HOUSE OF COMMONS

Justice Select Committee

Oral evidence: Private prosecutions: safeguards, HC 248

Tuesday 25 May 2021

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Watch the meeting

Members present: Sir Robert Neill (Chair); Paula Barker; Rob Butler; Janet Daby; Miss Sarah Dines; Maria Eagle; Dr Kieran Mullan; Andy Slaughter.

Questions 70 -144

Witnesses

I: Helen Pitcher, Chair, CCRC; Karen Kneller, Chief Executive, CCRC; and Miles Trent, Case Review Manager, CCRC.

II: Stephen Wooler CB, Former HM Chief Inspector to the Crown Prosecution Service (1999-2010), Committee Member, Criminal Law Reform Now Network; Paul Jarvis, Barrister, 6KBW College Hill, Committee Member, Criminal Law Reform Now Network; and Andrew Marshall, Partner, Edmonds Marshall McMahon.

Examination of witnesses

Witnesses: Helen Pitcher, Karen Kneller and Miles Trent.

Chair: Welcome to this follow-up session of the Justice Committee on the work that we did previously on private prosecutions. We have two panels of witnesses: first, the Criminal Cases Review Commission, dealing with their involvement in the Post Office cases, where clearly, in summary, significant miscarriages of justice occurred as a result of privately brought prosecutions; we will also look later at the Government's response to this Committee's report on public prosecutions that we published a little while back.

Before we start, Members have to make their declarations of interest. I am a non-practising barrister and a former consultant to a law firm. Let me go through the Members who are present.

Rob Butler: Good afternoon. Prior to my election, I was a non-executive director of Her Majesty's Prison and Probation Service and a magistrate member of the Sentencing Council.

Andy Slaughter: I am a non-practising barrister, Chair.

Chair: Dr Mullan has nothing to declare.

Maria Eagle: I was a solicitor prior to my election but not practising.

Q70 **Chair:** Thank you very much. If other Members join us, I will remind them to make their declarations.

Can we then turn to our first panel and welcome our three witnesses from the CCRC? I am very grateful to you for joining us. I will ask you to introduce yourselves, if I may, just for the record. Helen, do you want to start?

Helen Pitcher: Yes, certainly. I am Helen Pitcher. I am chairman of the CCRC.

Karen Kneller: Good afternoon. I am Karen Kneller. I am the chief executive.

Miles Trent: Hello. I am Miles Trent. I am a case review manager.

Chair: Great. Thank you very much. I ought to say that I had some dealings with the CCRC through my work as vice chair of the APPG on Miscarriages of Justice. You have given evidence to us, I know, on a number of occasions.

Andy Slaughter: I should add that I am also vice chair of the APPG.

Q71 **Chair:** Yes, indeed, Andy. That is right. We should just mention that for completeness on this panel.

Let me start with Helen, and whoever you think is appropriate to deal with this. I have in front of me the Court of Appeal judgment in the Post Office case of Hamilton and Others. Josephine Hamilton actually gave evidence to an APPG meeting yesterday together with Mr Hudgell, her solicitor, whom I know personally. Looking at the judgment, and I am sure you will have read it, in your experience of it, has the CCRC ever come across such a systematic set of misconduct, for want of a better word, by a prosecutor? This judgment does not pull any punches at all, does it?

Helen Pitcher: It does not pull any at all. The simple answer is no, we have never come across anything of this magnitude.

Q72 **Chair:** It is a short and simple answer, is it not?

Helen Pitcher: Yes, it was shocking.

Miles Trent: If I can come in briefly there, we have had other referrals on abuse of process, and we have had other referrals—I am particularly thinking of Troubles-related cases—where the abuse is very serious and what the state has done is extremely serious. It is difficult to compare in some ways. However, this is the most widespread example and a problem that has affected courts across the country. In those terms it is out there on its own, yes.

Q73 **Chair:** Lord Justice Holroyde refers to Mr Justice Fraser's judgment in the civil case files, does he not, when he says: "In my judgment, the stance taken by the Post Office in 2013 demonstrates the most dreadful complacency and total lack of interest in investigating these serious issues"? It struck me when reading Lord Justice Holroyde's judgment that I have never heard that said against an organisation with the power of prosecution. Do you have any thoughts as to why it took so long to identify the flaws in this?

Miles Trent: Bear in mind that the commission's work on this began in 2015, and, as you know, these cases had a long history before that. In terms of the many years before our involvement, this Committee has been right to point to whether there was adequate oversight of what was happening and an awareness of the picture across the country. I was pleased to see the Government accepting the idea of having a national register of private prosecutions, because part of the problem here was that there was an issue with whether there was sufficient independent challenge to decision making in these cases. That might be something we will come on to.

More broadly, there was an issue about whether everybody was aware of how often this was happening and how widespread the problem was. In answer to your question, that is a big part of why, for so long, these problems did not come to light because it was cropping up in different parts of the country. Many of the cases did not get to trial, remember; most of them were guilty pleas for false accounting, so you did not even get to the court door, in a sense. With that being the case, it would have

been difficult for anybody to have a handle on how widespread the problem was.

Q74 **Chair:** Josephine Hamilton said to us that she felt that a lot of people had not realised that there were many others in the same boat as themselves. It was simply because her case attracted some publicity, perhaps because of the high standing she had locally, that others then contacted her and said, "I have the same problem."

Karen Kneller: That is quite shocking, is it not, because that should never happen? There was a complete lack of transparency. One person was completely oblivious to what was going on elsewhere, so people were not able to join those dots up. That is why oversight is absolutely critical when you have private prosecutions such as these.

Q75 **Chair:** Obviously, the Post Office should have been joining those dots up and saying, "How come suddenly we appear to have lots and lots of people who are fraudulent, allegedly, in our employ?", which might seem bizarre in itself. Equally, was there anything from the CCRC's point of view where the dots could have been joined up? Was this a position where you had a lot of individual people coming to you from 2015 onwards and therefore prior to Mr Justice Fraser's judgment in 2019? Was there anything that was coming in and forming a pattern to yourselves?

Miles Trent: When cases were coming to us, we began our work in early 2015. There were around 30 cases in the original batch. As the months went on, that group gradually grew. By the time we got to the High Court judgment in late 2019, about 25 more applied to us immediately after that judgment. By early 2020, we had more like 61 cases going for consideration. It is important to remember that we did not have them all straightaway. Clearly, yes, they were raising similar issues, and that is why we decided to review them as a group. Those were issues that we were exploring in a lot of detail, including by instructing forensic accountants. So, yes, there were themes that were cutting across, but there is no doubt that the High Court judgment was a game changer in the case.

Q76 **Chair:** I understand that. Why was it that you did not make any reference to the courts until after the High Court judgment if those things were already beginning to emerge?

Miles Trent: It was only with the High Court judgment that you had a clear finding. The key findings from that judgment were that Horizon, or certainly the original version of Horizon, was not remotely robust. We had not ever had a clear finding of that kind before the Horizon judgment—the second High Court judgment. Before that, from a lot of different sources you had people referring to bugs in the system and potential errors with Horizon, but you did not have at any point a clear finding that cut across the whole group of cases and said, "There is a clear systemic

problem here and Horizon is so unreliable that there is a material risk that these apparent shortfalls are due to Horizon."

It is tempting to look back before that judgment and think, "Well, it was all very simple." In fact, the position we were presented with was, in the end, 60-odd cases all from different court centres—some magistrates, some Crown court. Some pleaded guilty. There were different offences: some were theft, some were false accounting, and some were fraud. It was a very complex picture. The trees were cleared, if you like, with the High Court judgment and it now all looks very simple, but, having worked on it, my position is that it was not always the case. Clearly, we always had our concerns and we had sufficient concerns to keep reviewing in a lot of detail, but we had not reached the point of having arguable grounds of appeal before the High Court judgment.

Q77 **Chair:** Without the judgment in the Horizon case, would you have got to a stage of saying it meets the test to refer it to the Court of Appeal criminal division?

Miles Trent: I think that we might. I have read some commentary to say that without the High Court judgment these cases would have never gone back to appeal. I do not think that is right necessarily. The fact that the cases were still under review and we were still exploring the various arguments showed that we thought there were still serious matters to look into. It might have been that even without the High Court judgment we would have referred these cases for appeal, but as soon as those findings came out it became clear that there was a very significant point that the Court of Criminal Appeal needed to hear. It certainly cut things short, if you like. I would not say we would not have been referring if it were not for the High Court judgment.

Q78 **Chair:** Would you, as the CCRC, have had the resource to identify the unsafety, to put it mildly, and the complete unreliability of the Horizon system that was exposed by the High Court judgment if it had not been for that? You are constrained, are you not, as to how much investigative resource you have? Do you think you would ever have had the resource to expose Horizon in the way that came about if you had been left to your own devices?

Karen Kneller: I will take the funding point. The approach that we take in a case or cases such as that is that funding does not get in the way, although funding will cause delay. We would have done all the work that we needed to do, but it may have taken us longer to get there. Funding is still a significant issue for us. Had it not been for the High Court case, yes, we would have continued, and, undoubtedly, I would be amazed if we had not instructed additional forensic experts, for example, all of which costs a huge amount of money, but we would have done that. If it means overspending then we overspend, because you cannot leave something like that up in the air.

Q79 **Chair:** The truth is that, if it had not been for the High Court decision, it

is quite possible that Mrs Hamilton and others in a like position would still be waiting.

Karen Kneller: That is possible. I suspect not though, because we were still working on those reviews, but, undoubtedly, the High Court judgment did short-circuit things for us. That is probably a fair way of putting it.

Miles Trent: I think that is fair. Bear in mind, our review was not at the beginning when the High Court judgment arrived. We were in an advanced stage with the work that we had done, including a lot of work with expert forensic accountants, but not limited to that. We had various other strands of inquiry. It is not the case that if there had not been a High Court judgment we would have been going for years and years. We were already in an advanced stage. In early 2019, we had been following the proceedings and realised that it made sense. I think we had a final report from forensic accountants in May 2019 and realised how close we were to the Horizon judgment later that year. Of course, it made sense for us to wait and see what happened in that civil jurisdiction.

Q80 **Chair:** Were your forensic experts already raising Horizon as an issue potentially to be raised if there was a reference?

Miles Trent: We were instructing them to look into the evidence with the Horizon issues in mind, bearing in mind that the submissions to us from the outset were that there were problems with Horizon so there was *[Inaudible]* in the forensic accountants work.

