

WRITTEN SUBMISSION TO THE CHAIR

by

LIVINGSTONE BROWN

on behalf of

CORE PARTICIPANT, SUSAN SINCLAIR

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1. This written submission is presented to the Chair following conclusion of Phases 5, 6 and 7 of the Inquiry, on behalf of Core Participant, Susan Sinclair. It is intended that this will provide the background for a closing oral submission.

Introduction

2. Susan Sinclair is a former subpostmaster who ran the Stuartfield Post Office near Peterhead, Aberdeenshire. She was wrongfully convicted of embezzlement at Peterhead Sheriff Court in 2004. She was the first to successfully have her conviction quashed by the Appeal Court in Scotland (which only happened as recently as September 2023) and, to date, is the only subpostmaster identified in Scotland to have a conviction after trial overturned on appeal.
3. Following the successful appeal of her conviction in September 2023, Susan Sinclair was granted Core Participant status in the Inquiry in November 2023, on the basis that her experience of the audit, investigation and criminal prosecution, which materialised after a so-called 'shortfall' was identified by the Horizon IT system, was different from those criminally prosecuted by the Post Office in England and Wales. Rather, she was prosecuted by the independent Scottish public prosecutor, the Crown Office and Procurator Fiscal Service ('COPFS') following the submission of a Standard Prosecution Report ('SPR') by Post Office Limited ('POL') in its capacity as a recognised Special Reporting Agency ('SRA') in Scotland.

Her involvement in the Inquiry is, therefore, made even more significant by her being the only Core Participant to specifically represent the lived experience in Scotland, having been prosecuted under the Scottish legal system and in accordance with the principles of Scots criminal law. This submission therefore draws to contrast the lived experience of those who fell victim to the Horizon IT scandal in Scotland, based on the evidence of the most recent phases of the Inquiry, in order to assist the Chair in fulfilling the Inquiry's Terms of Reference, and particularly in '*ensuring there is a public summary of the failings which occurred with the Horizon IT System at the Post Office leading to the suspension, termination...prosecution and conviction of subpostmasters*'¹. It is presented with a view to assisting the Chair with his final assessment of ultimately what went wrong and the lessons that must be learned by all.

4. Whilst this firm's involvement in this Inquiry has been to formally represent Ms Sinclair as a Core Participant, our experience in the aftermath of the scandal is not only confined to her case; indeed our firm is currently instructed to represent fifteen separate individuals who have fallen victim to the actions of the Post Office in varying degrees of severity and who now seek to claim the compensation to which they are rightfully entitled. Our involvement in the Inquiry to date has therefore drawn upon the lived experiences of all of those individuals, and upon recognising that their experience has been different to those who fell victim in England and Wales, we have been, and remain, committed to ensuring that those affected in Scotland specifically are given a voice.
5. In closing submissions presented orally to the Chair at the conclusion of Phase 4, we sought to address four key questions:
 - (a) Did the involvement of COPFS, the independent public prosecutor, mean that greater protection was provided to those facing allegations in Scotland, and if not, why not;
 - (b) Did POL understand its duties as a Specialist Reporting Agency, and did it discharge them, particularly in relation to revelation;
 - (c) Did COPFS comply with its duty of continuing disclosure; and

¹ <https://www.postofficehorizoninquiry.org.uk/about-inquiry>

(d) To what extent did the corroboration requirement that we have in Scottish criminal law act as a safeguard against wrongful conviction?

6. Having heard and read the evidence disclosed as part of Phases 5, 6 and 7 of the Inquiry, those questions are now revisited and addressed in turn in this submission.

Did the involvement of COPFS, the independent public prosecutor, afford greater protection to those facing allegations, and if not, why not?

