Written evidence from PAUL MARSHALL, barrister, of Cornerstone Barristers (PPS0024)

PAUL MARSHALL, barrister, of Cornerstone Barristers, 2-3 Gray's Inn Square, Gray's Inn, London WC1R 5JH will say:

1. I am a barrister in private practice. I have been invited to make a written statement to the Justice Committee. While it is unusual to do so, I have provided footnotes to avoid cluttering up the text of this statement with references.

2. The occasion, as I understand it, is a request from the Criminal Cases Review Commission following upon the disaster of the flawed Post Office prosecutions of its sub-postmasters and sub-postmistresses (SPMs), from introduction of the Horizon system in 1999 until about 2014, that was exposed by the judgments of Mr Justice Fraser in *Bates v Post Office*.[1]

3. I am instructed as counsel on behalf of some of the Post Office's victims in their appeals to the Court of Appeal following the CCRC group referral of 3 June 2020. I am representing them without charge - *pro bono*.

4. I have written several articles on the Post Office scandal including in the *Electronic Evidence and Digital Evidence Law Review* (19 June 2020) '*The harm that judges do: misunderstanding computer evidence: Mr Castleton's story*'[2] published by the Institute of Advanced Studies, London University and in *Butterworths Journal of International Banking and Financial Law* (3 July 2020) '*English law's evidential presumption that computer systems are reliable: time for a rethink*'.[3] (The former was peer-reviewed by five experts and leaders in their field.)

5. I understand that the remit of the Committee is to consider the position in connection with private prosecutions and the appropriate safeguards for these and whether at present they are sufficient.

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1 In particular, *Bates v the Post Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB) https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html (168 pages, 1,030 paragraphs – the Technical Appendix extends to 452 paragraphs).

2 https://journals.sas.ac.uk/deeslr/article/view/5172

3 7 JIBFL (2020) 433.

6. The Post Office abandoned its policy of prosecuting its SPMs from about 2014 after it obtained counsel's advice.[4] It maintains legal privilege in connection what that advice was.[5] The inference is that the advice was not at all encouraging given the vigour with which the policy was pursued to 2014. In the 3 years from 2014-2017 there were only 3 prosecutions brought by the Post Office. It appears that from introduction of Horizon to 2014 there were more than 1000 prosecutions.

7. It is understood that the Post Office prosecuted, and secured convictions against upwards of 1000 of its SPMs (900 convictions are understood to be subject to review by Peters & Peters LLP). It did so, as is now known, on the basis of seriously flawed evidence. The Post Office knew that its evidence was unsatisfactory but, because it failed to comply with its duty to disclose documents, the fact that its evidence was flawed and unreliable was known to neither the defendant SPMs nor to the court, and thus constituted no impediment to it securing convictions against its (thereby) disadvantaged SPMs. The unsatisfactory nature of the Post Office evidence was only exposed in the *Bates v Post Office* '*Horizon Issues*' trial in March 2019 (judgment 16 December 2019). I refer to this further below under 'legal failure'.

8. It cost the 550 claimants some £46 million to recover compensation of £11.5 million.

9. I have spoken with a number of victims, including those prosecuted and imprisoned who were claimants in the *Bates v Post Office* litigation, and some others who were imprisoned but who have never previously spoken of their experience to anyone. One lady has explained to me that she had been overwhelmed by the losses she was experiencing with her Horizon terminals in a large town branch Post Office – having previously operated another Post Office successfully for 16 years prior to the introduction of Horizon. She told me she pleaded guilty to false accounting simply because she could not face the prospect of a jury trial for theft, as threatened by the Post Office. She told me that she has hidden her experience of prison since then because of her shame. She is the most improbable fraudster I have ever come across – and is a regular churchgoer.

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4 https://committees.parliament.uk/publications/1621/documents/15462/default/ paragraph [31].
5 Vennells' letter *Ibid*.