Chair: Okay, thanks. Dr Mullan.

Q81 **Dr Mullan:** Thank you, Chair. I would like to get a better understanding from you of the current position in terms of the cases involved. My understanding is that there have been 736 prosecutions based on the evidence at least partly derived from Horizon, and that you have referred 51 cases with 23 still under review. Is that correct?

Miles Trent: Yes. We currently have 22 cases under review, 15 of which are fairly recent, just within the last few months, which have come to us. Fifty-one referrals is correct. That is a good point because we have seen a lot in the media about the 39 cases that were quashed by the Court of Appeal, but you may be aware that there have also been eight successful appeals at the Crown court and two more were successful quite recently. In total, there have been 51 referrals. If you add those up, that means there is one still outstanding, which is an appeal at the Court of Appeal.

Q82 **Dr Mullan:** I imagine you are one of the other 736. Is that because you have looked at everybody else's cases and found that there are not grounds from your point of view or they are still to be looked at? What is the bigger picture with the other cases?

Miles Trent: Not at all. We are very keen to make sure that everybody who needs our help on this issue finds their way to us. We have been

involved in developing guidance documents that can explain things to people and give them the right signposting of where to go. A lot of these cases, bear in mind, will not have tried to appeal before, so it will involve us playing our part in signposting them directly to the Court of Appeal.

There are some important situations where our help probably still will be needed, and a key one is where there were guilty pleas in the magistrates court. As you probably know, there is no right of appeal if you have pleaded guilty in the magistrates court, so they will need to come to us. We understand from the Post Office that there are about 200 cases in that category. We are very keen to make sure that we find those cases and if they want to challenge their conviction that they can do so through us.

It means updating the guidance on our website, which we are doing, making sure our helpline for any potential applicants has the right guidance, and things of that kind. The short answer is that we are not at the end of the story yet. There is potentially a lot more work to do and a lot more cases where they need our help.

Q83 **Dr Mullan:** It just requires them through themselves or their legal team either to exhaust the appeals process or come directly to you. Is there a foolproof way of ensuring that all those individuals are contacted? You imagine, with the level of publicity that has been involved, that people are not unaware of this.

Miles Trent: It certainly helps that there has been a lot of publicity. The main thing that is happening right now is that, ever since the High Court settlement, the Post Office has been going through a post-conviction disclosure exercise. As part of that, they are writing to all of the hundreds of cases that you mentioned to say, "This has happened, if you are not aware. If you want to challenge your conviction further, here is some information for you. Here is some material." We are making sure that our own guidance document is in there.

That is one way of making sure that for everybody who is getting this mailshot out of those hundreds of people it will be flagged up that the CCRC might be the people to help you. Also, every time we issue a press release and do anything on Twitter, we say, "If you want to challenge your conviction, and if you think Horizon is important to your case, please get in touch."

Q84 **Dr Mullan:** Does that have resource implications for you in your overall workload? Even if it is just the ones who pleaded guilty, and there are another 200 cases coming down the track over the next 12 months, is that something you are adequately resourced for?

Helen Pitcher: That is something that we are not adequately resourced for, which is a cause for concern. We are short on numbers of case review managers at the moment. We have just done another round of commissioner recruitment and we will need to go out again. Those three

new commissioners join us on Tuesday of next week. I was going to say Monday, but that is a bank holiday. We need to train them up and get them used to our procedures. We have a very good team of CRMs working on the Post Office cases who have specialised in them. We also have a committee of commissioners who have been specialising in these as well. If we get the number that we anticipate all at once, that will be a resourcing problem for us.

It is not often you say we have been lucky because of Covid, but, in a sense, our applications have been slightly down because the prison population has not been able to get to us. It is not as extreme as it could be, but we anticipate it could present a problem, which is why we are running a constant round of case review manager recruitment and we will go out again to do commissioner recruitment. One of the issues for us is that, because it is a public appointment that needs parliamentary approval, Cabinet Office approval and royal assent, it can take us quite a time. On the last round, it has taken us round about a year or slightly over, hasn't it, Karen?

Q85 **Dr Mullan:** As a proportion, how much of a year is waiting for the Cabinet Office to sign it off?

Helen Pitcher: How long did we wait this time? I have forgotten. There was an election in the way.

Dr Mullan: I see.

Karen Kneller: Yes, there was. I am not sure. I could hazard a guess. We can give you that information in writing. From start to finish, it is a very long process. Perhaps with the Chair's permission, if I may say on the Post Office cases, we know that there may be many others coming to us. It is really important to recognise from a resourcing perspective that these are not easy cases to look at. It is not a case where, because you have referred one batch, you can say, "Miles, just get on with it and refer this batch too." It does not work like that at all. We have to look at each one individually, and, as Miles can tell you, they are complicated cases.

Miles Trent: Certainly, they all have their own evidential context. The Court of Appeal's judgment underlines that and says that a key thing to look at is whether there was any supporting evidence and anything to corroborate the accusation against this person. You cannot review that as a group. You have to look at each individual case and say, "What was the evidence in this case?"

Q86 **Dr Mullan:** Okay, thank you. Moving on, you have talked about whether there were opportunities for you to act sooner and whether you feel that cases would have been reviewed and referred by yourselves anyway. You have given adequate explanations in regard to that. Having said that, taking a step back, what do you think you can learn from these cases, and is there anything that you could or should have done differently with the benefit of hindsight?

Helen Pitcher: I personally do not think there is anything we could have done differently. We were pushing very hard for disclosure from the Post Office, which came to us very late. That was an issue. That is not happening under the current regime, but it was happening. We were having significant difficulties getting the information that we required in order to further our investigations. For us, one of the things we welcome from the Westminster Commission report is the idea that our section 17 powers should have more teeth. We absolutely need that.

Q87 **Dr Mullan:** For those who are not as familiar with the legislation as you might be, section 17 powers allow you to compel somebody to disclose to you in the timeframe.

Helen Pitcher: Yes.

Q88 **Dr Mullan:** What are your powers at the moment? Was there anything that you could do in the face of the recalcitrance you experienced?

Helen Pitcher: We can ask, and we can ask again, and we can ask again, and we can ask again. We just have to keep following up. If the powers are strengthened, there could be sanctions, both financial and, I suspect, otherwise. That would make sense because, when you hear the stories of the Post Office victims who have been successful, it is absolutely harrowing. It has destroyed lives, which is not acceptable, and does not put the criminal justice system—albeit it was a private prosecution—in this country into a good light. That is why we wrote about private prosecutions and our concerns, and that was looked into, fortunately, and some recommendations were made.

To have an organisation that is victim, investigator and prosecutor, to my mind, cannot be right because there is no impartiality there, with the best will in the world. I hope from the Post Office's perspective that there are lessons learnt, not just about disclosure to us but all of those factors within that and also why this was not being discussed in the boardroom earlier. For something as huge as this—I do not know the answer to this—what was the service level agreement like with Fujitsu that could have had the system looked into sooner? Those kinds of things are really important lessons to learn.

Karen, do you want to add anything?

Karen Kneller: I just want to add that we have written to the Post Office. We have asked for assurance about the steps that they are taking now in going forward to assure us that we will get the disclosure that we need and what steps they are going to put in place to make sure that this does not happen again. Helen is absolutely right: there were lots of missed opportunities there. We do not know. We have not heard from them on that point, but we will keep banging on that particular door because this cannot happen again.

Miles Trent: Can I come in on that disclosure point briefly? It is right to recognise that we have had disclosure of thousands of documents from

the Post Office. It is certainly not the case that we have hit a brick wall and they are refusing to comply at all. However, what is almost as bad is when you have late disclosure very late in our process. The powers we have under section 17 of the 1995 Act are in very strict terms: "You must provide us with every bit of material about this case." It is not equivocal in any way. Very late in the process, particularly in the course of their post-conviction disclosure exercise, new tranches of material are finding their way to us. In one sense, you could say it is great; as they are finding them, they are sending them on to the CCRC. However, we would certainly say no, that is not good enough and that is a real concern. Paradoxically, the better they are at it now, the more we ask, "Why on earth didn't you look there before, five years ago, when we served the notices?" I think it is a real concern. We still have cases under review and we expect to have lots more. We need to make sure that compliance with our notices is comprehensive and timely.

Dr Mullan: Thank you.

Chair: Maria Eagle?

Q89 **Maria Eagle:** Could you set out why the CCRC's work on the Post Office cases prompted you to write to this Committee and ask us to investigate private prosecutions? Could you set that out so that people can understand?

Helen Pitcher: Do you want me to take that, Karen?

Karen Kneller: I am happy for you to, if you are happy to.

Helen Pitcher: Yes, sure. It was the sheer magnitude that was starting to come to light that had flown under our radar and flown under everybody else's radar, and there was no way of knowing exactly what the size of the problem would be. If that had been prosecuted in the normal way—not as a private prosecution—those factors would have come to light much sooner, and then we and the criminal justice system would have been able to see that this was a very large systemic issue and it just was not coming to light. It is only now, as the Post Office are writing to all these people that they prosecuted in the past, that we are hearing more and more. Initially, we heard that there would be a couple of hundred. We then heard it was 500. Now we are hearing it is likely to be 700. That information was not sufficiently in the public domain and, as Miles said earlier, was being spread across various different courts and jurisdictions.

Q90 **Maria Eagle:** If I understand you correctly, it was very much the lack of sight of the volume of cases that made you think, "It is because they are private prosecutions that this has been missing."

Helen Pitcher: I think it was twofold really. It was the volume, but it is also the fundamental principle of whether you should be able to be the victim, the investigator and the prosecutor, without there being some

degree of separation that says, "Hang on, is this right or is this an abuse of process?" We very much felt it was an abuse of process.

Q91 **Maria Eagle:** The abuse of process in your view is the fact that you are the victim, the investigator and the prosecutor. That is an abuse in and of itself.

Miles Trent: Can I come in on that point?

Helen Pitcher: Miles would like to come in and so would Karen, by the looks of it.

Miles Trent: I would just say that, while that sort of dual arrangement was not the reason for the referral and was not the basis of the abuse of process argument, it was an important part of the context. Throughout our review, we found it troubling that you have the same body that was victim, investigator and prosecutor, mainly because, viewed in CPIA terms, looking at the criminal rules that apply to a prosecutor, there is an important duty to pursue all reasonable lines of inquiry and for the prosecutor to satisfy themselves that all reasonable lines of inquiry have been pursued.

