

Witness Name: Kenneth William Donnelly

Statement No.: WITN10510100

Dated: 29 November 2023

POST OFFICE HORIZON IT INQUIRY

FIRST WITNESS STATEMENT OF KENNETH WILLIAM DONNELLY

1. I am the Deputy Crown Agent for Specialist Casework at the Crown Office and Procurator Fiscal Service. This witness statement to the Post Office Horizon IT Inquiry seeks to provide information in respect of both Scotland's prosecutorial framework during the period from 2000 to the present, and the operation and practice of reporting agencies to the Crown Office and Procurator Fiscal Service ("COPFS"), in particular, those employed by Post Office Limited ("POL"). I make this statement in response to a request from the Inquiry pursuant to Rule 9 of the Inquiry Rules 2006 and dated 26 October 2023.

The prosecutorial framework in Scotland

2. In Scotland, the responsibility for all public prosecutions is vested in COPFS. The head of the system of criminal prosecution is the Lord Advocate, who is a Scottish

Minister in the Scottish Government and one of the Scottish Law Officers. The Lord Advocate is responsible for all prosecutions in Scotland which are carried out by COPFS on her behalf.

3. COPFS operates independently and makes prosecution decisions based on the evidence and the public interest rather than political considerations. It plays a crucial role in the Scottish legal system by ensuring that criminal cases are prosecuted fairly and in accordance with the law.
4. When COPFS receives a report about a crime from the police or other reporting agency, before deciding what action to take in the public interest, the prosecutor will decide if there is enough evidence. There must be evidence from at least two separate sources (corroboration) to establish that a crime known to the law of Scotland was committed and that the accused was the perpetrator.
5. Decisions on how to proceed in a case are for the prosecutor. In reaching that decision, prosecutors will consider all the individual facts and circumstances of a case.
6. The criteria for decision making and the range of options available to prosecutors are set out in the published COPFS Prosecution Code (WITN10510101).

The Crown's duty of disclosure

7. Scottish criminal procedure proceeds on the basis, as required by Article 6 of the European Convention on Human Rights and Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, that the Crown (COPFS) has a duty, which exists in perpetuity, to provide to the defence all material information, namely that information which:
 - would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused;
 - would materially strengthen the accused's case; or
 - is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.
8. This includes information, of which the Crown is aware, that is likely to be of real importance to any undermining of the Crown case, any casting of reasonable doubt upon it or which is of positive assistance to the accused. In essence, the Crown must disclose any statement or other material of which it is aware of, and which materially weakens the Crown case or materially strengthens the defence case.
9. The Crown is not obliged to disclose all material information against the accused, only that information against the accused that forms part of the prosecution case. Neutral information or information damaging to the defence and not part of the prosecution case need not be disclosed and should not be brought to the attention

of the court, neutral information being information with no evidential significance to any party.

10. It is the Crown's duty to disclose information that is material to the defence. This duty does not depend on the defence making an application or request to the Crown for disclosure.

11. The Crown's duty is a continuing one and it persists in perpetuity. It continues throughout and to the conclusion of any trial, during any subsequent appeal proceedings and even after the final disposal of a case.

12. Statute places a continuing duty of review on the Crown (section 123 Criminal Justice and Licensing (Scotland) Act 2010). The Crown must, from time to time during the lifecycle of the case review the information held and disclosed and make further disclosure where appropriate. Where proceedings at first instance have concluded, there is a continuing statutory duty on the Crown to review the information held (section 134 Criminal Justice and Licensing (Scotland) Act 2010).

Specialist Reporting Agencies

13. Organisations other than the police who report cases to COPFS are called specialist reporting agencies ("SRAs"). SRAs investigate alleged crimes in their particular field and report them to COPFS.

