Written evidence from Edmonds Marshall McMahon (PPS0009)

Introductory background to Edmonds Marshall McMahon.

A. Edmonds Marshall McMahon (EMM) is the UK's first and only law firm specialising in private prosecutions. EMM has carried out investigations and conducted hundreds of private prosecutions on behalf of corporates of all sizes, including multinationals.

B. EMM is ranked in Chambers & Partners as a leader in the field of Private Prosecutions and Financial Crime (London). EMM is ranked in the UK Legal 500 (2013-2019) as a leading firm in three separate categories: "Fraud: White collar-crime", "Fraud: Civil", and "Contentious Trusts & Probate".

C. The three founding partners are experienced prosecutors who continue daily to guide their cases on a hands-on basis. Tamlyn Edmonds previously headed up the Department of Health's specialist Medicines and Healthcare products Regulatory Agency team of prosecutors and was the lead lawyer in their largest ever case. Andrew Marshall is an experienced prosecution barrister used to working at the highest level (Grade 4 CPS, Regulatory List, formerly Standing Counsel to HM Attorney General) and still prosecutes major cases for government agencies. Kate McMahon was a senior lawyer with the Serious Fraud Office leading on major bribery and corruption matters including the *Innospec* case.

D. The nature of the complex cases undertaken by EMM often requires extremely extensive reviews of unused material and corresponding extensive disclosure exercises. Cases prosecuted by EMM have been scrutinised by courts up to and including the Court of Appeal (Criminal Division).

E. Our experience of conducting major cases for a variety of government agencies and now as private prosecutors provides an insight that we consider makes us well placed to respond to this Call for Evidence and to assist the Committee in such other ways as it might request.

EMM'S RESPONSE TO THE JUSTICE COMMITTEE'S CALL FOR EVIDENCE

1. We address each of the terms of reference below though we would first like to make some preliminary observations on the events that have led to the Justice Committee's Call for Evidence which, in turn, was prompted by a request from the Criminal Cases Review Commission (CCRC).

2. We understand that the CCRC referrals arise from evidence that emerged in the group litigation in the High Court (Queens Bench Division) between Mr. Alan Bates (and other claimants) and Post Office Limited (Case No: HQ16X01238, HQ17X02637 and HQ17X04248).

   a) In one of the many judgments in that litigation, handed down on 16 December 2019[1], the Hon. Mr. Justice Fraser identified a number of respects in which the Post Office's

'Horizon' IT system used by subpostmasters was deficient and was capable of producing errors that might explain apparent shortfalls in the Post Office branch accounts[2]. The Post Office had prosecuted a number of subpostmasters for offences such as theft and false accounting based, at least in part, on such apparent shortfalls.

b) The judge expressly did not make findings as to who at the Post Office knew about the deficiencies in the Horizon system and when they were discovered[3]. The safety or otherwise of the resulting convictions was beyond the scope of the civil litigation[4].

c) We understand that the basis for the referrals is that the convictions might be unsafe due to inadequate disclosure by the Post Office of material concerning the deficiencies in the Horizon system and/or that, in light of what is now known about those deficiencies and the Post Office's knowledge of them at the relevant time, the prosecutions were an abuse of the process of the court.

d) The new evidence about the deficiencies in the Horizon system, and how that matter was dealt with (or not) in the various private prosecutions by the Post Office, raises a real possibility that the Court of Appeal will quash all or some of the convictions that have been referred to it. Beyond noting that possibility, it is not our intention to comment on the ongoing cases.

3. The Post Office was the complainant in the prosecutions in question. It was also the prosecutor. As will readily be understood, in most private prosecutions the prosecutor is the victim or complainant in respect of the alleged offence. That has, historically, always been the case and there is nothing inherently irregular or improper about it.

<u>The Call for Evidence</u>

4. We address each of the subjects as follows.

The Committee welcomes written evidence on:

a) The way in which large organisations conduct private prosecutions;

In our experience, the conduct by large organisations of private prosecutions reflects their typical conduct of civil litigation, in which they are more routinely involved. That is to say, a large organisation will typically approach the conduct of an investigation and any subsequent proceedings on a rational and dispassionate basis. A large organisation will typically be guided, in the first instance, by its managers and in-house legal team and will carry out an investigation where it appears necessary and proportionate to do so.