We always felt it was troubling that you had those decisions being taken by the same body that was the aggrieved, if you like. That was the context. The actual ground of appeal in the referral is about abuse of process and the fact that investigations were poor and disclosure was poor, but the background—the context for that—is the issue you mentioned.

Q92 **Maria Eagle:** Whether or not you are a private prosecutor or a public prosecutor, you still have the same professional obligations to the court, do you not, of disclosing properly and making sure you pursue all those lines of inquiry? It is not an issue about professional standards per se, but it may be that you think that because the Post Office was acting as a private prosecutor that had some impact on the conduct of the prosecutions. Is that right?

Miles Trent: Yes, that is one way to put it. We just felt that, arguably, there was an inherent conflict of interest there that the decision maker had such a vested interest in securing a conviction. You may be right that that is not unique to private prosecutions. There may be examples of a public prosecutor that has that kind of conflict of interest. There probably are examples where the prosecution should be handed over to a different agency if there is a key, inherent interest in the case for that person. We felt that that perhaps was something you would see more of in private prosecutions. However, you are right: it is not unique to private prosecutions.

Q93 **Maria Eagle:** The professional obligations of the individuals who conducted the prosecutions did not change, because their professional obligations as solicitors or as qualified lawyers of whatever kind are the same whether or not you are a private prosecutor or a public prosecutor.

There should not have been a distinction between whether you are a private or a public prosecutor, but you did not find that to be the case in your experience of these cases that were referred to you.

Miles Trent: It is worth remembering that, in these cases, the Post Office accept that they were following CPIA and they were following the code for Crown prosecutors. As this Committee has noted, in some ways it might not be the paradigm example of a private prosecution because they accept that they were applying the code for Crown prosecutors.

Maria Eagle: All right.

Q94 **Chair:** Can I just interject here? You can say you are applying the code, but does that actually imply that there was the rigorous degree of challenge that you would expect to be brought by an independent prosecutor?

Miles Trent: Yes, indeed.

Karen Kneller: I think that was one of the challenges here. There was no outside challenge. It was effectively one organisation. Without that challenge, a case is built and a mindset developed where you do not look outside the case that you have already built, and there is no one who is going to challenge that. That is the risk when you have private prosecutions of this scale with organisations such as the Post Office.

Miles Trent: Yes.

Chair: Thank you, Maria.

Q95 **Maria Eagle:** That is fine; thank you. I think I am clear about that. Do you have any views about the Committee's recommendations for strengthening the safeguards for regulating private prosecutions?

Helen Pitcher: I think it is really important that safeguards are strengthened so that something like this could never happen again. It is just not right that so many cases can fly under the radar anyway. If you talk about the sheer quantum, you need the safeguards, but, as we have just been talking about, you also need that independent rigorous investigation and challenge to be part of the process. It is absolutely fundamental.

Miles Trent: Whether it is private or public prosecutions, there need to be sufficient checks and balances. I think this Committee has noted that one of the existing safeguards for private prosecutions is the oversight of magistrates or the judiciary. There is also the fact that independent counsel would have been briefed in some of these cases. In the Post Office cases, there were problems before you even got to those stages. If the investigation is not pursuing all reasonable lines of inquiry, if the initial disclosure is not measuring up, and by that stage they are securing guilty pleas, do you ever get to that point of the judge or magistrate exercising that safeguard? I would say additional safeguards could only be a good thing.

Q96 **Maria Eagle:** What difference do you think a central register of prosecutions might make?

Miles Trent: I think it comes back to Helen's point about knowing the scale of the issue and these problems not being under the radar for so long. It could make a difference to have a handle on how often certain types of cases are being prosecuted so that you do not have that kind of fragmented picture and you have a more co-ordinated view of what is happening in the courts.

Q97 **Maria Eagle:** You have obviously expressed the view that there was not sufficient oversight of these private prosecutions. Is that a general issue with private prosecutions? Is there sufficient oversight or is there not? Is there a more general implication of these cases in respect of other private prosecutions?

Miles Trent: We were quite careful in our submission to this Committee to point out that we have not done many other cases that are private prosecutions other than Post Office cases. The vast majority of our work is public prosecutions. As a case reviewer, I certainly have not reviewed other private prosecutions.

Q98 **Maria Eagle:** I want to move on to the issue about resources. You have already said that you do not really have the funding and resource you need for taking on the sudden high volume of more of these cases that you expect to be coming your way. Are you talking to the Ministry of Justice about that? How would you describe your relations with them at the moment?

Helen Pitcher: We are talking to them about it. We are being very clear about what we need. The Westminster Commission was also very clear in its recommendations. Both Karen and I said we needed at least another million, and that was before we realised the magnitude of the Post Office issue. I will let Karen go into more detail, but we are definitely having a lot of discussions about it.

Karen Kneller: As Helen has said, we have asked for increased funding. We are waiting for confirmation of that, which I hope we will get in the next few weeks. We want both to protect and enhance the casework frontline so we can have more case review managers and more commissioners, but we also want to do more outreach and engagement work so that people who need our services are aware of us and can find us. It is still quite shocking that many members of the legal profession are unaware of our existence or do not quite understand the role that we play. That is down to us. It is down to having the resourcing to do that. We absolutely need more funding.

As Helen has said, if we do get several hundred more Post Office cases, we will be going straight back to the MOJ to say we need to ring-fence funding to deal with that.

Q99 **Maria Eagle:** Can I ask about terms and conditions for the

commissioners and whether or not the adverse changes that have occurred since 2017 in that respect have affected your capacity and your work? You said earlier that you are recruiting more commissioners. I understand that since 2017 commissioners have been fee paid, with no holiday, no sick pay and no pension, whereas, before that, they had all of those things. Has that affected your ability to recruit, and what impact, if any, has that had on your work?

Helen Pitcher: I will answer that one. It has not affected our ability to recruit. We do anticipate that, if we do not raise the day rate for commissioners, it might going forward when we compare it with other comparable roles in the system. It has not affected it. There is a myth that goes around that says commissioners are on one day a week. That is not true. They flex up, and they flex up quite considerably, and that is enormously helpful for us when we have issues such as the Post Office, Shrewsbury 24, and a couple of other linked cases where we need more commissioner time and it is not a single commissioner but a committee taking a decision. What we found is that that flexibility of employment enables us to call on those resources as we need them. That is why we have referred more cases in the last financial year than we have ever done before. Some people say, "Well, that is because some of them were linked," but, as you have already heard from Miles, we have had to investigate each and every case because of the particular facts and complexities within those cases. My personal view is that the model works well.

There was a question of whether being fee paid and part time affected people's independence as opposed to being full time, salaried, pensionable, et cetera. My argument would be that, if the organisation is your sole employer for pay and rations, that could lead to a slowing down and a caution in your decision making, which we do not want as an organisation and we do not support.

I think the evidence is there to say that, actually, the model works well and we attract good people. What worries me though, coming back to the level of fee for the commissioners, is that my commissioners will freely admit that the other elements of their portfolio fund underpin the money they get from the CCRC, and that cannot be right. Luckily, they are all passionate about miscarriages of justice and do it because they believe in our core purpose, not because of what they actually receive in remuneration. Karen, do you want to add to that?

Karen Kneller: No, I agree with that summary, Helen. I think there is a similar issue around the appointment of case review managers. We have struggled because of salary and funding to appoint very experienced case review managers who could come into the commission and start work immediately at the high end on the complex, sensitive cases—the sorts of cases that Miles and his colleagues do. There is a real pay and rations issue across the board at the commission right at the moment.

Maria Eagle: Thank you, Chair.

Chair: Thank you very much. Kieran, do you want to follow up on any of those points?

Q100 **Dr Mullan:** I want to ask more specifically about the commissioner days. You mentioned that you had moved from salary to days and that there was flexibility there, but the figures show that there has, I think, been a 30% drop in commissioner days from 2018-19 to 2019-20. From what you have said, I take it that you did not need those extra days, or is that not correct?

Helen Pitcher: Yes. If we do not need the extra days, we do not have them, which, from our funding model, when we have already talked about the fact that we are underfunded, works well for us. Where the rubber will hit the road is as we get more and more cases, which we anticipate not only in relation to the Post Office but we anticipate that there could be more claims of miscarriages of justice because of the delay in cases coming to court for prosecution, witnesses' memories fading and so on. We would need significantly more funding as that unfolds, and we really anticipate it will unfold post pandemic and also in relation to the Post Office.

Q101 **Dr Mullan:** Thirty per cent. from one year to another seems like quite a big drop. Did that reflect entirely the case mix you had that year?

Helen Pitcher: It reflected the case loads. We can provide you with the information about case loads, no appeals, and so on and so forth. It also reflected the fact that the commissioners at that time were involved in a lot of other things that were not necessarily within their core competence—such as governance of the organisation. They were being paid to be involved at what I would call almost an executive level in the organisation, when what we needed from them and got, but they had to squeeze it in with other things, was their ability to look at the work that the case review managers had done in detail, ask the critical questions and then formulate decisions.

Karen can say more because Karen was there at the time—I was not. I inherited all the changes to bring forward, which I agreed with, by the way, in full. It was more a question of focus than a loss of time on real core decision making. Karen, over to you.

Karen Kneller: This is about refocusing commissioners on casework and decision making in casework, which was the reason they were appointed to the role in the first place. I think it is much more that that was the issue that we were seeing back then. The model we have now works extremely well. We have commissioners who are doing two or three days a week. They can do it weekly or monthly. They flex their time to match what we need in terms of casework.

As Helen said, my concern is that there will be issues in the next recruitment round if we do not address the fee rate, because it feels as though it has dropped below the fees for other similar roles. As we know,

it is such a long process. We need to get that right, right at the front of the recruitment campaign; otherwise, a year in, we will find that we may be struggling to make really good appointments. But that is not as a result of the fee pay structure; that is purely, I think, as a result of the fee you are paid.

Dr Mullan: The actual fee. Thank you.

Q102 **Chair:** Do you have a sense as to how much behind the comparables it may have dropped, Karen?

Karen Kneller: I think probably a good quarter or a third. We are talking a substantial uplift, in my view.

Q103 **Chair:** Okay. Your budget would not stretch to that at the moment. You need to make a bid.

Karen Kneller: No, my budget would not stretch to that. They are not my terms and conditions. The Ministry of Justice would need to approve those, and I suspect that is a ministerial thing. Absolutely, my budget would not.