14. It is for COPFS to determine whether to prosecute and what form the prosecution should take.

The relationship between COPFS and specialist reporting agencies

15. The constitutional relationship between COPFS and SRAs differs from the relationship between COPFS and Police Scotland. In terms of section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police and Fire Reform (Scotland) Act 2012, the Lord Advocate has statutory powers to instruct Police Scotland with regard to the investigation and reporting of criminal offending. The Lord Advocate and her Procurators Fiscal do not have statutory authority to instruct or direct SRAs in their investigations.

16. The authority of the Lord Advocate to designate an agency or body as an SRA derives from the Lord Advocate's status as a Minister of the Scottish Government in terms of section 48(5) of the Scotland Act 1998. As the head of the systems of criminal prosecution in Scotland, the Lord Advocate has the autonomy to appoint a suitable agency as an SRA absent any official designation by statute. The founding of some SRAs is historic and reports are accepted by COPFS as a matter of continuing custom.

17. Organisations designed as an SRA by COPFS are authorised to report cases to COPFS on the basis that legislative provision designates that organisation as an appropriate enforcement, investigative or regulatory body, or where Ministers have appointed the organisation to investigate or enforce legislation.

18. It is for an SRA to investigate and then to decide whether to report the case circumstances to COPFS for consideration of prosecutorial action. Some SRAs are empowered by statute and have administrative penalties available to their organisation which they may utilise as an alternative to reporting a case to COPFS where such a sanction would be appropriate; others have no statutory authority.

19. In Scotland the ability of an SRA to investigate and report an offence directly to COPFS is dictated by the relevant legislation governing their organisation's area of responsibility. It may also be dictated by the nature of the crime committed and the powers available to the reporting agency to investigate the offence.

20. An agency must be registered with COPFS before it can operate as a SRA. A list of organisations registered with COPFS is publicly available on the COPFS website. As of 2014, 172 organisations were registered with COPFS as SRAs. All SRAs have a unique agency reference number for reporting cases to COPFS.

21. Generally, SRAs submit their report to COPFS in the form of a Standard Prosecution Report ("SPR") which is same format used by the police. The SPR includes, inter alia, a narrative of the facts and evidence, draft charges, a list of productions and a list of witnesses.

Investigation and disclosure obligations of an SRA (2000 – 2010)

22. The basic parameters of the Crown's common law duty of disclosure to the defence were set down in 1998 by the High Court in *McLeod v HM Advocate (No 2)* 1998 JC 67. The law was then clarified in a series of decisions by the Judicial Committee of the Privy Council and the Supreme Court (*Holland v HM Advocate* 2005 1 SC (PC) 3, *Sinclair v HM Advocate* 2005 1 SC (PC) 28, *McDonald v HM Advocate* [2008] UKPC 48 and *HM Advocate v Murtagh* [2009] UKPC 35). Following the implementation of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"), the Crown's duty of disclosure has been placed on a statutory footing. The provisions of the 2010 Act replace any equivalent common law rules about disclosure of information and the common law rules were abolished insofar as they were replaced by or were inconsistent with the 2010 Act.
23. During the period 2000 to 2010, the common law duties that applied to the Crown applied equally to the Police and SRAs. These common law duties required SRAs to pursue all reasonable lines of enquiry, record all relevant information and provide this information to the Crown.
24. In 2006, COPFS published the 7th edition of the guide, '*Reports to the Procurator Fiscal. A guide for specialist report agencies*' (WITN10510102). This guide provides advice for SRAs to assist them in following best practice in the investigation and reporting of criminal cases. The guide covers all aspects of reporting to COPFS including general legal requirements, form of report, preparation for trial, action following submission of statement, the role of COPFS,

court procedure and jury trials. Earlier versions of this publication exist from 1996 to 2005.

25. The 1996 (First Edition) publication of the guide contains the wording:

“Finally, it is important that material which may be detrimental to the prospect of a conviction is not omitted from the statement. In order to perform his or her function properly the Procurator Fiscal must be aware of all the evidence which has been gathered regardless of whether it contributes to the evidence against an accused person or is in his or her favour.”

