert should be instructed to indicate immediately:*
  - (a) *If he requires anything further - whether by way of legal guidance, evidence of fact, or expert evidence from other specialists - before reporting back. This should limit the number of experts' reports which are couched in contingent terms;*
  - (b) *If any part of the Terms of Reference is unclear;*

<sup>35</sup> I was unable to locate similar CPS guidance on the Terms of Reference and Letter of Instruction within the guidance in 2009.

<sup>36</sup> [Preliminary Draft \(9 \(justice.gov.uk\)\)](https://www.justice.gov.uk/preliminary-draft-9)

- *An early, informal indication of the report's likely conclusions. This will enable the investigator to liaise with the prosecutor to consider which other areas of evidence-gathering should be undertaken and inform of the overall timetable;*
- *All the relevant statements and exhibits. An expert's report based on a limited reading of the evidence is likely to be challenged by the Defence in cross examination;*
- *Finally, in terms of the content of the report itself, the expert should be reminded to preface his detailed observations by setting out (1) his experience and qualifications, and (2) an itemised list of the evidence and any other material (including the CPS Guidance for Experts with which s/he will have been supplied); and*
- *Timescales for completion of the report. This is vital given the Criminal Procedure Rules.*

49. The guidance observes that *“The Terms of Reference should be scheduled by the disclosure officer and disclosed to the Defence.”* The guidance goes on to address disclosure of material generated by the expert, or that has relevance to their competence or credibility. This is also addressed in the CPS Disclosure Manual (chapter 37).

#### The instruction of an expert witness: HSE

50. For comparative purposes, I have reviewed the Health and Safety Executive’s (‘‘HSE’’) archived website from 2011<sup>37</sup>. At that time, the website set out relevant HSE policies and guidance in respect of the instruction of expert witnesses in the ‘‘expert evidence’’ section within ‘‘enforcement’’.

51. In respect of the instruction of an expert, the guidance stated, *‘‘it is the responsibility of the person managing the investigation to manage the use of specialists, deciding how they should be used and ensuring that experts remain independent.’’* The expert evidence section stated, *‘‘when an outside expert is instructed to advise, s/he should have the guidance in this section expressly drawn to his/her attention...’’*<sup>38</sup> The guidance referred to included obligations in respect of the disclosure of unused material for investigations that commenced before<sup>39</sup> and on or after<sup>40</sup> 4 April 2005 with reference

<sup>37</sup><https://webarchive.nationalarchives.gov.uk/ukgwa/20110318145359/http://www.hse.gov.uk/enforce/enforcementguide/investigation/expert-intro.htm>

<sup>38</sup><https://webarchive.nationalarchives.gov.uk/ukgwa/20110318145359/http://www.hse.gov.uk/enforce/enforcementguide/investigation/expert-intro.htm>

<sup>39</sup><https://webarchive.nationalarchives.gov.uk/ukgwa/20110318225512/http://www.hse.gov.uk/enforce/enforcementguide/pretrial/before-approach.htm#p9>

<sup>40</sup><https://webarchive.nationalarchives.gov.uk/ukgwa/20110318225518/http://www.hse.gov.uk/enforce/enforcementguide/pretrial/after-approach.htm#p9>



to relevant sections of the Attorney General’s Guidelines on Disclosure, the CPIA, the Data Protection Act 1998 and the Criminal Procedure Rules. Within the guidance, experts were reminded of the requirement to pursue all reasonable lines of inquiry pursuant to the CPIA<sup>41</sup> and the Court of Appeal’s Protocol for the Control and Management of Unused Material to be applied in all Crown Court cases<sup>42</sup>.