Chair: I understand that. Thanks.

Q104 **Rob Butler:** I would like to start by continuing a little on the fee structure. Helen, you said you are not struggling to recruit with the current fee levels, but that many of your commissioners are effectively subsidising their work for you with other things in their portfolio. That might raise a concern that there are some people who are not applying because they do not have a means of subsidising what they are doing for you. That surely must then raise questions about diversity and whether or not you are really getting commissioners who are representative of society.

Helen Pitcher: Yes, that is a real concern for me, and I have raised it. It is twofold. If your rate is at a certain level, you get a lot of applications that are nowhere near the standard you want. On the last competition that we ran for commissioners we had 700 applications, and Karen and I had to go through every single application, with applicants saying things like, "I work in Burger King but I have an interest in justice." It was sending the wrong message about who we are, what we do and the level we need.

Of concern to me, because I think diversity and inclusion is so central, is that you can only really afford to work for us if you have reached a certain age and stage in your life, and that is a worry because we do need a more diverse bunch of people. We accept that that means they might serve a shorter period of time with us. We have become quite popular in other parts of the justice system, who then come and fish in our pond, if you like, and take some of our people because they are of such high calibre, but they are definitely being funded elsewhere.

Q105 **Rob Butler:** Thank you for clarifying that. Let us think a little about what they actually do when you have them and they are receiving their fees. As I understand it, the way the commission works is to consider whether, as a result of new evidence or argument, there is a real possibility that the conviction would not be upheld were a reference to be made. Could you clarify if I have that correct so far?

Helen Pitcher: You have.

Q106 **Rob Butler:** "A real possibility" are the key words here. In 2015, the then Justice Committee recommended that the CCRC be less cautious in its approach to the real possibility test. Do you think now that, actually, you should be less cautious? How do you determine that "real possibility"?

Helen Pitcher: I will give a top-line answer and I will then pass over to Karen and Miles. I do not think that our commissioners are overly stringent when interpreting the real possibility test. They look at it as it is. Is there a real possibility through all our investigations that this is something that could be seen by the courts as a miscarriage of justice?

We have said for years—and this certainly predates me by a long time—that we are very open to having our test looked at. The test in our original statute will be 25 years old next year. We should be looking at that test, but that is not within our gift. That is a statutory test.

Taking a view as to what that means in current society and the current context, and what therefore is the right test, if we took a less stringent view, as it is being described, that implies we have not been applying the right test in the past. We believe we have been applying the right test in the right way, and, therefore, if it is not achieving what we as a society would like to achieve in the criminal justice system, that is the matter that we need to look at. Karen, over to you.

Karen Kneller: We welcome a review of the test. I think we said that to this Committee several years ago. We are very open to that. I do not think we are too cautious at all. If we are unsure, the applicant will get the benefit of the doubt. I do not recognise that description of us, but I do think we need to be open about this and have the discussion. It is not something that we can lead. It is a statutory test. We really do welcome that test.

The challenge in reviewing the test would be what you put in its place, what you could have that might achieve a different outcome, and what is the outcome that people want to achieve. Of course, there is clearly a link, and there will always be a link, between our test and the test that is applied by the appeal court. That is my view. I really welcome a review.

Miles, do you want to add anything? You are at the frontline reviewing these cases.

Miles Trent: For years, we have supported there being a review. As someone reviewing these cases and taking them to committees, my firm view is that, wherever any case is in any way borderline, already we would err on the side of referring. It is perhaps not said enough in public. We want to refer cases. A great day for us is when we get to refer a case. It is slightly strange to be having this conversation in a year when we have referred 70 cases—the most we have ever referred.

My view as a case reviewer is that we absolutely always err on the side of the applicant. As a case reviewer, I would be putting a case to a committee wherever I think there is a reasonable point there, and committees will err on the side of the applicant where they can. However, it is an evidence-based judgment, and whatever wording you put in place would have to reflect whether there is something new that these decision makers believe could reasonably make a difference for the case. You could tinker with the wording, but my personal view is that you probably would end up with something quite similar because you still have to have at its core that value judgment about whether the evidence measures up. That is my thought.

Q107 **Rob Butler:** Just to absolutely nail that down, you do not feel in your day-to-day job when you are looking at cases, trying to make decisions about how to take them, in any way constrained by the wording you currently have of "real possibility". You feel there is enough flexibility if you genuinely fear there has been a miscarriage of justice to be able to act on it.

Miles Trent: That is the easiest question I have been asked all day. I and all the other case review managers would answer the same. We are not sitting around saying, "If it was not for this pesky real possibility test, I would have this case referred." Case reviewers do not feel the wording inhibits us. Having said that, it is only right that it is scrutinised. There has been a lot of debate about that, so let us properly scrutinise it. We support that. However, my view is that, no, it is not inhibiting my work.

Q108 **Rob Butler:** Great. Let us see if the next question is as easy. I understand that the CCRC has recently commissioned a study on the impact of the current legal aid framework. In fact, you have the results of that. What effect would you say that legal aid framework has on your work? You may have wished for another easier question.

Helen Pitcher: I do not think that is a difficult question at all. You have probably seen the statistics. If we just deal with the CCRC for a minute, only 10% of the applicants who come to us have legal aid or legal representation. I asked a question earlier on today of my team as to how many of the Post Office cases had had that, and we did not have that answer, unfortunately, but we will take a look at it because it is key.

When there is a legal representative, the case comes to us in a much more cogent fashion. I will let Miles say more about that in a minute. It makes the job of reviewing the case, in a sense, more straightforward. It

is like a good skeleton argument. It always signposts where the court needs to go or where we need to go. In relation to us, we absolutely would welcome the legal aid system being overhauled and properly funded. I think that is really key.

More broadly, in relation to the whole criminal justice system, if individuals do not have access to really good representation, at the very start of the process you are getting potential miscarriages of justice—and we see that. We know that criminal justice is not the most popular topic in society. We know that a number of people think that if you have been convicted you must have done something wrong. If you go out and talk to people on the street and say, "Who would you like your public money to go to?", we are going to be at the bottom of the list every single time. We might move places with defence sometimes, but, largely, we would be at the bottom of the list, which is an issue. I personally think it is much more systemic.

Oddly enough, I was in a conversation with the chairman of the Criminal Bar Association last night about this very topic. We are thinking of running a conference with the Bar Council, Criminal Bar Association and ourselves about the issues. James had taken issue with me saying, "I think now is the time perhaps to look at whether juries should give decisions." He said, "That is hugely complex, Helen." We were having a discussion. He said, "Do you believe if the criminal justice system was more appropriately funded in terms of representation that we would get better decisions?" I think the answer is yes. That is my big picture answer, but I will hand over to Miles and Karen.

Miles Trent: I agree. It is absolutely a crucial issue. We have been concerned enough about it that it was the CCRC that commissioned that research and invited academics to come in and study what the position was. For those who have not had the chance to read it, it is an excellent report and an excellent piece of research by Sussex University. It highlights a really important issue. Case reviewers at the CCRC are in no doubt that good legal reps can really make a difference to a case. In terms of focusing on the really relevant submissions and pointing you to relevant lines of inquiry, they can really help. That is crucial.

Also, there is a worry, if you have so many applicants out there and the rates of representation become so low in this kind of criminal work, whether those applicants will find their way to us in the first place. We have been clear that you do not need to be represented to apply to the CCRC. Ninety per cent. of our current applicants are not. If legal representatives are not taking on this work, will there be enough awareness generally of the CCRC, and will applicants find their way to us? We do what we can in terms of outreach and we want to spread the word about our work, but that is another worry.

Rob Butler: Thank you.

Chair: I suppose the objective must be to make sure that the

miscarriage does not happen in the first place, which is the point about having the quality of lawyers to pick up the disclosure failure and so on.

Andy Slaughter has some final questions.

Q109 **Andy Slaughter:** I have been listening to your answers. I had the opportunity just before lockdown to come and spend a day up in Birmingham with you. I have also had constituency cases that I have helped to refer. It is a difficult question to ask you, but, looking at your role in the round, do you feel that you are sidelined by the criminal justice system either by reason of your location—which is away from the legal establishment—your resources, your status or your modus operandi, because you still do not seem even after all these years to fit into the main pattern of decision and appeal in that way? Do we need to look fundamentally at the role that the CCRC has?

Helen Pitcher: I do not think location makes any difference. Covid has catapulted us into becoming a homeworking organisation, which hopefully also will have a knock-on positive effect—and we are already seeing this—on the diversity of people whom we can employ. Location is not hugely important.

I think our role is central. I know the Court of Appeal respect who we are and what we do. They may not always like what we refer, but they respect that we are doing what we believe to be the right thing, and we respect the fact that it is for them to take a decision. We make the decision to refer, but it is their decision as to what to do with the case once it gets there. I do not personally feel that we are sidelined or in the wrong location at all.

What I feel is that the system does not know enough about us. There are views that it costs £3,000 to bring an application to us. It does not. It is free. We talk to criminal barristers who do not know what we do. We have to take some responsibility for not getting that communication right. In the past, we have perhaps shielded behind—I will not say hidden because I do not think we hide from anything—our section 23 obligations, which can make it difficult to publicise certain things. But that does not stop us publishing who we are, what we do and why people should have access to us, which is why, when Karen was talking about funding, we say we do need more funding for that outreach work.

We find when we get into prisons, whether that is on prison radio or running surgeries in prison, quite a considerable interest in what we can do to support them. We know, again, that there are pockets. Minority groups take longer to come to us. Women take longer to come to us if they are in the prison system. That is all an example of systemic issues that we need to work on. That would be my broader answer, but I will hand over to both Karen and Miles to give you some further specifics.

Karen Kneller: I would agree. I think location is irrelevant, if I am perfectly honest. I think we need to do more engagement,

communication and outreach. That comes down to funding. We are doing it, but we do it at quite a small scale. That is actually supported by case review managers, but every time they do that—and it is work that they enjoy—it is taking them off casework, so there is a constant balancing act. We absolutely have to get out there more so that people know about us and so that potential applicants hear about us. That comes down to having a much larger external affairs team, and that is one of the things that we want to do on the back of funding, along with growing the number of case review managers.

Chair: Thanks. All right.

Miles Trent: I think that is exactly right. The entire time I have been here—since 2005—we have been saying that we are not well enough known, even in the legal professions, and that has to change. We have put a lot of effort into our outreach work, but we can do even better with more resources.