As the investigation progresses, organisations large and small will typically seek external guidance where it appears that a criminal offence may have been committed.

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[1] Neutral Citation Number: [2019] EWHC 3408 (QB)
[2] See paragraphs [442], [457] and [508] for example.
[3] See paragraph [961].
[4] See paragraph [61] for example.

This may involve contacting the police or, in the case of a potential private prosecution, an external law firm. It is that external law firm (such as EMM) that guides (and perhaps conducts) the further investigations and then conducts the steps necessary for the effective and proper conduct of the prosecution. EMM instructs external counsel for all advocacy and often, where required, disclosure counsel.

We note that the Post Office Ltd used to be a branch of government (General Post Office) and is now a commercial company owned by UK Government Investments. It has historically retained its own team of (in-house) prosecution lawyers, which is atypical for a commercial organisation. We do not know whether the Post Office sought the advice of an external law firm in commencing and conducting the prosecutions in question.

A large organisation will likely have experience from civil litigation of the necessary protocols for the retention of relevant documents and the integrity of evidence. The importance of proper disclosure is, of course, even greater in the case of a criminal prosecution, a point identified by Mr. Justice Fraser[5]. A corporate entity will, in any event, typically be guided by lawyers, internal and external. We invariably advise our clients, corporate or otherwise, of the fundamental importance of disclosure and the potential consequences of failing to comply with the common law and statutory disclosure requirements.

Failings in disclosure by a corporate prosecutor are far more likely to be the result of human error and/or bad advice than as a result of bad faith, which may be expected more in the case of an individual prosecutor. It goes without saying that disclosure failures should not occur at all, whatever the reason, and whether the prosecutor is a public body or private person.

b) *The effectiveness of existing safeguards that regulate private prosecutions;*

Private prosecutions are subject to the same court-imposed procedural safeguards as any prosecution, such as the judicial power to exclude evidence or to stay the prosecution as an abuse of the process of the court.

The lawyers and investigators are subject to the same professional obligations and/or statutory disclosure obligations found in the Criminal Procedure and Investigations Act 1996 (as amended) and the guidance issued under it, including the Attorney General's Guidelines on Disclosure. There are, however, two additional safeguards.

Firstly, a judge dealing with an application to issue a summons – the means by which a private prosecutor commences proceedings - is empowered to decline the application if the pleaded case does not, on its face, disclose an offence or if the prosecution would be vexatious, oppressive or otherwise an abuse of the process of the court.

[5] See paragraph [457].

Secondly, a private prosecution is subject to the superintendence of the Crown Prosecution Service (CPS). This is a vital constitutional power vested in the CPS which enables it to review and discontinue any private prosecution or offer no evidence where there is not a realistic (i.e. more than 50%) prospect of conviction, or where the prosecution is not in the public interest. The CPS is, in that regard, the guardian of the public interest. When the CPS decides to review a case, they require sight, not only of the evidence, but also that of the disclosure. This includes material that might undermine the prosecution case or assist that of the defendant. Moreover, the CPS is empowered upon a review to take over and conduct any private prosecution. A judge or defendant may refer a private prosecution to the CPS.

It may be thought that the second identified safeguard simply brings the matter up to the 'normal' level of CPS legal scrutiny but this is not necessarily the case. A referred case receives the close attention of a senior lawyer, normally in a specialist division. That is not to say we always agree with their conclusions – we certainly don't - but, in our consideration, the scrutiny is likely to be far closer than might be expected had the matter been referred by the police.

Both these additional safeguards are intended to, and do, protect a suspect or defendant from an unmeritorious and/or improper prosecution and uphold, respectively, the interests of justice and the public interest.

In our experience, private prosecutions – rightly – receive very considerable scrutiny from the defence, the courts and (when referred) the CPS to ensure they have merit and are brought for a proper purpose. It is our experience that private prosecutions receive far greater scrutiny than had the same matter been undertaken by a government prosecution agency.