7. At the conclusion of Phase 4, we submitted that the involvement of COPFS as the independent public prosecutor made no practical difference to the outcome in Scotland; it did not offer greater protection to those facing criminal allegations derived from Horizon evidence or prevent the scandal from occurring north of the border. Rather, COPFS was reliant on Standard Prosecution Reports submitted by POL in making its prosecutorial decisions; cases in Scotland proceeded on the same evidential understanding as elsewhere, without further, independent scrutiny of POL's investigations. In his third witness statement, a senior official in COPFS, Deputy Crown Agent Kenneth Donnelly, confirmed that *'a summary of the evidence obtained from the Horizon system would first be provided to COPFS within the SPR [Standard Prosecution Report] provided by POL'*². Given that the *'Horizon system required a degree of specialist knowledge to understand the information it provided in its raw form, the POL Reporting Officer would provide a simplified explanation of the SPR as to what the Horizon evidence was and how this supported the evidence against the accused'*³ and that all information contained within an SPR submitted by POL would be regarded as *'accurate and true'*⁴. He confirmed that *'for the process to work properly the prosecutor requires to be provided with all relevant information in the SPR'*⁵ and for *'many summary level cases it is not necessary for the prosecutor marking the case to read and examine all the witnesses statements and/or productions'*; indeed *'it will only be during the course of further procedure,*

² WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 70

³ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 70

⁴ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 67

⁵ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 67

where the accused has pled not guilty at first calling, that all case material will be provided to COPFS by the Reporting Officer⁶. Thus, the decision to prosecute subpostmasters in Scotland appears to have been taken by COPFS without any real scrutiny of the underlying Horizon evidence in the majority of cases, with full trust being placed in POL to accurately summarise and report all relevant evidence to COPFS.

8. With the benefit of hindsight, only now has it been made clear to COPFS that such full and trusting reliance on POL was, in fact, misplaced. In its opinion on the first six Scottish Horizon cases referred by the Scottish Criminal Cases Review Commission, the Scottish Criminal Appeal Court held *'the POL investigator submitted an 'incorrect and misleading' standard prosecution report to the Crown'* in the case of Aleid Kloosterhuis⁷, but this would have not been clear to COPFS at the time of making its prosecutorial decision, given that, as Kenneth Donnelly acknowledged, *'absent any information from POL or elsewhere that the evidence that POL was submitting was potentially flawed and faced with an admission of guilt and an intention by the accused to plead guilty, [which appears to have been the case for all 60 Scottish Horizon cases since reviewed by COPFS, with the exception of Susan Sinclair, which went to trial⁸, it would not be considered necessary by the prosecutor to review raw Horizon data'⁹.*
9. In such circumstances, the involvement of an independent public prosecutor did not afford greater protection to those facing criminal allegations in Scotland; rather its reliance on POL as the sole provider of information to support such criminal charges effectively meant that its involvement was essentially limited to acting in the capacity of 'agent', rather than affording the independence that one might have expected would arise from its involvement. Even where doubts and queries appear to have been raised by prosecutors involved in the consideration of individual Horizon cases in Scotland prior to prosecution, they deferred to POL investigators (in most cases, Robert Daily specifically), who were able to resolve any doubts as to the

⁶ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 68

⁷ RLIT0000200 Opinion of the Court in the Appeals by William Quarm, Susan Sinclair, Colin Smith, Judith Smith, Robert Thomson and Aleid Kloosterhuis [2024] HCJAC 15, para 31

⁸ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 72

⁹ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 84

reliability of Horizon evidence¹⁰ or who would cite the difficulties in obtaining further evidence to support the alleged criminality which seem to have been accepted without further question¹¹. It appears that only once specifically called upon in 2014 to defend the accuracy of the Horizon system as a potential Crown witness did Robert Daily acknowledge to prosecutors that he could not¹². Indeed, in her statement to the Scottish Parliament on Horizon Information Technology Prosecutions on 16 January 2024, the Lord Advocate confirmed that *'when it came to the reporting of Horizon cases, [the Post Office] professed to be an expert in the Horizon system and its operation'* and that *'its experienced staff provided statements explaining the operation of Horizon and they spoke to how it was used to commit criminal offences'*¹³. From the evidence available to the Inquiry, it appears there was very little independent scrutiny by COPFS in its consideration of the material provided to it by POL (including no real scrutiny of the Horizon output), with its role offering little benefit in providing the extra layer of protection that one might have hoped for. It is crucial that this point is recognised in the Chair's consideration of the removal of POL's prosecutorial authority and the deference of the prosecution of POL criminal cases to the Crown Prosecution Service in England and Wales.