As to not fitting into the legal establishment, that is probably quite a good thing, because our whole reason for being is to be able to speak truth to the establishment and to be able to send back cases and say, "No, look again." So I do not think that is a bad thing.

Q110 **Chair:** Okay, thanks. If Andy has no more questions, thank you very much to all three of our witnesses. I think that has covered a good deal of ground. I appreciate Helen, Karen and Miles, all three of you, coming and answering our questions today. Thank you very much for your time and for the work that you are doing. It is much appreciated. Thank you.

Helen Pitcher: Thank you.

Karen Kneller: Thank you.

Examination of witnesses

Witnesses: Stephen Wooler, Paul Jarvis and Andrew Marshall.

Q111 **Chair:** Can I then welcome our next witnesses, Stephen Wooler, Paul Jarvis and Andrew Marshall? Would you like to introduce yourselves and your roles or current organisations? Mr Wooler, do you want to tell us a little bit? You are a former chief inspector, are you not?

Stephen Wooler: I am a former chief inspector. I had a lengthy career in the legal profession, in private practice to start with, mainly public sector, and, currently, I am a member of the committee of the Criminal Law Reform Now Network, which gave evidence earlier in this inquiry.

Q112 **Chair:** That is absolutely right. I am grateful to you as well for submitting the statement that we have read, and we will make sure it is published along with the rest of the evidence. It saves you having to read it all out. I am grateful to you and for your time as chief inspector of the Crown Prosecution Service. Mr Jarvis?

Paul Jarvis: I am a practising barrister specialising primarily in crime. Like Stephen, I am also on the committee of the Criminal Law Reform Now Network, and I am involved in our current project on private prosecutions and, particularly, costs.

Q113 **Chair:** Thank you. Mr Marshall?

Andrew Marshall: Thank you very much, Chair.

Chair: It is good to see you.

Andrew Marshall: And you. Long time no see.

Chair: It is a long time. We know each other, I have to say for the record, from our time in practice. It is good to see you.

Andrew Marshall: It is a long time ago. I am a barrister. You forced me to calculate. I think I am 35 years called now, or something like that, and I have been prosecuting for most of that time for the public service. While the role existed, I was standing counsel to the Attorney General. I specialise in serious crime and regulatory crime, and about 10 years ago set up with other partners Edmonds Marshall McMahon, which has specialised in conducting private prosecutions. I have for the past 10 years sat in both camps. I am instructed by the Government currently to conduct their prosecutions, a much more confined practice, and with EMM.

Q114 **Chair:** Thank you very much. It is fair to say, I think, Mr Jarvis sold himself short. You are also Treasury Counsel to the Crown at the Central Criminal Court, Paul, are you not?

Paul Jarvis: I am indeed. It slipped my mind.

Q115 **Chair:** He has experience there of prosecuting on behalf of the state instructed by the Crown Prosecution Service. That gives us a range of expertise in the field.

Can I start, Mr Wooler, with you? We have all read the Hamilton judgment. I was interested to know the wider implications for the justice system. I noted from your statement that you make it pretty clear that there was a real concern about the permissive regime, as you put it, which allows uninspected persons to prosecute. Within those wider implications, had the Post Office been subject to oversight by the inspectorate or some greater superintendence role by the Attorney General, as the CPS and SFO are, do you think those problems with their approach—this unequivocal disregard of their obligations of disclosure, I think is the way you put it—would have been picked up more readily?

Stephen Wooler: I would hope so. It was a particularly egregious case. When you read what the judges found in terms of disclosure, the wilful non-disclosure and the shredding of documents despite counsel's advice, it bordered on the criminal, and that is why I went public and asked for a criminal investigation.

There is a great danger in judging from one particularly bad case. There is that argument. Having said that, it is very much about culture, ethos and having the right approach to prosecutions. While inspection can never guarantee that you will not have a repetition because things can go wrong in any organisation, and we have seen it over the course of many years in different organisations, a good oversight and inspection regime can really minimise that risk. It can flag up to Ministers and senior managers where the problems are, and it substantially reduces the risk. In the light of what has happened, there is a very good case for going down that route.

There is also the strong argument of principle that I put into my statement, which is that the power of prosecution is one that most people expect to be vested in the state. As a matter of principle, it ought to be exercised either by the state itself or within a framework that ensures proper oversight and the maintenance of the right prosecuting ethos and standards and according to acceptable standards. We do not have that at the moment. It is an issue that is not confined to private prosecutions because the CPS was superimposed on a very fragmented system some years ago in 1985. It is outside the remit of this particular inquiry as to whether it should go further. Where private prosecutions are concerned, it has now become such a major contributor to the criminal justice system— dare one say it is a necessary evil because the system would not be able to operate without that contribution?—that there is a very strong case for going down the route of a proportionate system of oversight and regulation.

Q116 **Chair:** Thank you very much. Mr Jarvis and Mr Marshall, in your time when you have been prosecuting, let us say in a non-private case or perhaps even when you have been doing private prosecutions, have you never come across an example where the client in effect declined to act on unequivocal advice from you as to what their disclosure obligations were? You provide them with your advice, "Here are your disclosure obligations," and they say, "No, thank you very much, but we are not going to do it."

Andrew Marshall: The whole thing is extraordinary to me. It is completely outside my experience. My experience, whether in private or public, is that people take your advice, and, in fact, if they do not and there is a disclosure issue, I would walk away.

Chair: That is right.

Andrew Marshall: I think your professional obligations are to do that. I will give you an example. I was prosecuting a murder. This is a while ago now. It was an important case at the time. The police officer late in the day—it was a HOLMES case, so everything was logged—came across a memo that he had written, and he had written it the wrong way. On an important point, it could be looked at in an alternative way. He said, "I didn't mean it like that." I could see why he had done it. He said, "I am bringing it to your attention because there is this alternative

interpretation that will have a big effect." I get chills now thinking about it because it was so important. We took it to the judge—in fact, no, I do not think we even needed to.

That is the culture that I am used to where a Government organisation wants to do the right thing. It wants to be guided by people with experience and they follow that. It is the same with the people I represent in the private sphere. There has never been any resistance to disclosure at all.

Looking at Hamilton, I find it extraordinary. Every time I hear it being described as a private prosecution I quake because it does not seem like one to me. The Post Office were a quasi-public prosecutor that had been hived off. They may technically be a private prosecutor, but they did not see themselves like that, they were not considered like that and they most certainly were not acting like that. I have never known any prosecutor in my time behave like that.

One thing that has not been mentioned is that they did have advice. There is a Mr Clarke who features, who was a barrister in practice with an independent firm of solicitors, and he gave advice. Stephen was kind enough to send me his notes, and they mentioned counsel's advice. I thought this might be some generic advice. When I read the ruling—it is highly focused and specific, telling them what to do and what the dangers are—I was truly shocked, to be honest.

Q117 **Chair:** That is helpful. It is my instinct that, if they ignore your advice, you are professionally compromised in an issue of that kind. Paul Jarvis, is your experience any different perhaps from Andrew's and mine?

Paul Jarvis: I do not think it is. What surprised me most about the Clarke advice—it is paragraph 82—was that it was no more than reminding the Post Office of what their obligations are in law anyway. The advice was not a difficult or complicated document. It was not some esoteric or fancy area of the law. It was simply an orthodox statement of what they need to do to ensure that the prosecution is sound. That is to provide the defence with material that is capable reasonably of undermining the integrity of the Horizon system. The fact that that advice, which was not even debatable, and the accuracy of what was being said was ignored, I find the most shocking thing. There will always be cases where you are advising on difficult areas and reasonable minds might take different views, but this really was not that sort of case, and that is what I find most surprising about this.

Stephen Wooler: To my mind, that also raises a very interesting and difficult issue as regards professional responsibilities. It is a very rare situation where advice is ignored, but it happened. It was a barrister who was employed, but there was also an in-house lawyer. Stephen Clarke's second written advice records the fact that he had set up arrangements whereby the shortcomings of the Horizon system would be noted with a view to disclosure, both the current and past pieces. An instruction came

from within the Post Office that the records of those meetings were to be destroyed—"shredded" was the word that I think he mentioned.

I do not think there is any specific provision as to what the professional duty of those lawyers involved might be at that juncture. They were not followed. They could withdraw from the case, which is certain. At that point, they are with knowledge. That is the stage at which something could have been done because the whistle could have been blown in an egregious situation. Perhaps one ought to focus on what responsibilities and rights that professional might have had in terms of client privilege and so forth so that they are protected if they did, in fact, take steps to bring it to notice.

Q118 **Chair:** That is a helpful and interesting broader point.

Andrew, I just wanted to raise one further matter with you. You make the point, do you not, that originally the Post Office had its prosecutorial powers when it was a Government Department?

Andrew Marshall: Yes, and it operated like that.

Chair: It stayed with them when it was privatised.

Andrew Marshall: It seems to have done. From the research that I have done, it seems to have been treated as if it was a state prosecutor reflecting its history. Apparently, it had access to the PNC for intelligence and prosecution purposes, joint investigations with the police and with other statutory powers. As I understand it, it is a relevant public authority under RIPA for directed surveillance. Whatever its precise characterisation, it certainly was treated and trusted as a public prosecutor. When it was giving its assurances they were acted on in a way that, I have to say, although I am the same person when I privately prosecute, they are not. We are treated with the gravest of suspicion and scrutiny, and we do not mind that. But it does not seem to have been dealt with in the same way. For example, there do not seem to have been any referrals to the DPP. It is an odd hybrid that just reflects its odd history.

Q119 **Chair:** I take it from that, for example, that the access to RIPA powers and databases is not something that the other organisations for which you have acted as a private prosecutor would necessarily have.

Andrew Marshall: No. In order to assist the court, we can find out on application criminal convictions, and we do that when a case is coming to its conclusion. Beyond that, we have no statutory powers and we cannot get the police to come and give us a helping hand. It just does not work like that at all.

Chair: Kieran, you wanted to follow up on some of these points.

Q120 **Dr Mullan:** Mr Wooler, you articulated it as a dilemma. What is the provision at the moment? Is that client confidentially absolute? I am a doctor myself. We have extremely stringent restrictions around

confidentially of patients, but it is not absolute except in very limited circumstances. What is the current situation for someone, as you have described, who might have a public interest obligation in having raised a concern? Would they be in breach of their professional regulations no matter the circumstances?