52. The guidance stated, *“When an expert witness is instructed, it is important that s/he understand what is required of him/her. The expert should be referred to this chapter of the Enforcement Guide and also the section on disclosure mentioned above. The expert must fully understand that s/he has an overriding duty to assist the court and should not feel prevented from providing information that might prove detrimental to the prosecution case. In order to meet that overriding duty, s/he is under an obligation to assist the prosecution with the statutory requirements relating to disclosure. The expert should be reminded of this obligation, which takes precedence over any internal codes of practice or other standards set by professional organisations.”*
53. In respect of the investigator / prosecutor’s role in ensuring that the expert witness was aware of their duties, the guidance continued, *“experts should be reminded that a failure to comply with their duties or a direction of the court could have a number of adverse consequences, including the delay or halting of the prosecution case, exclusion of the expert evidence, the overturning of any conviction and criticism of the expert by the judge, which might result in referral of the expert to any relevant professional body. Such consequences might prevent him/her from acting as an expert in future<sup>43</sup>”*.
54. Regarding the contents of an expert report, the guidance stated:

*“5. All reports should begin with the expert’s name, official address, occupation, relevant academic and professional qualifications, accreditations including membership of*

<sup>41</sup> *“Experts should not be asked to conduct tests that will only favour the prosecution. The Criminal Procedure and Investigations Act 1996 requires investigators to pursue all reasonable lines of enquiry, and this means that tests that might undermine the prosecution case should also be commissioned.”*

<sup>42</sup> In respect of joint investigations with the police, the website referred to additional guidance: *“In joint investigations with the police, you may find the expert is referred to the ACPO/CPS Guidance Booklet for Experts May 2010. Although the general principles of this booklet are already captured within internal guidance and followed in HSE investigations, the entirety of the document has not been adopted therefore you do not need to refer experts to it outside of a joint police/HSE investigation.”*

<sup>43</sup><https://webarchive.nationalarchives.gov.uk/ukgwa/20110318225447/http://www.hse.gov.uk/enforce/enforcementguide/investigation/expert-role.htm>

*professional institutions, career history, relevant experience, the range and extent of his/her expertise and any limitations upon the expertise. Detailed CVs are increasingly being asked for and it may be preferable to provide this in an appendix.*

6. *The report should also include:*

- *A statement setting out the substance of all the instructions received (written or oral), questions upon which an opinion is sought, the materials provided and considered, and the substance of all facts, documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based. The expert should make clear which of the facts stated in the report are within the expert’s own knowledge;*
- *Where necessary, the report should give the current state of the inquiry and the areas where further information would be needed to reach a final view . If the expert is not able to give an opinion without qualification, s/he should state the qualification;*
- *Information on who has carried out any examination, measurement, test or experiment which the expert has used for the report, including that person’s qualifications, relevant experience and accreditation. The report should give details of the methodology used, summarise the findings on which the expert relies and say whether or not such measurements etc were carried out under the expert’s supervision;*
- *Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for his/her opinion. Any material facts or matters that detract from the expert’s opinions, and any points which should fairly be made against any opinions expressed in the report, should also be set out;*
- *Details of any literature or any other information or material which the expert has relied on in making the report or which might assist the court (see also ‘Extrinsic material’ below);*
- *A summary of the conclusions reached;*
- *A statement that the expert understands his/her duty to the court to provide independent assistance by way of objective and unbiased opinion and that s/he has complied, and will continue to comply, with that duty. The expert should acknowledge that the expert will inform all parties and, where appropriate, the court in the event that his/her opinion changes on any material issue;*
- *The same declaration of truth as that contained in a voluntary witness statement form (LP70).”*

55. A footnote to the “Contents of the Report” section expressly referenced the relevant section of the Criminal Procedure Rules 2010<sup>44</sup> regarding the contents of expert reports required under the Rules and relevant Court of Appeal guidance, “Rule 33.3 Criminal Procedure Rules (“CPR”) 2010. Also, the Court of Appeal gave guidance on the

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<sup>44</sup> Rule 33.3 as quoted at para.28 above

*matters to be included in an expert report in criminal proceedings in R v B [2006] EWCA Crim 417."*

56. Currently, the HSE provides guidance on its website<sup>45</sup> in respect of the instruction of expert witnesses that expands upon the previous guidance. The current guidance states that an external expert must be directed to two documents<sup>46</sup>; *"Enforcement Guide (E&W): 'The Report: Contents of the Report'"* and *"The Code of Practice for Experts<sup>47</sup>"*. Expert witnesses instructed on behalf of the HSE are required to sign a declaration that they have read the guidance booklet *"Disclosure: Experts' Evidence, Case Management and Unused Material"*, complied with their duties in accordance with the CPIA and provided a list of all relevant material (that they have gathered or generated).