10. One of those by whom I am instructed was imprisoned in 2010 following a trial before a jury and convicted of theft. She was imprisoned when 8 weeks' pregnant. Her circumstances, to my knowledge, are unique because a full transcript of her Crown Court trial is available. The transcript reveals how profoundly unsatisfactory her prosecution and trial were. (It ought to become a standard study for judges. Were it to be so, it would do much, without more, to prevent a repeat of the Post Office *debacle*.) I refer to this further below under 'legal failure'.

A SINGLE CAUSE?

11. It would be an error to attribute the Post Office scandal to a single cause of inadequate safeguards in the bringing of private prosecutions. The Post Office's conduct of its prosecutions, while rightly censured for exhibiting institutional mendacity of a high order, was facilitated by wider structural and institutional failures. Those failures facilitated - indeed probably encouraged - the Post Office's *policy* of prosecuting on the basis of flawed investigations and flawed evidence. Put another way, the systemic failures/weaknesses were the occasion for the Post Office's approach to prosecuting SMPs and enabled these to be exploited. (It is to be borne in mind that it was a policy formulated and pursued by individuals, and endorsed by the board, not by an abstract legal person (below).) The final *Bates* litigation, though ostensibly concerned with the claimants' claims, was in truth a last-ditch attempt by the Post Office to defend/justify its prosecution policy and wider improper/unjustifiable and oppressive conduct towards its SPMs – the prosecution aspect of which had been suspended much earlier, in 2014, on the face of it (as noted above), in the light of counsel's advice. A major consideration, arguably the dominant consideration for the Post Office, was reputational.[6]

12. In my view the causes of the Post Office scandal are multiple and at least four:

    a. Legal - legislative failure.

    b. Legal - court/judicial failure.

    c. Post Office mendacity/opportunism.

    d. Failure in Post Office corporate governance.

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6 *q.v.* Fraser J's comments at the start of the '*Common Issues*' judgment paragraphs [28] and [32]: *Bates and Others v Post Office Limited (No 3)* [2019] EWHC 606, https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html (288 pages, 1,121 paragraphs).

13. I understand the Justice Committee to be focused on the third of these, *viz* Post Office mendacity/opportunism and how similar conduct may be prevented in the future. I use those words, plainly value-laden, because in my view apposite. But the scandal would not have happened, and events not have unfolded as they did, but for the other three important factors. In this brief statement I shall attempt to sketch how Post Office mendacity was *facilitated* by legal failure. Of necessity, this statement is an unelaborated sketch and I barely touch on (d) which is a study of its own. Most of what I say might be caveated and subject to conventional deference and courtesy that I eschew in the interest of brevity. There is virtue in calling a spade a spade.

LEGAL FAILURE – STATUTORY

14. Fundamental to the understanding of the Post Office *debacle* are statutory repeals in the 1990s. It is remarkable that the CCRC in its Statement of Reasons to the Court of Appeal of 3 June 2020 omits any mention of these, because they are in my view fundamental. The omission attests both the importance and poorly understood nature of the issue.

15. Until its repeal in 1999 by the Youth and Criminal Evidence Act 1999, the Police and Criminal Evidence Act 1984 by section 69(1) provided:

> "(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown … (b) That at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents." (My emphasis.)

16. The Law Commission papers *The Hearsay Rule in Civil Proceedings*[7] and *Evidence in Criminal Proceedings Hearsay and Related Topics*[8] recommended the repeal of statutory formalities that were seen increasingly as cumbersome and difficult to comply with. Those recommendations were carried into effect. Section 5 of the Civil Evidence Act 1968 was repealed by the Civil Evidence Act 1995, and the provision under s. 69 of PACE was repealed by the Youth and Criminal Evidence Act 1999. In

7 1993 Law Com. 245.
8 1997 Law Com. No. 216.

the absence of formal statutory requirements, the courts have applied the presumption of the proper functioning of *machines* (see for example *Castle v Cross*[9]) to computers.[10]

17. The important practical effect - the importance of which cannot be overstated - is that, when a party adduces evidence of a computer-based or derived document, that party may rely upon the *presumption that the computer was operating reliably* at the material time. An evidential burden is then on the party objecting ('the objector') to the admission of the document as evidence of the truth of its contents to produce *some* evidence that it is not. The effect is to shift the burden back to the person relying on the document to show that the computer was working reliably.