26. The 1996 (Second Edition), 1997 – 2001 (Third Edition), 2001 (Fourth Edition), 2001 – 2005 (Fifth Edition), 2005 (Sixth Edition), and 2006 (Seventh Edition) editions all contain either the same or similar wording..

27. Between 2000 and 2013, COPFS would routinely meet with SRAs to provide guidance and advice, both case specific and general. From 2003 onwards an annual training conference was held for SRA's where prosecutors from COPFS would provide training and guidance regarding the reporting of cases to COPFS. These conferences would deal with a range of matters such as the electronic reporting of cases to COPFS via SRAWEB, but also dealt with matters such as how to take witness statements, rules of evidence, and corroboration.

28. COPFS has continued to regularly engage with SRAs to provide training, guidance and advice.

29. The training and guidance issued to SRAs generally mirrored the content of the guidance provided in the *'Reports to the Procurator Fiscal – A Guide for Specialist Reporting Agencies'*. Prosecutors have and will routinely refer SRAs to this guidance and the guide has been cited regularly as the practice to be adopted when reporting cases. As case law has developed, training has been given to SRAs on the changes to the law at these annual conferences. A copy of PowerPoint presentation slides regarding the duties of disclosure that was delivered to SRAs (including POL) in 2009 (WITN10510103) has been provided with this statement.

Obligations and duties of an SRA (2010 – present)

30. On the commencement of both the Criminal Justice and Licensing (Scotland) Act 2010 and the Disclosure (Persons engaged in the Investigation and Reporting of Crime or Sudden Deaths) (Scotland) Regulations 2011, statutory duties of disclosure were introduced. Further guidance was issued to SRAs in December 2011 in a document *'Disclosure of evidence: Guidance for specialist reporting agencies'* (WITN10510104). It is set out within the guidance at para 1.2:

"To ensure that the Crown can comply with its disclosure obligations, all agencies who report cases to the Crown must comply with obligations to disclose relevant and material information to the Crown. This is known as the principle of revelation."

31. The guidance indicates that the statutory framework is supported by the '*Code of Practice – Disclosure of Evidence in Criminal Proceedings*' (WITN10510105). The duties and responsibilities are set out at para 18. The five core responsibilities and duties are listed at para 18.2. These are, recording, retaining and reviewing information, conducting reasonable lines of enquiry, identifying and investigating exculpatory information, revealing and, where appropriate, providing information to the Crown, the submissions of accurate Standard Prosecution Reports (SPRs) and the taking and submission of witness statements.

32. "Investigative agencies" within the meaning of sections 117(4) and 164(3) of the 2010 Act are obliged by statute to adhere to these five core responsibilities and duties.

Specific relationship between POL and COPFS

33. POL has been an SRA since 30 March 2012 but operated as an SRA before this date when it was a part of Royal Mail Group ("RMG").

34. POL investigate alleged crimes against the Post Office and report them to COPFS. The relationship between POL and COPFS was not established, nor is it regulated, by statute.

35. Since 6 June 2011 RMG has been an “Investigating agency” in terms of section 117 of the 2010 Act and the Disclosure (Persons engaged in the Investigation and Reporting of Crime or Sudden Deaths) (Scotland) Regulations 2011 (“the 2011 regulations”). On the date of the enactment of the 2011 Regulations, POL was a subsidiary division of RMG.

36. POL was a subsidiary division of RMG until 1 April 2012. Following the division of POL from RMG on 1 April 2012, POL continued to report cases to COPFS using the same agency reference number as it did when part of RMG, and it continued to employ the same reporting practices.

37. POL report cases directly to COPFS in respect of a limited number of offences, namely allegations of fraud, theft and embezzlement allegedly involving conduct by POL employees or former employees. Police Scotland may also report such cases directly to COPFS.

38. POL reports suspected criminal conduct to COPFS via a secure website created for SRAs (referred to as “SRAWEB”). SRAWEB is an electronic system which came into effect in around 2005/2006 and is accessible via a digital certificate. SRAWEB requires SRAs to specify various information about the suspected criminal conduct, including a ‘Charge Code’ albeit that this does not determine if/what charges will ultimately be pursued by COPFS.