Stephen Wooler: I must confess that, in all honesty, I do not have an answer to that. The current practitioners—I am 10 years retired—might be in a better position to answer that.

Q121 **Chair:** Fair enough. Let us see if Paul or Andrew can help with that.

Paul Jarvis: What I can tell you is that, if it is an advice that you have been instructed to give, the privilege and the advice rests in the hands of the client. They can waive that and allow you to report the content of it, but if they do not you are in a very difficult situation. If you were to go to the authorities and say, "I have provided them with advice. I have told them what to do and they are not doing it. I have concerns that by not doing it there is a risk that serious injustice will follow," that might have potentially damaging professional consequences for you. The situation might be different where you are not seeking to disclose the content of the privileged communications but you are in possession of potentially confidential information that is not privileged. There, you might be in a better position in terms of going to law enforcement and saying there is a real problem with it. The distinction might be drawn between circumstances where I have provided an advice as against circumstances where I have just come into possession of information, and the one might carry stronger obligations than the other.

Andrew Marshall: From my end of things, our experience of Government is, as I have said, a wish to comply properly and wholeheartedly, and if there was any resistance with a public prosecutor, that would ultimately go up to whatever level was needed. When I was standing counsel, if I needed to go and speak to David Green, when he was the director, I would be able to go and knock on his door and say, "This is the problem." Paul would have the same opportunity, ultimately, with Max Hill if he needed to, but it is very unlikely.

In my sphere, we are independent of the clients; we work for them but we are not their mouthpiece; and we instruct the very best of independent counsel. If the client was refusing to disclose something, that's it, we would withdraw from the case, because the alternative of putting forward a case where disclosure has not been done correctly is unthinkable morally and professionally impossible. We may not be able to disclose what the truth is, but we would be out of the case, and that would send a signal to the world.

Q122 **Dr Mullan:** I understand that. I guess it is exploring what has gone on here, as you have mentioned. Over the time periods involved, it obviously had counsel and legal advice from people who are regulated professionals. The case would suggest that prosecutions were improperly

conducted, and that is a matter for accountability. It is not just about what we do going forward but where the accountability for individuals is. You have to really understand where the boundaries are drawn if we are to say that people should be held to account for their conduct as professionally regulated individuals.

Andrew Marshall: That is a very good point. One of the things that may have happened here is that there may have been some central knowledge within Post Office, but that was never disseminated to the people who were, for example, counsel—and I am not particularly protecting them. It is a bit like when the CCRC was asked, "Why didn't you put the picture together?" I think that is because the defendants only had the crumbs.

Going back to another period of time, with customs, if you had a central problem like this, they would get everybody relevant together, knock heads together and sort it out. There would be a central repository. It would be dealt with centrally. That does not seem to have happened here. It was not tackled as a proper problem.

Q123 **Dr Mullan:** It is bound to be something the inquiry is going to have to explore.

Andrew Marshall: Exactly.

Dr Mullan: Thank you.

Q124 **Maria Eagle:** Can I ask Mr Marshall first, because you are the one who does lots of private prosecutions currently, if you believe that the growth in the number of private prosecutions is problematic, and that the kinds of concerns that have come up as a result of these cases might be replicated elsewhere?

Andrew Marshall: I obviously have to declare an interest because they are not problematic for us because it is our *[Inaudible]*. I do not think it is, as long as they are done properly. That is a matter, as you raised, of professional responsibility, which goes hand in hand with integrity and knowledge. I do not think there is inherently anything wrong with them. I do not want to be seen as ignoring what has happened, but the Hamilton case is a bit unique in our experience. Disclosure failures can arise in any case, and you have to guard against that. We are looking at it now in a private prosecution, but they are not a characteristic of private prosecutions. They happen most of the time in public prosecutions, but they are not really a characteristic of them. They are potentially through oversight, with people generally trying to do their very best and others taking a different view. I hope I am not minimising the problem. It is certainly not meant to be.

Q125 **Maria Eagle:** No, you are setting out your views about whether it has more general application, which is answering the question that I asked you. That is fine. Mr Jarvis, do you have anything to add?

Paul Jarvis: In common with what a number of people have said, it is very difficult to take a case like Hamilton and extrapolate from that the conclusion that this is a problem endemic in the conduct of private prosecutions, whether by individuals or organisations. Such a unique situation presented itself in that case that I would not want to draw conclusions as to how other prosecutions are carried out. As somebody who has privately prosecuted and defended in private prosecutions, I have not seen from my personal experience, or anecdotally from people I have spoken to, anything like the sorts of issues that arose in that particular case. I tend to agree with the comments that Andrew has made. Ordinarily, the private prosecutions I have seen have been conducted very properly and very fairly.

Q126 **Maria Eagle:** Mr Wooler, do you have anything to say about whether the growth in the number of private prosecutions is problematic?

Stephen Wooler: I do not think that the growth per se is problematic, but as more and more practitioners become involved it makes it much more difficult to ensure that the professional standards that are needed—the ethics and the approach—are maintained on a consistent basis. Obviously, what Paul and Andrew have been talking about are what I call the high end of private prosecutions. We must not lose sight of the fact that they occur across quite a wide range—everything from train operating companies at one end of the spectrum to the major intellectual property prosecutions at the other end. There is a risk that, particularly when it is real financial interests that are involved, the organisation concerned can lose sight of its wider public interest role and focus too much on its own particular interests. I do think that the growth is something that needs to be monitored.

Having said that and starting as a sceptic, and, seeing the evidence that has emerged as to how dependent the system is on them, I regard them as something that needs to be harnessed. It is an area where, with proper oversight, the private sector and the public sector can work together.

Q127 **Maria Eagle:** Thank you. I would like to move on to the issue of the costs regime for private prosecutions. An advantage can be gained by private prosecutors in recovering the actual costs that they charge out rather than legal aid rates. Could I come to Mr Jarvis first? Does the current costs regime for private prosecutions represent a cost-effective use of public money?

Paul Jarvis: Thank you. I saw the word "cost-effective" in the Government's response to your recommendations, by which I assume it means, "Are you getting good value for money for what private prosecutors do?" I would say two things as a starting point.

If anyone is going to start capping the costs that private prosecutors can recover out of central funds, we need to be conscious of the law of unintended consequences. While ostensibly that will have an impact on

costs—it will reduce the amount of costs recoverable and the Ministry of Justice budget will not be adversely affected—one consequence of that is that you might end up having more people prosecuting these cases privately without the assistance of lawyers. I am not saying this to defend the lawyers' profession and increase their profits, but what will the knock-on effect of that be on the justice system if you have what Stephen called high-end prosecutions being brought by individuals without the help of lawyers, who would not be prepared to get involved because, for example, the rates were deemed too low for them? There might be a consequence that needs to be reflected on. ^^^

The second point is that there is in existence already, as you know, within section 17 of the Prosecution of Offences Act, which allows an order out of central funds to be made, the jurisdiction under subsection 2(a) whereby the judge can intervene, if they consider it appropriate, by setting out what they feel might be appropriate restrictions on the level of costs recovered by private prosecutors. If there has been bad practice or poor practice, or for some other reason the judge feels the entirety of the costs ought not to be recoverable from the public purse, he or she can say so now.

These large costs orders—the headline-grabbing figures that we have all seen—need to be set against the fact that a judge somewhere has presumably had a look at it and felt that in the circumstances of that particular case a figure in that region was not inappropriate given the work that had been done and potentially the result that had been secured. I would be slightly hesitant about suggesting that the current system is not cost-effective and does not represent good value for money for those reasons.

Q128 **Maria Eagle:** Mr Marshall?

Andrew Marshall: Our practice is to ask a judge for an order. We tend to think that, in nearly all our cases, if we were asking for a specific sum, that invites the judge to do something that is unfair to them—they are not taxing officers—and it might just bring criticism on them. We tend to ask them for an order in principle. The effect of that is that it then goes to specialist civil servants who are taxing officers. They look at the claim and at all of the work—we have to send them the papers, what we have done and everything—and they scrutinise every single penny of it against a parliamentary set of criteria. Everything that is handed back is being thoroughly scrutinised and is necessarily reasonable. If there is any challenge from either side, they can go to the High Court's own costs office—the senior court's costs office. We think that is a better way of doing it and fairer to the judges rather than draw them into controversy as well, because these are public funds. Therefore, we do not get headline-grabbing figures because we never ask for them.

In terms of the unintended consequences, I agree with Paul; I think they would be very severe. We act for charities, among other people—and I know that is an easy one to pick. Charities need the costs recovery. If

they do not get the costs recovery—and even they will not get every penny back—they cannot do it. It actually prevents a prosecution. It does not make it more difficult—it prevents it. That has other consequences in a society that really depends upon a functioning justice system. It is taken for granted, but when it slips away it is hard to put back into place.

We think that where there are no real budgets for fraud in the police and anywhere else, by and large, very few fraud cases are brought. It is important to make sure that people do not think that financial crime is risk free. I think you may have said something on the floor of the House quite recently about that. I was trying to find the quote. I may have got it wrong, and if I have I apologise. There is a sense that there is no consequence for financial crime at the moment. We can do a little bit, but the bit that we do does have an effect.

Maria Eagle: Thank you very much, Chair.

Q129 **Chair:** Thank you very much. What about the proposed changes to the regime? Can you help me on that?

Andrew Marshall: Is that the changes in relation to the capping of costs?

Q130 **Chair:** The Government have made two proposals, as you recall, to change the costs regime for private prosecutions. It is the cap and so on.

Andrew Marshall: If it changes to legal aid rates, that will not be possible to do. Any suggestion that there needs to be an equality between the prosecution and defence, in my submission, is quite misplaced. They are quite different jobs. They are done by different people with different responsibilities, and they are quite different tasks. We keep going back to disclosure, but, ultimately, those who prosecute know that you can often spend more time dealing with disclosure—because there is only one option, and that is to do it properly—than you do on the actual case itself. Prosecution is a quite different thing. You simply would not be able to function and run it at legal aid rates.

I do not want to be misunderstood as drawing some sort of moral equivalent here, but it is a bit like the security services and terrorism. If you fund the security services at terrorism rates, it will not work. The security services cannot afford to make any mistake at all, and that is how they operate. As I say, I am not drawing a moral equivalent at all. That is the approach that you have to take if you are prosecuting. You could not do it at legal aid rates at all. If you cap what you can recover from a defendant—I do not know why you would want to do that when you may be prosecuting somebody quite wealthy—you could not achieve that either, really.