18. Underlying the presumption are two commonly held assumptions:[11]

    a. computer errors are readily identifiable and

    b. computer errors, where not obvious are commonly caused by operator/input error.

    Both assumptions, while widely held, are wrong.[12] That this is so is powerfully attested by the *Bates v Post Office 'Horizon Issues'* trial and judgment. Similarly, the prosecution in Mrs Seema Misra's case repeatedly asserted (a) above without providing any evidence that this was in fact so (and, given Fraser J's judgment on '*Issue 2*' in the *Horizon Issues*, could not have done so if it had been required by the trial judge). This assumption/contention (i.e. (a) above) was the second of the issues in the *Horizon Issues* trial that Fraser J answered in the negative. The second issue lay at the heart of much of the Post Office's evidence in *Bates*.[13]

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9 [1984] 1 WLR 1372, [1985] 1 All ER 87, [1984] 7 WLUK 180, [1985] RTR 62, [1984] Crim LR 682, (1984) 81 LSG 2596, (1984) 128 SJ 855, [1985] CLY 3048 – effectively a printout from a breath testing machine is treated as real evidence and admitted as 'original' evidence.

10 In part-justification, the Law Commission cited the paper by Professor Tapper, 'Discovery in Modern Times: A Voyage around the Common Law World' (1991) 67 Chicago-Kent Law Review 217, 248.

11 Examined in detail by Peter Bernard Ladkin, Bev Littlewood, Harold Thimbleby and Martyn Thomas CBE, *'The Law Commission presumption concerning the dependability of computer evidence'*, 17 *Digital Evidence and Electronic Signature Law Review* (2020) 1 – 14.

12 Ladkin *et al, loc. cit*.

13 See Mr Andrees Latif's evidence in the *Horizon Issues* trial: Fraser J's judgment paragraph [85]ff which the Post Office contended couldn't be correct if Mr Latif did as he should have done. The judge said: "The approach by the Post Office to the evidence of someone such as Mr Latif demonstrates a simple institutional obstinacy or refusal to consider any possible alternatives to their view of Horizon, which was maintained regardless of the weight of factual evidence to the contrary. That approach by the Post Office was continued, even though now there is also considerable expert evidence to the contrary as well (and much of it agreed expert evidence on the existence of numerous bugs)."

19. In theory, the evidential burden on the objector is a low evidential threshold. In practice, it is typically impossible to discharge the burden without massive resources of the kind expended in the *Bates* litigation.

20. The Post Office scandal reveals that the burden upon an objector to shift the evidential burden to the person relying upon computer evidence to prove affirmatively (rather than it be *presumed*) that the computer from which that evidence is derived is working reliably properly at the relevant time, is one that a defendant is commonly unable to discharge where there exists a disparity of resources/information – as typically obtains. That this is so is vividly demonstrated by the cases of:

    a. Lee Castleton – *Post Office v Castleton* [2007] EWHC 5 (QB).

    b. Seema Misra – *R v Misra* T20090070 Guildford Crown Court.[14]

    In both cases, civil and criminal respectively, both Mr Castleton and Mrs Misra positively averred that they believed the problems they had experienced (accounting shortfalls at their Horizon terminals) might lie with the computer system. In neither case was the Post Office required by Judge Havery or Judge Stewart to prove affirmatively that the Horizon system *was* working properly/reliably at the relevant time. Had the Post Office in either case been required to prove that the Horizon system was working reliably (as would have been the position under s. 69(1) of PACE 1984 and s. 5 of the Civil Evidence Act 1968 prior to their repeal) it could not have done so. That this is so is the necessary consequence of the factual findings of Mr Justice Fraser. He found that from its introduction, the Horizon system (a) was unreliable and (b) apt to generate accounting errors and shortfalls of the kind alleged in the *Bates* group litigation (and as had been alleged by Mr Castleton in 2006 and Mrs Misra in 2010).