10. Similarly, one might have hoped that the involvement of COPFS, as a single independent prosecutor with appropriate overview of POL criminal cases reported to it in Scotland, would have identified the same issues arising in various different cases, such that patterns and similarities could be established. However, it appears that the benefit that this might have offered was negated by such cases being considered by individual prosecutors sitting in local offices, dealing with local cases. There was no central bank of cases reported by POL to COPFS considered by the same team with appropriate oversight and corporate knowledge of other cases involving a similar set of circumstances. This is explained by Procurator Fiscal Depute, Angus Crawford, where he states *'within COPFS each individual office marks their own cases which merit proceedings...For example, a Procurator Fiscal Depute in Aberdeen could be marking a Post Office*

¹⁰ WITN11690100 First Witness Statement of Malcolm MacDonald MacLeod, paras 12-14

¹¹ WITN11770100 First Witness Statement of Angus Crawford, para 13(ii)

¹² WITN11770100 First Witness Statement of Angus Crawford, para 12 (ix)

¹³ Official Report, Meeting of the Scottish Parliament, 16 January 2024 (Lord Advocate's Statement on Horizon Information Technology Prosecutions) RLIT0000511

case similar to the cases I marked in Glasgow. If the PF Depute marking the Aberdeen case was not aware of any potential Horizon IT issues, and these issues had not been highlighted in the [Standard Prosecution] report, the marking depute would accept the Horizon evidence as being accurate. Assuming there was a corroborated case, usually the Horizon evidence and the accused admissions, that case would likely be prosecuted.¹⁴.

11. With prosecutors effectively working in silos, patterns could not be established where the same issues arose time and time again. Notwithstanding the question of whether or not individual accused persons raised concerns about the accuracy of the Horizon evidence relied upon, had such concerns been forthcoming, they would be dealt with on an individual basis by individual prosecutors sitting in individual local offices; there was no opportunity to piece these together in order to view such concerns within a wider context. Even by July 2013, which COPFS identifies as the earliest point that it first became aware of concerns with the Horizon IT system at an institutional level, COPFS Policy only contacted those prosecutors directly involved in cases which were, at that time, being reviewed by POL (or indeed by lawyers instructed on POL's behalf), and relevant information and direction was only communicated to a targeted group of individual prosecutors¹⁵. One key potential benefit of COPFS being a single public prosecution body – oversight of similar cases across the country – was therefore lost.

Did POL understand its duties as a Specialist Reporting Agency, and did it discharge them, particularly in relation to revelation?

12. In our submissions presented to the Chair at the conclusion of Phase 4 of the Inquiry, reference was made to the statutory duty of revelation which POL was required to comply with, in its role as a Specialist Reporting Agency under the Criminal Justice and Licensing (Scotland) Act 2010 (the '2010 Act'). The legislation requires that, as soon as practicable after the first appearance in court, the investigating agency (in this case, POL) must provide the prosecutor

¹⁴ WITN11770100 First Witness Statement of Angus Crawford, para 13(ii)

¹⁵ WITN10510300 Third Witness Statement of Kenneth William Donnelly, paras 126-133

with details of all the information that may be relevant to the case for or against the accused that the agency is aware of or was obtained in the course of investigation the matter¹⁶.