#### Post Office policies

57. I have re-reviewed the Post Office policies relating to investigation and prosecution of criminal offences to assess how they address the legal requirements in relation to experts.
58. I have identified a number of documents which reference opinion evidence, as a type of evidence, to at least an extent, and/or address the content of witness statements for evidential purposes. In this category are:
- (a) An 'E' Learning document relating to 'evidence and witness statements' as part of the 'Introduction to investigations'<sup>48</sup> course, which was issued in 2006. This addresses opinion evidence in high level terms but does not address either expert or non-expert evidence as to the operation of computer systems, the duties of an expert or disclosure by/to an expert.

<sup>45</sup> <https://www.hse.gov.uk/enforce/enforcementguide/investigation/expert-role.htm>

<sup>46</sup> <https://www.hse.gov.uk/enforce/enforcementguide/investigation/expert-role.htm>

<sup>47</sup> As set out on The Academy of Experts' website: <https://academyofexperts.org/practising-as-expert/expert-witness/codes-of-practice/>

<sup>48</sup> POL00104805

<sup>49</sup> POL00104827

- (b) Royal Mail Procedures and Standards 'Witness statements'<sup>49</sup>, dated January 2010. This addresses the core components of a witness statement but does not refer to experts at all.
- (c) Royal Mail Procedures and Standards 'Rules and Continuity of Evidence'<sup>50</sup>, dated January 2010. This addresses hearsay evidence and the provisions of the Criminal Justice Act 2003, and in that context the preserved common law exceptions listed in section 118. It thus refers to the fact that an expert is permitted "*to give evidence of any relevant matter that forms part of their professional expertise (although not acquired through personal experience) and to draw upon technical information widely used by members of the expert's profession*". The document also addresses opinion evidence briefly in similar high level terms to the E-Learning referred to above.

59. The Royal Mail Group 'Forensic and Technical Procedures'<sup>51</sup>, published in January 2008, addresses the process by which investigators should determine whether to submit items to the Forensic Science Service ('FSS'), and, if so, how to do so. As it explains, the FSS "*consists of privatised former police forensic laboratories*". In terms of the information provided to the FSS, this should relate to the "*nature of the work to be undertaken*", and there is a form to be completed. This form is not included with the paper, and I cannot therefore comment on whether it addressed any of the areas identified in the terms of reference for experts addressed by the CPS. Certainly, there is no reference to any of those requirements in this paper.

60. The policies I have considered in relation to the conduct of investigations<sup>52</sup> and prosecutorial decisions<sup>53</sup> do not address any aspect of expert evidence or the legal requirements relating to it. They also do not address Criminal Procedure Rules 1.2 or its implications.

61. In relation to disclosure, I have considered the two policy documents that address the topic of the disclosure of unused material specifically<sup>54</sup>. Whilst that issued in

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<sup>49</sup> POL00104827

<sup>50</sup> POL00104891

<sup>51</sup> POL00104813. There is also a version 3 of this document, POL00104815

<sup>52</sup> For example, POL00104912

<sup>53</sup> For example, POL00104852

<sup>54</sup> POL00104762, May 2001, and POL00104848, July 2010

May 2001 alludes to the Attorney General's Guidelines on disclosure, and the July 2010 document annexes the Code to the CPIA, neither addresses disclosure in relation to expert evidence. The only exception is that the July 2010 document alludes to the Code's list of non-sensitive material that should be shared with the prosecutor and thus includes reference to "*communication between investigators and experts such as forensic scientists including reports of work carried out by experts and any schedules prepared by them as part of the case*".