21. Further, it is salutary to note, that in the light of Fraser J's findings in the *Bates* judgment No. 6 (the *Horizon Issues* trial), *had* the Post Office in any prosecution or claim been required to prove affirmatively (as distinct from anecdotally) that the Horizon system was working properly, in no case could it have done so. This is because Fraser J reviewed detailed evidence of the working of the Horizon system

[14] A full transcript of the trial is available at 12 Electronic Evidence and Digital Signature Law Review (2015) pp 44-55. https://journals.sas.ac.uk/deeslr/article/view/2217

over the entire period and concluded that it never worked reliably and was prone to the generate the kind of errors and shortfalls at branch terminals of which the 550-odd claimants in the *Bates* litigation complained. (The relevant technical findings are under the Technical Appendix to the *Horizon Issues* judgment.)

22. The foregoing demonstrates that the evidential presumption introduced following repeal of s. 69(1) of PACE 1984 is a presumption that is unsafe in practice and is liable to work very serious injustice. In my view this is the key issue.

23. The importance of the foregoing observation, as will be apparent to the Justice Committee, is that the issue is significantly wider than the Post Office prosecutions. Mr Justice Fraser in his judgment of 16 December 2019 stated that, but for the group litigation, many of the issues that he considered would not, in his words, 'have seen the light of day'.[15]

24. The importance, as will be apparent to the Justice Committee, is that there will be many other cases in which evidence has been adduced that has been derived from a computer that has been admitted on the basis of the *presumption* that the computer in question was working reliably, when in fact it was not, where a defendant was simply unable to displace/rebut the presumption because, like the SPMs, they had insufficient information/resources available to them to rebut the presumption and were unable to do so.

25. In short, the Post Office litigation reveals a fundamental weakness in connection with the present approach of the courts to computer evidence - the *presumption of reliability* - that not only is apt to work very serious injustice but actually does so in fact – reflected in the prison sentences of Mrs Seema Misra imprisoned when 8 weeks' pregnant and Ms Tracy Felstead, imprisoned in Holloway aged 19.

26. Peter Bernard Ladkin, Bev Littlewood, Harold Thimbleby and Martyn Thomas CBE in their article '*The Law Commission presumption concerning the dependability of computer evidence*',[16] suggest that there should be a middle way between the statutory provisions under s. 69 of PACE and the presumption that a computer was working properly at the material time. I concur with the authors in their proposal that all evidence from computers should be viewed from the starting point that all

15 *Horizon Issues* judgment paragraph [459].
16 *Loc. cit*.

systems fail, and therefore it is important in any given case to know how reliable the system in question is as a matter of fact (not just anecdotally as with Anne Chambers in Mr Castleton's trial – now referred to the DPP).

27. There is an urgent requirement for Parliament to address the manifestly unsatisfactory evidential position that exists and that has existed since 1999. It is this factor, more than any other, that contributed to the Post Office scandal. It is likely that the injustice caused extends well beyond the victims of the Post Office.

LEGAL FAILURE - JUDICIAL

28. The cases of Mr Castleton and Mrs Misra, together with the fact that, as appears, some 900 SPMs were very likely wrongly convicted on the basis of flawed evidence and - by necessary implication - false allegations made and misleading evidence led by the Post Office, suggests widespread judicial failure.

29. The legal system ought not to be susceptible to such widespread failure. It is an oversimplification to exclusively blame the Post Office for what happened.