13. Whilst concerns relating to the reliability and accuracy of the Horizon system were relayed by POL to COPFS around 4 and 5 September 2013, it appears that these were downplayed at this meeting and the true extent of the problems with Horizon was not disclosed to COPFS until a much later date. In his witness statement, Simon Clarke describes the meeting between POL and COPFS representatives (Paul Miele and Paul Beaton), which he attended with Martin Smith and Jarnail Singh on 4 and 5 September 2013. He states that *'the meeting had been called for by POL because the Procurator Fiscal had informed POL that all SPM prosecutions in Scotland were to be terminated...on the basis that, as POL were then unable to prove that Horizon was wholly reliable and were concerned that a conviction could potentially be unreliable'*¹⁷. Prior to this meeting, a representative of COPFS's Policy Unit had been contacted in relation to concerns arising with Horizon on 14 May 2013, and in the months that followed, was informed as to the concerns arising from Second Sight's review of the Horizon IT system, and the Helen Rose Report¹⁸. There appears to be no evidence to suggest that COPFS was made aware, or obtained a copy, of Simon Clarke's advice dated 8 July 2013 at that stage; rather a redacted version of this was only disclosed to COPFS in 2023¹⁹. In his witness statement, Mr Clarke says that *'POL were concerned that an intention to stop all cases, rather than just those where evidence of alleged misconduct derived from Horizon would have raised a considerable public relations storm for POL'*²⁰, which provided the basis for POL's meeting with COPFS. Ultimately, POL was successful in persuading COPFS to deviate from its intended course of action in terminating all POL criminal prosecutions at this point, and rather to favour an individualised review of pending Scottish cases in light of this information. The information provided by POL to COPFS at this meeting extended only to the findings of the Second Sight and Helen Rose reports²¹ and the meeting

¹⁶ Criminal Justice Licensing (Scotland) Act 2010, s.118 & s.120

¹⁷ WITN08130100 First Witness Statement of Simon Andrew Clarke, para 58

¹⁸ WITN10510300 Third Witness Statement of Kenneth William Donnelly, paras 31-34

¹⁹ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 86

²⁰ WITN08130100 First Witness Statement of Simon Andrew Clarke, para 58

²¹ COPF0000233 Minute of meeting taken by COPFS Policy PFD

passed without mention of Simon Clarke's discrediting of Gareth Jenkins; nor was it made clear that there were concerns as to the reliability of Legacy Horizon, which had been in use from 2000 to 2010. Whilst acknowledging that further forensic analysis was required, POL advised that, upon review of all live cases, the defects identified in the reports did not play a part in live Scottish cases²².

14. The motivations behind the manner in which POL relayed the issues with the Horizon system to COPFS at this meeting in 2013 are clearly questionable: it was concerned with a '*considerable public relations storm*'²³ should COPFS decide to suspend all POL prosecutions in Scotland. Meanwhile it was commercially incentivised to recover payment of shortfalls from subpostmasters under criminal confiscation proceedings which would follow a criminal conviction; it had engaged in a campaign under the Network Transformation Programme to tighten the contractual obligations imposed on subpostmasters in terms of the requirement to repay any shortfalls; and was wholly concerned as to the maintenance of its reputation in light of the Royal Mail Group's Initial Public Offering, as announced on 12 September 2013²⁴. The party line provided by POL at the time was that the issues identified with Horizon were not systemic and did not impact any live or concluded cases in Scotland²⁵. Clearly, this has now been shown to be incorrect.
15. Upon a further meeting with POL in 2015, COPFS decided to proceed on the basis that all Scottish cases reliant on Horizon evidence required to be reported to Crown Counsel with a recommendation for proceedings either not to be taken or be discontinued, which was a decision taken due to POL's failure to provide further supporting evidence to speak to the credibility of the Horizon data²⁶. Notwithstanding this, Procurator Fiscal Depute Angus Crawford speaks to his involvement in the criminal case against Rauf Akhtar Bashir, which Crown Counsel only decided not to prosecute in February 2017²⁷.

²² COPF0000233 Minute of meeting taken by COPFS Policy PFD

²³ WITN08130100 First Witness Statement of Simon Andrew Clarke, para 58

²⁴ Transcript of Day 3 of Oral Evidence by Paula Vennells, 24 May 2024 [INQ00001153]

²⁵ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 145

²⁶ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 157

²⁷ WITN11770100 First Witness Statement of Angus Crawford, para 14 (vi)