We will not advise our clients to commence criminal proceedings unless there is a realistic prospect of conviction and the prosecution is in the public interest.

Furthermore, before commencing a prosecution, we will investigate and evidence our cases thoroughly in order to identify any weakness. In major cases (just as we would in government prosecutions), we will look to have made substantial progress in the disclosure exercise prior to commencing proceedings.

c) *Alternative legislative, legal and administrative safeguards that could be used to regulate the way in which large organisations use the right to bring private prosecutions;*

Given that a private prosecutor is subject to the same substantive, evidential and procedural legal rules, and bearing in mind the supervision of the courts and the superintendence of the CPS, we do not believe that legislative or other legal changes are necessary. Indeed, we take the view that there is no need to regulate additionally in any way the manner in which any individual or corporate entity brings or conducts a private prosecution. In short, the appropriate tools of regulation are already there.

The constitutional right of a private person to bring a prosecution has been recognised at the highest levels of the judiciary and is deeply enshrined in our law[6]. Nothing should be done that hinders the right of access to the criminal courts for private persons other than the statutory limitations that are already in existence. We say this not out of commercial self-interest (though the Committee should be alive to that consideration) but because, as the members of the Committee will likely be aware of from their constituents, access to justice *via* the police for certain crimes is now the (rare) exception rather than the rule, particularly in relation to fraud.

If the potential regulation considered by the Committee is a requirement for police investigation (and therefore CPS conduct of the prosecution), then a candid, real-world appraisal would reveal that there is neither the capacity or appetite to prosecute these matters and it would serve to further underline why private prosecutions are needed rather than the opposite. We can provide concrete examples.

Equally, Codes of Conduct or similar are unnecessary and do not address the substance of the problem; there are ample existing rules, guidance and professional obligations. An additional Code – normally drafted necessarily in very general terms –will add nothing and is likely to be, at best, entirely derivative. Whilst there have been different iterations over the years, nobody has yet shown how to improve on the Attorney General's Guidelines. Put simply, if you have the knowledge and experience to undertake a major disclosure exercise then a further Code is unnecessary and likely irrelevant; if you do not then a Code will not provide that knowledge and experience to make the difficult judgements that arise.

No doubt the Court of Appeal will, in determining the subpostmasters' appeals, make observations about the manner in which the Post Office conducted the prosecutions in question. There will, no doubt, be a focus on the Horizon system and what was known about it, by whom and when. We do not underestimate the gravity of the situation if it transpires that some or all the appellants were wrongly convicted. We expect there may be lessons to be learnt (to use a rather trite phrase) by the Post Office and, indeed, by other private prosecutors as well as public prosecutors.

If failings are identified, then – and subject of course to what the Court of Appeal has to say in due course – this does not necessarily mean that additional legislative or other legal safeguards need to be imposed. Rather, it may be the case that the existing safeguards are perfectly appropriate but were not observed by the prosecutor in the cases in question. This, we suggest, has been the conclusion drawn from all previous disclosure 'problems' and it is a human, rather than structural, failure. It requires rigorous investigation/analysis of evidence or issues that may be problems and the application of high-quality legal judgment borne of experience; the practical execution of a prosecutor's disclosure duties can be far harder than the simple rules of operation would suggest.

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[6] Section 6(1) of the Prosecution of Offences Act 1985, *R (on the application of Gujra) v. CPS* [2012] UKSC 52

The genesis of the problem that may be revealed is not, we suggest, found in the difference between public and private prosecutors; in neither sphere have we detected a willingness, still less a wish, by any client to conceal issues or carry out disclosure less than thoroughly. Equally, when carrying out the disclosure task, we apply the very same judgement and integrity we would were it a public prosecution; there are not two different modes of operation. Having dealt with[7] or been familiar with historic disclosure failings, it is clear that the duties of investigation, retention and disclosure of unused material are sometimes imperfectly fulfilled by public prosecutors.

We have only found cooperation and willingness to assist in the disclosure process from our corporate clients; there is an understanding of the purpose of disclosure and a commitment to justice actually being done. This mirrors our experience of government investigators when we were/are acting as public prosecutors. It is in the interests of corporates (and indeed any other prosecutor) to get it right. Serious failures in disclosure can have serious adverse costs and reputational consequences and could lead to a case being stayed.