### Analysis

62. There is no question but that the law does impose duties on expert witnesses, and that the expert owes their duty to the court to ensure their compliance with these duties.
63. That was well established in the civil context through, for example, the *Ikarian Reefer* case<sup>55</sup>, and in the criminal context by decisions such as *Harris*<sup>56</sup> and *B(T)*<sup>57</sup>. It follows that at least by 2005-2006, any investigative and/prosecutorial authority should have been aware that any expert instructed owed their primary duty to the court, and that they were required to meet a series of requirements as to the content of their report, their underlying material and their conclusions. This was supplemented, following the introduction of the 2010 Criminal Procedure Rules, by the duties of experts there clearly enunciated. I have not identified in any Post Office policy documents with which I have been provided any analysis of these obligations, or their implications for Post Office investigations.
64. Those cases did not directly impose a duty on such investigative and/prosecutorial authorities to ensure that their experts were aware of this. However, it was clear from the approach in those cases that expert evidence that did not meet these criteria was at least likely to be excluded. There was, therefore, in common sense a pragmatic impetus for an authority instructing an expert to ensure that the expert met these obligations. That was further enforced when the 2010 Criminal Procedure

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<sup>55</sup> [1993] 2 Lloyd's Rep.68

<sup>56</sup> [2005] EWCA Crim 1980

<sup>57</sup> [2006] EWCA Crim 417

Rules at rule 33.4(2) made clear that expert evidence not meeting the requirements of Part 33 would not be admitted.

65. More than this, a natural reading of Criminal Procedure Rules, rule 1.2 imposed a duty on participants in criminal proceedings, and therefore including both the prosecution and any expert they instructed, to comply with the Rules, and to act justly, fairly and efficiently. That, in common sense, included an obligation to abide by the requirements imposed by law on experts, and a duty to ensure that an expert instructed did so. Once Part 33 of the Criminal Procedure Rules 2010 incorporated the guidance from cases such as *Harris* and *B(T)* into the Rules, rule 1.2 required both compliance by participants, including prosecutors and experts, with those rules and duty to alert other participants to any failure of compliance with those Rules. That, in effect, represented a duty on the prosecutor to ensure that any expert they instructed understood and complied with their duties as an expert as defined in the Rules.
66. That analysis appears to be consistent with the approach adopted from at least 2006 by the CPS and from at least 2011 by the HSE. Each recognised the important duties imposed on experts, as to disclosure and as to the content of their reports, and each prosecuting authority saw it as part of their duty to ensure experts they instructed met those obligations. The approach adopted by the CPS and HSE does underline the importance of the obligations of experts, both to experts themselves and to a prosecuting authority that instructed them.
67. I have not seen any letter of instruction or terms of reference for an expert by the Post Office, so as to compare it with the CPS terms of reference, and cannot therefore speak to the extent to which the Post Office did address these obligations with any expert they instructed. In contrast to the CPS position, both through the Guidance Booklet it issued in 2006, and the guidance now in place, there was no Post Office document that I have seen that gave guidance as to what an expert being instructed needed to address. There was no policy that identified the implications of Rule 1.2 and/or Part 33 of the Rules for the Post Office as an investigative or prosecutorial body.

68. My concerns as to the potential deficiencies in this regard of the Post Office in policy terms are raised by the disclosure position. There were duties on those relying on experts from at least section 81, PACE 1984 and the rules made under it. Such rules were in place throughout the Inquiry's core period. However, such limited policy materials as I have seen that address disclosure do not address disclosure in relation to expert evidence to any real or meaningful extent. Certainly, they bear no real comparison with the approach of the CPS or HSE in this important area.
69. I will consider the extent to which this reflected a position in practice when I consider the case files provided for volume 2 of this report.