Misunderstanding *that* and *how* computers fail

30. The failure has a number of facets beyond the scope of this paper, but the essential feature is a more or less complete failure by judges to understand the nature of computers and how they fail – and, accordingly, how their reliability is to be evaluated/assessed. The failure has two aspects:

    a. Widespread judicial misunderstanding of how computers fail.

    b. Relatedly, insufficient judicial understanding of the importance of the disclosure of computer records that go to 'reliability' and 'robustness'. (Ladkin[17] notes that 'robustness', an expression that is routinely deployed, was used by leading counsel for the Post Office in the *Bates* litigation in a way that it would not be understood or recognised by anyone in the software industry.)

31. The foregoing is demonstrated:

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17 Peter Bernard Ladkin, *'Robustness of software'*, 17 *Digital Evidence and Electronic Signature Law Review* (2020) 15 – 24.

a. In the general case by the following statements of senior judges in reported cases that exhibit a startling lack of understanding:

- Lord Hoffmann in *DPP v McKeown and Jones*[18] expressed his opinion that: *'[i]t is notorious that one needs no expertise in electronics to be able to know whether a computer is working properly'*.

- Lord Justice Lloyd in *R v Governor of Pentonville Prison Ex p Osman (No 1)*[19] said that: *'Where a lengthy computer printout contains no internal evidence of malfunction, and is retained, e.g. by a bank or a stockbroker as part of its records, it may be legitimate to infer that the computer which made the record was functioning correctly.'*

- Lord Griffiths in *R v Shephard*[20] opined: *'Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. I suspect that it will very rarely be necessary to call an expert and ... in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.'* (Emphasis mine.)

The danger with the approach advocated by Lord Griffiths is vividly illustrated in Mr Castleton's case by the evidence given by Ms Anne Chambers (below) who was employed by Fujitsu and who gave evidence for the Post Office that she could see nothing wrong with the Horizon system and Mr Castleton's branch terminal. Judge Havery thought her a reliable and impressive witness (Mr Castleton, who was a litigant in person had no means whatever available to him of testing her evidence). 10 years' later, Mr Justice Fraser has referred Ms Chambers to the Director of Public Prosecutions for giving untruthful evidence.

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18 [1997] 1 WLR 295 at 301C-D.
19 [1990] 1 WLR 277 at 306H, emphasis mine.
20 [1993] AC 380 at 387B-D, emphasis mine.

b. In the particular case, by the cases of Mr Castleton and Mrs Misra. The reading of the judgment of His Honour Judge Havery QC and summing-up to the jury of His Honour Judge Stewart leave one with the impression of neither judge having the slightest understanding of computers, how they fail, or how to evaluate the reliability of documents derived from them.

32. I shall provide a striking example of this problem which is obviously an important problem because Mrs Misra was sentenced to 15 months' in prison because His Honour Judge Stewart did not understand how the reliability of a computer system and thus how the reliability of evidence derived from it (see the point a above about the evidential 'presumption' of reliability and displacing it) might be assessed. The example is from, on the one hand the summing-up in Mrs Misra's criminal trial, and on the other, Mr Justice Fraser's contrasting approach to the expert evidence in the *Bates* litigation. They are concerned with the same thing/issue, *viz*, the *reliability of Horizon*. Effectively, consideration by two different judges *of the same circumstances* resulted in Mrs Misra's case her conviction by a jury for theft, but in the *Bates* litigation, the almost contemptuous dismissal by Fraser J of the expert evidence led by the Post Office at the *Horizon Issues* trial. The contrast of the judges' approach to the very same issue could not be more striking – nor the consequences more disastrously different – and therefore troubling.

(a) Mrs Misra – His Honour Judge Stewart (summing-up to the Jury)

His Honour Judge Stewart summarised Mrs Misra's defence in these terms:

> *"Her case is that she didn't take money that belonged to the Post Office at all. There was a shortfall apparent on the tills at the time of the audit, she tells you, but the cause of that was not her taking the money. She thinks it was staff theft, problems with the computer system and general just problems of coping with the demands of running the post office leading to disorganisation and incompetence. That is what the defence case is."*

As to the reliability of the Horizon system, the judge said:

> *"There has been a great deal of time spent on the question of whether the Horizon system is sound or robust. Ultimately you will*

decide how important all that evidence was. Of course, it depends on human inputting of figures at times and that can be a source of error. There was that specific problem identified at Calendar Square in Falkirk. You will decide whether that is or is not relevant to the question of the shortfall at West Byfleet…"

The judge said that an issue for the jury was this:

"Do you accept the prosecution case that there is ample evidence before you to establish that Horizon is a tried and tested system in use at thousands of post offices for several years, fundamentally robust and reliable." (My emphasis.)