It is axiomatic that lawyers, in-house or external, involved in prosecutions should be fully apprised of the vital importance of proper scrutiny of the evidence and unused material. Serious failings by lawyers could have regulatory consequences.

d) *Whether the existing investigatory standards and duties of disclosure that apply to private prosecutions are effective;*

The common law duties of disclosure apply to private prosecutions as they do to public prosecutions. Indeed, there is an additional duty of candour[8] and disclosure to the court when applying *ex parte* for a summons [9].

The statutory regulation, by virtue of the Criminal Procedure and Investigations Act 1996 (CPIA) in respect of unused material arising from an investigation and the proper disclosure of it, applies to a private prosecutor as it does to a public prosecutor.

A responsible private prosecutor will, even at the investigation stage, apply the Attorney General's Guidelines on Disclosure and the CPIA Code of Conduct. A serious failure to do so carries the risk of forensic criticism of the investigation, which may undermine the prospects of conviction, the exclusion of evidence, and potentially the stay of the proceedings. Modern prosecutions require the prosecutor to provide a Disclosure Management Document explaining its approach to disclosure in respect of the issues in the case as it understands them – a document that can be updated as the matter proceeds.

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[7] Andrew Marshall, as Standing Counsel, was instructed by HM Attorney General/RCPO to review convictions following HMC&E's disclosure failings in respect of the London City Bond and later instructed to prosecute the first post-LCB prosecution of a bonded warehouse keeper.
[8] *Kay v. Leeds Magistrates' Court* [2018] EWHC 1233 (Admin)
[9] The duty of candour is, we submit, being sought to be misapplied by some defendants and is becoming an issue in itself but this is, perhaps, beyond the scope of this review.

There is no reason to consider that disclosure failures are any more prevalent in respect of private prosecutions than in the case of public prosecutions. Indeed, to the extent that disclosure failures by public prosecutors are due to lack of resources, private prosecutions, which are typically well-funded, ought to be able to avoid them. A rational corporate private prosecutor would be keen to avoid the reputational and financial consequences of failures of disclosure.

Thus, there is no reason to think that the existing legal framework is any less effective vis-à-vis a private prosecutor than a public prosecutor. The statutory mechanism, including the availability of applications under section 8 CPIA, are proper and critical safeguards overseen by the judges.

e) *The effectiveness of different safeguards in preventing miscarriages of justice resulting from the right to bring private prosecutions;*

We believe these have been addressed above. In particular, a judge or defendant may, if s/he lacks confidence in the ability or integrity of the prosecutor, invoke the power of the CPS to review a private prosecution.

We do not have access to the data that the Committee may have. However, other than in the instant Post Office matter(s), we are not aware of responsible claims of miscarriage of justice arising from private prosecutions and, as we explained earlier, Post Office Ltd may well be an atypical private prosecutor.

The scrutiny to which private prosecutions are already subject is intense. We are not aware of any such conviction being quashed by the Court of Appeal let alone arising from 'miscarriages of justice' (as that phrase is commonly understood).

If anything, the problem can be the other way in that the CPS has prevented some perfectly proper cases from proceeding following its review. These are decisions that are granted an unusually high degree of protection by earlier decisions of the High Court and are therefore virtually unchallengeable. Again we can provide concrete examples.

f) *The role of the Crown Prosecution Service in taking over private prosecutions;*

As above.

g) *The role of the Attorney General in supervising private prosecutions;*

In practice this role is fulfilled by the CPS. The power of the Attorney General to enter a *nolle prosequi* has effectively been superseded by the CPS' power to take over and discontinue a private prosecution or offer no evidence in respect of it.

h) *The role of the courts in private prosecutions; and*

We believe we have addressed this above. Recent case law[10] has emphasised the scrutiny with which courts must treat private prosecutors' applications for summons and it is our experience that they are so scrutinised.

i) *The way in which private prosecutions are regulated in other jurisdictions."*

We do not believe this is a matter upon which we can comment.

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[10] *Kay v. Leeds Magistrates',* above