I think the Government accepted this. When they were trying to drive down defence rates of recovery, they used the twin arguments of the different kinds of work and the adverse effects on it. Now that they have driven those down and, as it were, banked it, they seem to want to

abandon that reasoning and try to bring the prosecution rates down, which is an interesting approach but one that I do not think washes.

Q131 **Chair:** Paul, you did a lot of work in the costs field. What is your assessment from the practical implications that might or might not arise?

Paul Jarvis: There is a number of things you can say, Chair. If you are going to cap the rates of recovery for private prosecutions, you are very likely to have one of two consequences. One is that you are going to reduce the number of private prosecutions because individuals who want to prosecute privately will not be able to find a firm to do it for them. If you do not see a reduction in the number of private prosecutions, you will see an increase in the number of people who are doing it themselves. That will have ramifications, because, as people have already said, the last thing that we want to have if we want to retain the private prosecution as an entity is more people prosecuting high-end cases without the help of the sorts of people who are beholden to these professional obligations to do it right. That is one consequence.

The other thing to bear in mind as well is that this equivalence argument—this idea that we need to have in place a system that is as fair to private prosecutors as it is to defendants—has a number of things underlining it that we need to tease out. The first, which Andrew mentioned, is, why are we treating the private prosecutor and the defendant as equivalents when they are not? The private prosecutor, as you know, is a Minister of Justice, has various obligations that they must comply with, might in the event secure a conviction in the public interest against an individual that might result, for example, in confiscation proceedings that have a significant financial boon to the state once they reach their conclusion, and yet what the Government are proposing to do is to deny them the opportunity to recover the costs of carrying out that prosecution even though it was undoubtedly in the public interest to do so.

The other thing to be conscious of is that the parity argument cuts both ways. At the moment, under section 17, the private prosecutor cannot recover legal costs from central funds for summary-only prosecutions, whereas, potentially, defendants can. If you are arguing for a costs cap on the basis of parity, the parity argument goes much wider than that. A question to be asked would be whether, if private prosecution costs are to be capped, they ought to be on the same level as the defendants in the sense that private prosecutors should be able to recover costs from summary proceedings. At the moment they cannot.

Q132 **Chair:** Was that always the case, Paul? I am trying to think. Pre-section 17, were you able to get costs from central funds in the magistrates court?

Paul Jarvis: I am not sure what it was like going back that far.

Q133 **Chair:** It is probably because I am so much older that I had a suspicion

that you were able to.

Paul Jarvis: Nonsense, Mr Chair. Stephen might be in a slightly better position to answer that than I can. Certainly, under the current framework, private prosecutors can only get their costs out of central funds.

Chair: I understand that.

Stephen Wooler: Mr Chair, I was looking for an opportunity to intervene because I have to confess that I am old enough and long enough in the tooth to have been round the table in what was then the Home Office building when sections 17, 18 and 19 were being worked out. The caution that I was going to offer is that there is actually a delicate interface between them, and it is very difficult to tinker with one without the other. The reason why you have defendants only able to get their costs out of central funds was a considered decision at that time.

If you follow the civil law example where costs follow the event, it could actually become a significant disincentive to prosecutors to bring proceedings if they thought they were always on risk; and I am talking about public prosecutors as well—the CPS. The inequality that arises now comes largely from something that the Committee is looking into, which is the legal aid issue where the legal aid rates are below the market rate and have been brought down. That in itself causes some quality issues.

In reducing the funds out of central funds for prosecutors, you would actually be replicating what is a pretty unfair situation for many people and many defendants who are acquitted and substantially out of pocket to prosecutors in that they brought a prosecution where it was absolutely in the public interest to do so—it is very much so usually and substantial prison sentences often follow—and yet the prosecutor does not recover their appropriate costs. When I say appropriate, I mean those that are uneconomic, which I think are wrong. I do not suggest there should be Magic Circle-type rates. Those who bring private prosecutions, in my view, ought to get reasonable and fair remuneration.

In relation to Andrew's point about the difference drawn between the prosecution and defence, I think the answer to that is probably to make sure that the rates are comparable, but, of course, when you come to work out what is actually payable, the computation takes into account the different amounts of work that have been involved.

Chair: That is helpful, thanks. The final set of questions go to Sarah Dines. Sarah, you are a member of the Bar as well. We did not get a chance to record your interests earlier.

Q134 **Miss Dines:** I am a practising barrister, although I have not taken a case since my election. Apologies for my lateness to this panel. Were the Government right to reject the Committee's recommendation that there should be a binding code of standards enforced by a regulator that applies to all private prosecutors and investigators?

Chair: Who wants to start on that one? It is asking yourselves the negative in a sense.

Stephen Wooler: It was an approach that I adopted and advocated in the written submission that I made to the first hearing. As I said earlier, done in a light-touch way and a proportionate way, it could be very beneficial indeed and it would need some very sensitive handling.

I thought when I put forward the proposal that I was breaking new ground. In fact, in preparing for this and looking at papers from the Criminal Law Reform Now Network, we have a paper that went to the Criminal Procedure Rule Committee as long ago as February of last year where a system of licensing was one of the options suggested by the Ministry of Justice, not for quality reasons but as a means of lowering the costs, which has been a thorn in its side for some time. Those reasons were the wrong reasons. I was bemused to see the Ministry of Justice proposing it and then describing it as "disproportionate" in its response to the Committee when a very similar scheme had been something it had put to the Rule Committee.

Q135 **Chair:** That is interesting. Paul? Andrew?

Andrew Marshall: Paul, do you want to go first?

Paul Jarvis: Yes, of course. I am very happy to. Putting my defence hat on for a moment, having something like that in place would be, I would say, a rather beneficial development in this particular area because there are private prosecutors and there are private prosecutors. There are a great many whom I would trust implicitly to comply with their professional standards without question. There are others where that degree of confidence might not be apparent. If you are going along to a court and making complaints about the way you are being prosecuted privately by a particular person or corporation, or whoever it might be, being able to direct the court's attention to a set of standards that they are governed by would be a very good way of enabling the court to check that the proceedings that you are subject to have been properly brought and are not abusive in the sense that we have discussed in relation to Post Office cases and that the Court of Appeal considered in Hamilton. That is part of the reason why, certainly as far as the Committee is concerned, we would endorse what Stephen has been saying and see that as a positive development. It seems rather odd that it has been proposed initially and then that proposal has been rejected. We see force in the recommendation that the Committee made first time round.

Q136 **Chair:** Andrew?

Andrew Marshall: Can I put the alternative view for the Committee's consideration? I am against it. The reason is this. The code that would be drawn up would be no more than a simplistic version of the existing professional rules but, more importantly, the statutory and criminal procedure rules that are in place. It is hard to know what else it could

include. It could not simply replicate them; it would have to be simple. I am not sure where it would take you, because if you then add an inspection regime to it there are problems with that. If you are privately prosecuting, you must bear the responsibility of getting proper advice and doing it properly, and you should not look to a government-appointed inspectorate to help you on your way.

The other thing that we are trying to do by this is to get everything right before it goes to court while ignoring the whole purpose of the courts, which is to resolve all these issues. It is for the courts to uphold these rules, whether statutory or criminal procedure rules. I question how it would work in practice. Could an inspectorate, for example, second-guess, let us say, my disclosure decision? What if they do, and what if I still disagree with them? Is that itself disclosable? More importantly, how do we even get to that point?

At the moment, we have two sets of papers, of course. We have the ones that get published—the statements and the disclosure schedules. All that gets published and anybody can look at that, including the inspectorate. The rest of the papers that do or do not form part of the unused material would be both confidential and likely to be legal professional privilege. Certainly, some of them should be. That is an absolute right. How could you have an inspectorate piercing that right without primary legislation and really changing everything that we know about legal professional privilege?

What is suggested as light touch never really ends up as that. In fact, recommendation 8 shows you where that might end up—not just by gentle advice to people as to how to do it, but, as it were, if you do not comply, having to pre-qualify before you are even allowed access to a court. So I see real difficulties in practice. I certainly hope I come within the second of Paul's category of private prosecutors. However, that is how I see it. With those who are like Post Office, if there had been an inspection regime there, would they in real terms have got to the bottom of what Post Office did not see as an issue? I am not sure it would work.

Q137 **Chair:** Is there not the argument that the way, for example, Stephen's inspectorate works—or, indeed, the inspectorate of prisons and so on, but let us take the inspectorate of the CPS—is that you are not inspecting the decision in individual cases or an individual disclosure decision? You are inspecting whether there is a system in place adequately to deal with disclosure issues and a corporate culture that recognises those issues.

Andrew Marshall: It could be. I can see the importance of that where the Government are ultimately responsible, for example, for the CPS and the prisons, although they devolve executive responsibility. The Government have an interest in making sure that those things are done properly. Because they are spread out—the CPS is all over the country, as we know—it is important that you see what is happening and its priorities, and really, I suppose, it is a vehicle for a reassessment of those priorities. The DPP cannot see and be responsible for everything.

However, we do not have that here; we are hands-on with all of our cases; we control them. We do not have that disparity problem.

I am not sure whether I have answered your question, Chair. I think it would be difficult to—

Chair: Okay.

Andrew Marshall: *—[Inaudible]* and say, "Yes, we do not really treat disclosure properly. We do not think it is important," but they would not get the right answer, I suspect.

Chair: They would not get the right answer. I am sorry, Sarah.

Q138 **Miss Dines:** If everyone has finished, I will move on to the issue of the creation of a central register of private prosecutions. Paul, what difference does it make to have such a register, and should it be publicly accessible to members of the public?

Paul Jarvis: On the first of those questions, one of the issues that you are implying is in relation to Post Office. Would we have detected the problem sooner if there had been some joined-up thinking? If the scale of Post Office's prosecution operation had been known about by someone at some point, might that have helped? I think it would. I suspect the CPS has very little appetite for a central registry, and HMCTS might query who would be responsible for compiling it in the first place.

One of the problems that we would then have to get to grips with is defining what a private prosecution is, because, for the registry to work, we would need to know whose cases are meant to be on it. Who would be responsible for ticking the box on the form saying this is a private prosecution and this is not? For my part, I can see a real benefit in having a central registry available for that reason. Again, we are not talking about the responsible private prosecutors; we are talking about the rogues, whether individuals or organisations who do not have proper practices in place and might be committing sins nationwide that nobody is aware of.