The formulation for the jury is little more than the homespun proposition that *Horizon* seemed to work pretty well most of the time for most SPMs. The judge invited the jury to draw inferences as a matter of 'common sense'. There was no evidence whatetver that Mrs Misra had had in her hands the £70,000-odd allegedly stolen (a common feature of Post Office prosecutions). It is to be noted that Mr Gareth Jenkins, the witness from Fujitsu called by the prosecution, gave evidence that he had not considered the 'PEAK' Horizon error records which Fraser found of fundamental importance in identifying the unreliability of Horizon. None of the judge, prosecution or defence appear to have had any understanding of the significance of that omission. Mr Jenkins has been referred by Fraser J to the DPP. Contrast Fraser J's more rigorous and analytical approach.

(b) The *Bates* litigation, *Horizon Issues* judgment, Mr Justice Fraser

[826] *"Consider a hypothetical bug, bug X. Also consider that bug X impacts upon branch accounts in a single branch upon a single occasion leading to a shortfall in the branch for that branch trading period. That shortfall would be treated as a debt by the Post Office and the SPM either has to pay, seek time to pay, or may even end up in a dispute with the Post Office and/or be suspended as a SPM and not pay. Analysis and resolution of the correct and true situation of the branch accounts between the Post Office and the SPM for the trading period in question does not depend upon*

whether, in all the other millions of branch accounts, there was no such incidence of bug X. The correct analytical approach in my judgment is to consider the branch activity for that branch for that period; consider the evidence both for and against (1) the existence of bug X and (2) the likely cause of the discrepancy, bearing in mind both the burden and standard of proof; make findings on the cause of the discrepancy; and then apply those findings. Expert IT evidence of most assistance in that exercise would be whether or not bug X exists or existed, and what were its effects. It is of no assistance to have an exercise that in effect says the statistical likelihood of any bug having an impact upon the branch accounts of that branch in that period is very low.'

[827*]* *The section 8 analysis is, in my judgment, so riddled with plainly insupportable assumptions as to make it of no evidential value. It is the mathematical or arithmetic equivalent of stating that, given there are 3 million sets of branch accounts, and given there are so many sets of branch accounts of which no complaint is made, the Horizon system is mostly right, most of the time. It is a little more sophisticated than that, but not by very much.*

...

[938]: *"The Post Office's approach to evidence, even despite their considerable resources which are being liberally deployed at considerable cost, amounts to attack and disparagement of the claimants individually and collectively, together with the wholly unsatisfactory evidence of Fujitsu personnel such as Mr Parker. The Post Office evidence also includes a very high-level overview of Horizon by its expert which amounts to little more than a claim that it has worked quite or very well, most of the time."* (My emphasis)

33. The foregoing examples reveal a systemic problem. His Honour Judge Stewart's approach, and the way in which he left the issue to the jury, reflects the thinking behind statements of Lord Hoffmann, Lord Justice Lloyd and Lord Griffiths referred to above. Essentially, the widely entertained assumption is that, on the one hand

errors with computers are readily detectable, and, on the other, that if a system *in general* is working properly then it will be working in the *particular*. Fraser J appears to be one of comparatively few judges who understand this to be an error in reasoning and analysis as demonstrated in paragraph [826] of the *Horizon Issues* judgment to which I have referred. (The point is perhaps best illustrated by the US case of the unintended acceleration in *Toyota* motor vehicles - with fatal consequences - referred to in the articles I have cited. Software failure was initially ruled out as a possible cause.) I say that because, as is clear from Mrs Misra's and other cases, the defendants correctly apprehended that there might be something wrong with the system – but could not put their finger on or point to what it might be – perfectly understandably. Mr Castleton's case and the judgment of His Honour Judge Havery QC is a paradigm example of the failure in reasoning: *Post Office v Castleton* [2007] EWHC 5 (QB). The judge's conclusion is an *a priori assumption* presented as a conclusion.