16. Not only did POL fail to timeously reveal all relevant information and evidence which was available at the time of its first meeting with COPFS in 2013 (as also acknowledged by Paula Vennells in her oral evidence to the Inquiry on 24 May 2024²⁸), it is remarkable that prosecutors within COPFS have only, in recent years, discovered the involvement in Fujitsu in the supply of underlying Horizon data to POL, having previously only had dealings with POL investigators for this purpose.²⁹
17. In terms of s.118 and 120 of the 2010 Act, the statutory duty of revelation extends until the conclusion of the proceedings (such as the recording of a guilty plea or the determination of a later appeal). The COPFS Guidance on Disclosure of Evidence for Specialist Reporting Agencies³⁰, published in December 2011, highlights a wider obligation at both common law and in terms of the Convention:
- '17.1... It must be remembered that the common law and convention law obligations continue to exist in relation to any new information which comes to light at any stage even after conclusion of proceedings in terms of the legislation.'*
18. POL must accordingly have been aware that it remained under a duty to reveal to COPFS any new information that was potentially relevant to any case that it had reported, regardless of whether or not proceedings remained live. There was no evidence that it did so.
19. With reference to the Chair's request for submissions as to the duty of POL to disclose the advice of Simon Clarke to convicted subpostmasters and/or other persons convicted on the basis of Horizon data, under the Scottish system POL plainly had a duty to reveal that information to COPFS, which in turn had a duty to disclose it to individuals who were facing or had been convicted of allegations based on Horizon data.
20. In light of the evidence that has emerged as a result of this Inquiry, on 16 May 2024 Scotland's most senior Law Officer, the Lord Advocate, publicly announced that POL was now stripped

²⁸ Transcript of Day 3 of Oral Evidence by Paula Vennells, 24 May 2024 [INQ00001153]

²⁹ WITN11770100 First Witness Statement of Angus Crawford, paras 10 & 13(iii)

³⁰ <https://www.copfs.gov.uk/publications/disclosure-of-evidence-guidance-for-specialist-reporting-agencies/html/#revelation-in-solemn-cases-and-disclosure-sch>

of its role as a Specialist Reporting Agency in Scotland.³¹ This was deemed by Paula Vennells to be a *'very appropriate response'*³², and similarly, this did not come as a *'great surprise'* to Nick Read, who was of the view that this was *'in keeping with the direction of travel of the last five years'*³³. John Bartlett similarly confirmed in terms that POL *'did not want to have that status anymore'*³⁴. Indeed, the Lord Advocate has confirmed that work is now underway in Scotland to strengthen the guidance and safeguards that exist to endure that all Specialist Reporting Agencies abide by the essential duties of revelation and candour in Scotland, the clear implication being that POL did not. It is submitted that POL plainly failed to discharge its duties of revelation; the evidence presented to this Inquiry has not established whether it even recognised those duties existed.

Did COPFS comply with its duty of continuing disclosure?

21. Under the Scottish system, information is disclosable³⁵ if:
- (a) it would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
 - (b) it would materially strengthen the accused's case, or
 - (c) it is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.
22. COPFS has a duty to disclose such information to accused persons, as soon as reasonably practicable, throughout the currency of proceedings and beyond. Section 137 of the Act specifically obliges COPFS to disclose such information to those who have already been convicted. Where those convictions were based, at least in part, on evidence drawn from the

³¹ Official Report, Meeting of the Scottish Parliament, 16 May 2024 (Lord Advocate's Statement on Horizon Information Technology Prosecutions) [RLIT0000512](#)

³² Transcript of Day 3 of Oral Evidence by Paula Vennells, 24 May 2024 [INQ00001153](#)

³³ INQ00001195 Transcript of Day 3 of Oral Evidence by Nick Read, 11 October 2024

³⁴ INQ00001198 Transcript of Oral Evidence by John Bartlett, 17 October 2024

³⁵ Criminal Justice and Licensing (Scotland) Act 2010, s.121(3)

Horizon system, information capable of undermining the reliability of that evidence plainly satisfied the test for disclosure.