As to who would have access to this, I think that is a slightly more delicate question. If it is not to be publicly available, somebody would have to have access to it who would be in a position to have that light-bulb moment of saying, "Gosh, an awful lot of prosecutions are being brought by Mr X or Ms Y. We need to look into this." Who would be responsible for doing that? If we cannot identify who that individual would be, it might be that the only way of ensuring that this joined-up thinking takes place is to have it as a publicly available register, but I could see that bringing with it lots of problems. People would say inevitably, "I don't want the fact that I am being prosecuted bandied around on a public register."

Although it is a public court and the public have access to court lists, it is a very different thing to say that people have to get up and dig this

information out for themselves than it is to say, "We are going to advertise to the world that I am being prosecuted by this organisation for this particular offence." But I would agree in principle with the idea of a register. I think you might to need to consult more widely as to how that register was put into effect, who ends up on it, and, most importantly of all, who ends up managing it.

Q139 **Miss Dines:** Thank you. Do you have any contribution, Andrew?

Andrew Marshall: No, only my agreement, actually. I agree with everything that Paul said. I cannot see any harm in it with the safeguards Paul has mentioned. It is to catch the rogues. That may be achieved by the duty of candour point, at the point of an application of summons, if it is an individual asking them whether they have been refused; and, in fact, they are obliged to say whether that particular application has been previously refused. It may catch them out on the basis that they just go round the country seeking applications in different sorts of cases. I am not actually sure that that takes place, but it might happen. I do not know.

Stephen Wooler: I think it would be very much a second best. It would give you some idea of volume. Unless there was some sort of oversight of them or scrutiny of it, it would not necessarily tell you very much. It would not pinpoint where there were possible difficulties, because volume is not an indicator necessarily of anything at all.

If I can go back to the previous question where I was going to come in, in response to Andrew's point, he rightly says that a code would be very general in terms, but underneath that it would have to be particular to the individual prosecutor, who would have expectations as to how they would apply that to their particular line of business—the area they were operating in. One size would not fit all. The particular area where one would expect it to focus is on the nature of the relationship with the client organisation.

If we go back to the Philips principle, Philips was concerned not so much with investigation and prosecution under one roof, but it was the solicitor-client relationship. On the issue that I raised earlier as to how the professionals having given the right advice and seeing it ignored in the Post Office case should have acted, I would expect, if there was such an oversight regime, to see it fully covered in the understanding between them. It is all well and good relying on the very high professional standards of people such as Andrew and Paul, but if the client can walk away and just say, "Thank you very much, but I don't like that advice"—and it does occasionally happen more on the defence side than on the prosecution side because prosecutions are nearly all public work—if that can happen, that is where it goes wrong. If that very close relationship had been noted where Post Office was able to override the professional advice, that is the point at which the Post Office scandal might well have been identified and stopped.

Q140 **Miss Dines:** If I can move on to our last area of questioning, feel free to give a frank answer, which can be against us if you like. Were the Government right to reject our recommendation that the Crown Prosecution Service be automatically notified when a private prosecution is initiated?

Paul Jarvis: I can only speak in a personal capacity. I like the recommendation that the CPS ought to be notified. One of the concerns I had with the Post Office case—and you touched on this with the first tranche of witnesses—is this. At the moment, there are an awful lot of people who are still being convicted of offences that relied on the Horizon system, and we have no idea—because they have not gone to the CCRC, the Court of Appeal or the Crown court—whether those convictions are safe or not.

We simply do not know what mechanisms there might be in place. If people do not know about the CCRC, do they know, for example, if they are being prosecuted privately, that the CPS has a power to take over that particular prosecution? Anything that has the potential to assist the CPS to exercise its powers in appropriate cases I would have thought personally would be a good thing. I am not sure the CPS would necessarily appreciate an obligation, a duty or a right to be notified in those sorts of cases where private prosecutions are instituted.

The big question to my mind is back to something I mentioned earlier on, which is how we define what a private prosecution is and therefore what goes on this potential notification. That will be particularly important, I would have thought, in an area like this. It was a recommendation that I thought, on a personal level, had some force to it.

Q141 **Miss Dines:** Andrew?

Andrew Marshall: I think they were. I do not want to sound defensive. The CPS take their role in this extremely seriously. When a case is referred to them, they spend an enormous amount of time and resources of very senior people looking at these cases and trying to get to the bottom of them. Sometimes we agree with their views, and sometimes we do not, actually. It is quite difficult when you are the same person who might have been consulted in the past or somebody else has taken a different view from you and it is a very marginal one, which means a case can go into the dustbin, which is quite shocking. My own view is that we now have a very different criminal justice system from when the Prosecution of Offences Act came in. It is a very streamlined, modern, quick system. Between being charged, if it is a police case, but in a summons to get to a judge who will make a dismissal application, what used to be done at half-time or the old-style committal proceedings is quite quick.

My own view would be that the CPS should be reserved if needs be for ones that obviously need weeding out and taking out of the system,

rather than these very marginal decisions, which I think should be a matter for the courts and judges to deal with.

The second is that the ones that obviously need weeding out actually do get weeded out by the courts system now. Magistrates exercise a judicial function, and they are not frightened of doing it. They can be asked to do it by defendants. I query to what extent it is needed, but I do not say it defensively simply because the more that is referred, the more senior CPS lawyers' time is taken up. While I am not here to represent the director, it seems that you will create an imbalance where a good chunk of senior lawyers' time is taken up looking at private prosecutions rather than their own core work.

I think that the Government were right. We have ended up focusing on a particular right of a defendant, but they have many rights in litigation. If you simply focus on one—because that is what we are looking at—it would really be incumbent on a prosecutor to notify them of all of their rights. That is not really what the prosecution is there for. The police have to do that in the police station, but they have their own representation by and large when they are litigating.

Stephen Wooler: For my part, I think it would have very limited value. How much value would depend on how proactive the CPS was in response to that information, absent a specific request from the defendant. Having said that, I think we need to look at the suggestion in the context of the wider picture, which is the fact that England and Wales is probably one of three or four jurisdictions identified in an international survey that does permit such a general right of private prosecution. When there is a right, it is usually confined to victims, and very often it has to be exercised in conjunction with the public prosecutor or under supervision from the public prosecutor. That is an important factor in looking at it.

I think there is a stronger role for the CPS to play. Having said that, I know that a big factor in their thinking is that, if in each case they have to take a view as to whether they intervene or not, that decision may, in their view, be susceptible to judicial review, cause them a lot of expensive litigation and hassle, and delay the process. So there are downsides to it. The fundamental issue is the fact that it would happen in this country, in this jurisdiction, on such a wide scale.

To complete that, of the other jurisdictions, the most we found that they were acknowledging was between one and four private prosecutions a year, which is a very different scenario from that which we are dealing with. We are very unusual.

Paul Jarvis: The only thing I was going to add is in relation to that specific question. Certainly, I have seen in the Government's response to your recommendations that they were suggesting that this notification requirement would carry with it an obligation on the part of the CPS to review each and every private prosecution in the country. As I read it, that is not what the Committee was suggesting. It is part of a package of

measures that you would look to put into place to ensure that the pattern of private prosecutions nationwide is a matter that is more widely known either through notifications, whether it is some virtual public billboard, or by ensuring that the CPS are aware of it so that patterns can be detected earlier on, which might lead to the earlier correction of injustices.

I certainly did not understand the Committee to be recommending that every notification sent to the Crown Prosecution Service had to be met with a review. If that were to happen, the drain on resources for that would be absolutely enormous. What was then being piggybacked on to it was the idea: are defendants to be told that they have this right to invite the CPS to review? Who should be obligated to tell them that? Is it an order to come from the court or an order to come from the CPS? If it is simply a case of the CPS being notified, a body or individual within the organisation being told, "This private prosecution has commenced in this court," and adding it to their own internal registry so that at least a person might look at it and think, "My goodness, this person is commencing a lot of private prosecutions around the country," I would see that as being a positive thing. The Government's reservations about it can only bear fruit if we accept that the CPS have to review each and every case, which was not what you were suggesting.

Chair: Your analysis is accurate.

Q142 **Miss Dines:** That is exactly right. Just in finishing, Chair, it was really a run-on from the last question. Should the Government have rejected that proposal? Every defendant who is privately prosecuted should be informed, not advised. Andrew, in closing, what would your view be about that?

Andrew Marshall: Like you say, if you inform them of one right, you would then be criticised for what you do not advise them about. There is no harm. I do not think it is unknown. I cannot see that any harm can come from it other than that it seems to be cherry-picking. If that is thought to be a good thing, if that cherry is thought to be important, it can be done. We send letters out to people with a summons. It could be simply written into that letter.

Q143 **Miss Dines:** Do you have a further view, Stephen?

Stephen Wooler: That knowledge of the right to refer them to the CPS is perhaps more important in the higher volume cases and social welfare cases that are still privately prosecuted—train operating companies and so forth—where decisions are often taken without the level of consideration elsewhere. We have very much focused today on the high end, as I said earlier. I think we have to look at it across the board as well—or the Committee has, I should say.

Paul Jarvis: You could very easily achieve it. The Criminal Procedure Rules, as you know, has a section that directs the court on what they need to say to defendants at first appearances. You could just stick a

one-liner in there saying that defendants can be told by the court clerk, whoever it maybe, in the case of a private prosecution that they have the right to invite the CPS to review it—or, as Andrew says, in a letter. As far as I can see, it is a very easy reform to put in place. I do not see what the downside to it would be.

Andrew Marshall: It could even be on the summons itself that is issued by the magistrates court. It could go on that form.

Miss Dines: Thank you very much, gentlemen. Thank you, Chair.

Q144 **Chair:** Thank you. I think you have made a breakthrough there. Thank you very much, everyone. I have to say when I started that my first experience of prosecuting was private prosecutions and shoplifters for the West End stores. I won't tell you what the fee rate was, but I suspect it was probably not high end.

Andrew Marshall: Not enough.

Chair: I am grateful to all three of you gentlemen for your evidence today and for your time.

Stephen Wooler: Mr Chair, I started there, and the fee rate was five and two.

Chair: I do not think it has gone up that much, Stephen. Thank you all very much for your time and for your evidence. You have been extremely helpful to us. I am also grateful to all members of the Committee. Without more ado, the session is concluded.