39. POL does not enjoy the statutory powers of the police concerning powers of arrest, search and seizure. In conducting its investigations, POL relies on the co-operation

of the subject being investigated to consent to interview, search and providing access to and allowing the recovery of materials. Where such co-operation is not forthcoming, POL may seek the assistance of the police to investigate and report cases in certain circumstances.

40. During the period 2000 – present, it was not typical for POL to involve Police Scotland in investigations being conducted in Scotland. Rather, POL would prepare reports for COPFS. However, Police Scotland might be involved in cases where a suspect refused to attend an interview.

41. COPFS has been unable to identify any specific direct guidance issued by COPFS to POL prior to 5 September 2013. No specific internal guidance issued prior to 2013 has been identified regarding how prosecutors were to assess reports and evidence submitted by POL, and it is understood that prosecutors would approach POL reported cases as they would with cases from any other SRA.

42. COPFS is aware that a representative of POL was present at a COPFS SRA training event at Tulliallan, Perthshire, Scotland, in 2009. This training included a presentation where it was explained that reporting agencies must disclose all relevant information to the Crown and that this was an ongoing duty. The presentation referred to the then up to date case law in relation to disclosure and made clear that consequences of non-disclosure were “*unnecessary trials, unnecessary delays and miscarriages of justice*” (WITN10510103 refers).

Institutional knowledge of COPFS about Horizon

43. Between 2000 to 2013, COPFS was not institutionally aware of the bugs and errors in the POL Horizon computer system ("Horizon") that significantly impacted the reliability of evidence submitted by POL.

44. On 14 May 2013, POL, via their Scottish agents, BTO Solicitors ("BTO"), contacted COPFS to request a discussion about issues with the Horizon Online system (also referred to as HNG-X or HNG-A). On 29 July 2013, solicitors for POL, explained to COPFS that as a result of the 'Second Sight' and 'Helen Rose' reports, POL had instructed their English solicitors, Cartwright King Solicitors ("CK"), to carry out a review of all cases reported against sub-postmasters/mistresses ("SPMs") dating from the roll-out of Horizon Online in January 2010. In cases where an SPM had raised an issue with either Horizon Online or their training of the system, both the 'Second Sight' and 'Helen Rose' reports were being disclosed to the defence by POL. BTO then advised COPFS that it would be reviewing all the Scottish cases that could be affected by the issues identified in these two reports. On 9 August 2013, COPFS Policy division made Senior COPFS officials aware of the developments and asked that information regarding the issues with Horizon Online be passed to prosecutors dealing with ongoing POL reported cases.

45. Following this initial contact, COPFS Policy division officials provisionally concluded that all POL prosecutions in Scotland should be terminated. As a result, POL instructed BTO and CK to meet with COPFS officials. This provisional position

adopted by COPFS had been assessed by CK to raise a considerable public relations storm for POL if it were followed.

46. On 5 September 2013 a meeting took place between POL, BTO, CK and Crown Office Policy Division officials at Crown Office, Edinburgh. CK Senior Counsel, Simon Clarke, was in attendance. At the meeting BTO explained that it had carried out a review of all live Scottish cases and had determined that the Horizon system defects identified in the 'Second Sight' and 'Helen Rose' reports did not play a part in any live Scottish cases save for one. BTO's review process assessed cases as either 'Type A' or 'Type B'; 'Type A' being cases in which Horizon had provided the information as to wrongdoing but was not the provider of primary evidence. In almost all of these cases the SPM had admitted to the taking of monies belonging to POL for their own unauthorised purposes. 'Type B' cases were cases where Horizon or the training of its use had been raised by the SPM. CK and BTO advised that only 'Type B' cases were cases which, in their view, required disclosure of the 'Second Sight' and 'Helen Rose' reports. BTO's review concluded that all but one live Scottish case was a 'Type A' Case and that all concluded cases were 'Type A' cases which did not necessitate further review or disclosure.