Disclosure failure

34. Further, amongst the most important legal failures, which is a specifically judicial/court failure, is the fact that, as in the recent scandal concerning the collapse of rape trials for prosecution failure to disclose to the defence material documents,[21] the Post Office routinely failed to disclose the true position in connection with the known unreliability of the Horizon system.[22]

35. To make the foregoing point good, it is necessary only to refer to Mrs Misra's criminal trial in the Crown Court. On no less than three separate occasions, the defence applied to three separate judges to have the prosecution stopped on the basis that the disclosure given by the Post Office was woefully inadequate and the prosecution an abuse of process (this is specifically referred to by the CCRC and also apparent on the face of the transcript of Mrs Misra's trial (that is publicly available[23])). Every one of those applications was dismissed by on grounds that the jury could form their own view of disclosure failure, if any. The jury could not, with life-changing consequences for Mrs Misra. The CCRC covers in detail disclosure

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21 The former Attorney General, Geoffrey Cox QC MP, was recently constrained to make the statement to Parliament that 'for too long, disclosure has been seen as an administrative add-on rather than fundamental pillar of our justice system'.

22 One example being given by Fraser J at Horizon Issues judgment paragraphs [457] and [458] – this was not disclosure failure but *deliberate concealment* – note the judge's word "secret".

23 *Loc. cit*.

failures by the Post Office, as does Fraser J. I do not rehearse these. The CCRC has expressed its view to the Court of Appeal 10 years' later, that Mrs Misra's prosecution was an abuse of process – for disclosure failures by the Post Office. This is very troubling given the three defence applications to which I have referred. It appears that judges are routinely unable to recognise an abuse of process by disclosure failure. I believe the explanation is because they frequently do not understand the evidential issues that I have touched on above.

36. As I have elsewhere pointed out, the courts have virtually no tools available to them to impose sanctions/penalties for disclosure failures. It is worth noting that disclosure obligations owe their origin to equity's concern with matters of conscience. Disclosure failure is a matter of legal ethics as much of rules. Ethical failure is not actionable. But ultimately ethical failure undermines confidence in legal processes and erodes confidence in the rule of law. Those SPMs to whom I have spoken believed that when their accounts were given to a judge it would become apparent that they were guilty of no wrongdoing. They were wrong, and their expectation unfounded. Their experience has understandably coloured their perception of courts as institutions (rightly) to be fearful of. This is unfortunate because it reflects a justifiable loss of confidence in the rule of law.

37. If the courts had greater powers to punish disclosure failures, and had they existed in connection with the Post Office prosecutions (and civil claims) I suspect that the position might have been different, and institutions and their lawyers would be less ready to disregard their obligations both to defendants and to the court. On one view, it might well be the case that, were culpable disclosure failures punishable by effective penalties, civil and possibly criminal, the Post Office scandal would not have happened, because the Post Office would have been astute to disclose how unreliable its Horizon system was and was known to be – and would have taken appropriate steps to take remedial action rather than impose blame for its shortcomings on its hapless – and in effect *defenceless*[24] – SPMs.

38. Further, in both the Castleton and Misra trials there is detectable in both judges' comments a note of unattractive incredulousness in respect of Mr Castleton and Mrs Misra's contentions that they thought that *there must be something wrong with the Horizon computer system itself*. Both Mr Castleton and Mrs Misra were both

[24] Because of the disparity of information and data.

correct in their misgivings. Both were treated with thinly disguised incredulity[25] by the judges in their cases.