23. Despite, on its own account, COPFS becoming institutionally aware of the concerns about the Horizon system by 2013, there is nothing to suggest that any effort was made to disclose that information to those who had already been convicted.
24. In his statement, Deputy Crown Agent Kenneth Donnelly confirmed that there is no evidence to suggest the Second Sight or Helen Rose reports were disclosed to accused or convicted subpostmasters or to the courts, following receipt of these by COPFS in 2013; these reports were only recently disclosed within the context of proceedings before the Appeal Court in 2022/2023, and to the handful of subpostmasters whose cases were considered thereby.³⁶ This is despite the Horizon Issues Judgement of Mr Justice Fraser in the case of Alan Bates and others, and related press coverage in 2019, and despite knowledge of individual prosecutors that had, themselves, found the Horizon system to be 'wanting'³⁷, or had personal knowledge of the concerns surrounding Horizon from around 2013, when the 'internet was awash with information' documenting such concerns.³⁸
25. Curiously, a view was said to have been taken upon receipt of the Second Sight and Helen Rose reports in 2013, that the reports did not meet the statutory test for disclosure and revelation, and reliance was placed solely upon reassurances from POL that the bugs, errors and defects identified in these reports had not impacted live or concluded cases. Given that, at the time of POL's disclosure of these reports, further action was still to be taken by Second Sight and external lawyers, and an independent expert was to be identified, COPFS was content for POL to instruct a review into past cases, and claimed it had no reason to not to trust POL's conclusions.³⁹

³⁶ WITN10510300 Third Witness Statement of Kenneth William Donnelly, paras 113-114

³⁷ WITN11690100 First Witness Statement of Malcolm MacDonald MacLeod, para 21

³⁸ WITN11770100 First Witness Statement of Angus Crawford, para 12 (vi)

³⁹ WITN10510300 Third Witness Statement of Kenneth William Donnelly, paras 106-110 & 124

26. Only now is it acknowledged by COPFS that these reports should have been disclosed to subpostmasters once the issues with Horizon fully came to light, and that, at the time, COPFS did not comply with its duty of disclosure⁴⁰.

To what extent did the corroboration requirement that we have in Scottish criminal law act as a safeguard against wrongful conviction?

27. In the Scottish system, nobody can be convicted of a crime based on a single source of evidence alone. The corroboration rule requires a second source. That need not be a second source of equivalent strength to the first; where there is a strong primary source of evidence, all that is required is an independent check, something that is at least capable of supporting it.

28. Corroboration is often presented as a significant safeguard for the rights of accused persons. It provides a balance to other rules that differ from other jurisdictions, such as the ability of juries to convict by a simple majority, the inability of a trial judge to exclude evidence they consider to be unreliable or incredible, and – at least until the UK Supreme Court’s decision in *Cadder* in 2010⁴¹ – the absence of any right on the part of an individual to be represented by a solicitor during a suspect interview.

29. As set out above, only one of the Scottish cases reviewed by COPFS appears to have proceeded to trial: that of Susan Sinclair. Every other case was resolved by a plea of guilty. It would be wrong to conclude, however, that the corroboration requirement only featured in the Sinclair case. In many cases, decisions to plead guilty would have been based upon an assessment by legal representatives of the evidence likely to be relied upon at trial and the prospects of securing an acquittal. That will necessarily have included an assessment of whether the charges were supported by corroborated evidence.

30. In marking cases, COPFS will have considered the corroboration available. In many cases, that will have come from admissions supposedly made by suspects when confronted by

⁴⁰ WITN10510300 Third Witness Statement of Kenneth William Donnelly, para 166

⁴¹ *Cadder v Her Majesty’s Advocate* [2010] UKSC 43

investigators⁴². In the case of Susan Sinclair, the trial sheriff said that he relied upon her unwillingness to accept that any money had gone missing – essentially, her persistent denials that she had done anything wrong⁴³.

31. Ultimately, there is no reason to believe that the corroboration rule provided any greater protection for those wrongly accused in Scotland.

Conclusion

32. Conclusions will be set out during the forthcoming oral submission.

⁴² INQ00001120 Transcript of Oral Evidence by David Teale, 25 January 2024

⁴³ COPF0000052 Report by Trial Sheriff (Sheriff Garden), p.12