47. POL advised COPFS that a full examination of the Horizon system would be undertaken and would be completed within 6 to 8 months.

48. In light of these revelations, an instruction was thereafter circulated within COPFS for prosecutors to consider POL reported cases on their facts and circumstances

in determining whether they should be adjourned pending the outcome of POL's review. COPFS did not terminate all Scottish POL cases.

49. COPFS did not directly participate in the review of live Scottish cases and there was no direct review of closed Scottish cases by COPFS.

50. Ultimately, it is understood that POL did not commission a second report as discussed at the meeting of 5 September 2013. POL subsequently advised COPFS that despite consulting with academics, a further interrogation of the Horizon Online system was not possible.

51. On 6 October 2015, a further meeting was held at Crown Office, Edinburgh, between prosecutors and both POL officials and their legal representatives. At the meeting, POL informed COPFS that all POL reported English cases had been reviewed including cases where there had been a conviction. The purpose of the 2015 meeting was to update COPFS on what had happened since and allow COPFS to 'take a view' on POL reported cases if it so wished. POL advised it had ceased prosecuting cases with any Horizon involvement on public interest grounds as it considered there was an issue of the public perception about how POL was conducting itself and it did not want the public to lose trust in the organisation. In respect of all the Post Office cases sitting with COPFS, POL advised that were these in England and Wales, POL would "close these down". Further, POL advised that in England and Wales, it was considered to be unfair to prosecute cases without an expert being able to opine on the integrity of the Horizon system. As such, COPFS was told that cases continued to be considered on a case by case

basis but where reliance was required to be placed on the Horizon system the view was generally being taken that the evidential test for prosecution was not met because no expert would be available to speak to the accuracy of the system or rebut any defence that shortfalls found were as a result of computer error rather than as a result of a criminal act.

52. In 2015 COPFS decided that all live Scottish cases involving evidence from Horizon should be carefully reviewed on a case-by-case basis. Where there was a sufficiency of evidence without reliance on Horizon prosecutions could continue. Where evidence from Horizon was essential to the proof of a charge cases were reported to Crown Counsel with a recommendation of no action or no further action.

53. COPFS did not undertake its own retrospective review of closed cases where an accused had either pled guilty or been found guilty after trial.

Current appeal proceedings in Scotland

54. Unlike in England and Wales or Northern Ireland, the Scottish Criminal justice system is very much closer to the start of its journey in addressing potential miscarriages of justice arising out of unreliable evidence obtained from the Horizon system.

55. On 29 September 2023, two Scottish former POL SPMs had their convictions overturned by the Court. At present, four SPMs are currently appealing their

convictions to the High Court of Justiciary Appeal Court (“HCJAC”) with substantive dates for the hearing of these appeals fixed for early 2024.

56. These appeals by six former POL SPMs (“the appellants”) mark the first tranche of ‘Horizon appeals’ in Scotland.

57. This first tranche of ‘Horizon appeals’ are all cases which have been referred to the HCJAC by the Scottish Criminal Cases Review Commission (“SCCRC”). These referrals were made following developments beginning in 2020, whereby a number of different individuals applied to the SCCRC arguing that their convictions are miscarriages of justice as a result of issues arising from the use that POL made of its Horizon system.

58. Due to COPFS’ record retention policies, it is not always possible to examine full case files to ascertain the extent that the Horizon system may have been relied upon in convictions of POL SPMs dating back to 2000.

59. As a consequence, in respect of the first tranche of referrals by the SCCRC to the HCJAC, material was ingathered by the SCCRC from COPFS, POL, the appellants’ solicitors and from the appellants themselves so that a comprehensive review of their cases could be undertaken.

60. COPFS understands that these six referrals represent the cumulation of this process of review by the SCCRC, in conjunction with an assessment of recent case law in other parts of the United Kingdom, in particular, the findings of Mr Justice

Fraser in the group litigation proceedings in the English High Court (*Bates and Ors v Post Office Limited (Common Issues)* [2019] EWHC 606 and (*Horizon Issues*) [2019] EWHC 3408).

61. The first tranche of cases was referred by the SCCRC to the HCJAC in October 2022.

62. It should be noted that Scottish criminal law is separate and distinct from that of England and Wales. Although the decisions of the Courts in England and Wales and Northern Ireland offer insight as to how a 'Horizon case' might be identified, different legal principles exist.

63. Scots law cannot therefore simply adopt the legal precedent set in other UK jurisdictions.

64. In that respect, at present, there is no legal precedent in Scotland relating to what is a 'Horizon case' and so in this first tranche of cases, both COPFS and solicitors for the appellants have been carefully examining case material so that assessment criteria for a 'Horizon case' can be applied within the Scottish legal framework.

65. In assessing and responding to the first tranche of appeals, COPFS has become aware that both POL and POL's former legal representatives are in possession of additional material relating to the investigation of the appellants that neither COPFS nor the appellants have previously been privy to.

66. A document recovery exercise is currently underway to enable COPFS to recover, review and thereafter disclose this additional material to the appellants. This has involved the recovery of over 5,000 additional documents from POL to date, with further material anticipated. POL's interrogation of its own systems to produce all relevant material to COPFS has extended this process of disclosure and review.

67. Given the volume of potentially relevant material held by POL and the fact that these appeals mark the first interaction between the 'Horizon issues' and Scots criminal law, this process requires, and continues to require, careful and responsible consideration.

68. The remaining four appeals in this first tranche of referred cases are expected to be fully considered and disposed of by the HCJAC by February 2024.

Review of Scottish cases

69. COPFS believes the total number of former POL SPMs who were convicted on the basis of unreliable Horizon evidence to be higher than this first tranche of appeals.

70. It is understood that further cases are presently under consideration by the SCCRC and are following a similar process of review to the first tranche.

71. Whilst this review by the SCCRC is underway, COPFS is undertaking a review of all potential 'Horizon cases' reported to it during the period of interest. COPFS is

carrying out this review with the assistance of both POL and the SCCRC to ensure that all available case material is recovered as efficiently as possible so that all potential future appellants can be identified, and their cases reviewed.

72. Due to COPFS policy decisions taken within the period of interest and the fact that all 'Horizon cases' in Scotland were prosecuted by COPFS under the application of Scots criminal law, the total number of Scottish cases is anticipated to be significant less than in England and Wales. As an estimate, it is certainly not anticipated that the number of Horizon cases in Scotland will amount to in excess of 100 cases.

73. Following the conclusion of the first tranche of appeals it is anticipated that a streamlined and expedient process of review, appeal and disposal will be available for application to any future cases. It is anticipated that the rate of review and appeal will thereafter increase exponentially. It is not possible at this stage to provide a timescale for this process to be completed.

Concluding remarks

74. COPFS recognises that the expedient review of past prosecutions and the efficient disposal of appeals is paramount to ensuring that justice is delivered to those who have been affected by the Horizon IT 'scandal'. To that end, tireless work continues to be carried out by prosecutors to identify and bring before the Court all cases in Scotland which were impacted.

75. I believe the content of this statement to be true.

SIGNED

GRO

KENNETH WILLIAM DONNELLY

DEPUTY CROWN AGENT, SPECIALIST CASEWORK

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

29 NOVEMBER 2023

Index to First Witness Statement of Kenneth William Donnelly

No.	URN	Document Description	Control Number
1	WITN10510101	COPFS Prosecution Code	WITN10510101
2	WITN10510102	Reports to the Procurator Fiscal. A Guide for Specialist reporting Agencies, 7th Edition (2006)	WITN10510102
3	WITN10510103	Disclosure Presentation to SRAs (2009)	WITN10510103
4	WITN10510104	'Disclosure of evidence - Guidance for specialist reporting agencies', (2011)	WITN10510104
5	WITN10510105	'Code of Practice Disclosure of Evidence in Criminal Proceedings', (2011)	WITN10510105