39. Further, institutional deference exhibited by courts to large institutions, coupled with evident lack of judicial understanding of the evidence relied upon by the Post Office, combined to constitute a major institutional impediment to defendants in their being able to effectively defend the claims/charges made against them.

40. In my view these matters are inexcusable and reveal widespread institutional failure.

41. It is the Lord Chief Justice who is answerable for the administration of the criminal courts. There are in my opinion serious questions to be asked because the judiciary failed to discharge its primary function, *viz* effectively to probe and test evidence. In this, judges routinely failed. They failed because of ill-informed opinions of the kind Lord Hoffmann and Lord Griffiths expressed in their judgments that are widely shared, it appears, by the judiciary. Mr Castleton was financially ruined by the Post-Office's claim against him because Judge Havery uncritically accepted Anne Chambers' evidence that she could see nothing wrong with the operation of his Horizon terminal as evidence of the proper working of Horizon. *That was not evidence that the Horizon system was working properly*, it was evidence that she couldn't see that it wasn't (which appears to have been untruthful in any event). These are fundamentally different things (as Fraser J correctly and very clearly explained (paragraph [826] of his Horizon judgment – though in general terms and as a matter of principle, not by reference to Judge Havery's unsatisfactory judgment). As noted, Anne Chambers has now been referred by Fraser J to the Director of Public Prosecutions. But it would be an error to see this as the courts being 'hoodwinked' by a lying witness. The problem is structural and institutional as I have sought to explain.

POST OFFICE MENDACITY – THE EXPLOITATION OF WEAKNESS

42. In my opinion the legal failures, namely (i) the removal of the statutory safeguards hitherto provided by s. 69(1) of PACE 1984 and the absence of any satisfactory replacement other than the inapposite 'presumption' of the working of *machines*, (computers are machines – but machines that operate on (more or less unreliable soft[26]

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25 I have been told by one expert witness that he was in court when another judge publicly stated that he would be very surprised if the Post Office used a system that was susceptible to errors.

26 Ladkin *et al loc. cit*.

) instructions) together with (ii) judicial institutional deference paid to the Post Office as a prosecuting authority and (iii) poor judicial understanding of computer derived evidence, provided an ideal legal and institutional vulnerability that was open to exploitation, and that was exploited, by the Post Office. Put another way, the legal system provided a warm and receptive environment for the Post Office *bacillus* and enabled it to thrive and flourish. Fraser notes that but for the *Bates* massive group litigation the true position would have remained unidentified. The Post Office almost got away with it - and would have done so, but for massive group litigation that is comparatively rare - and was phenomenally expensive (£46 million-odd to the claimants alone). This should be a matter of serious concern so far as the *Bates* litigation has exposed systemic weaknesses and failures in both the criminal and also the civil justice systems.

43. As I have suggested, had the Post Office in any given case, prior to the Bates litigation and, in particular, before the *Horizon Issues* trial that took place in March 2019, been required to affirmatively evidence and prove the reliable and proper working of its Horizon system, it could not have done so. That is both a remarkable and a necessary conclusion from Mr Justice Fraser's judgment in the *Horizon Issues*. The omission/failure was a legal and systemic failure of the criminal justice system that was very effectively exploited by the Post Office by a prosecuting policy that merely took advantage of institutional legal and court weaknesses.

44. In my view, the foregoing somewhat weakens a call to restrict or heavily regulate the right to bring a private prosecution. This is because, had the legal system functioned as it ought, the Post Office prosecutions would have failed. That they did not is attributable to widespread legal weakness and judicial failure – a failure in turn that was played upon and ruthlessly exploited by the Post Office. It is the combination of these factors (apart from failure in corporate governance) that resulted in the fiasco of successful prosecutions (and other, civil claims by the Post Office). Put another way, the Post Office prosecutions are the manifestation of a deeper systemic or structural failure.

45. That is not to say that there are not obvious arguments for some institution, most obviously the CPS, having overall supervisory responsibility or role in private prosecutions. But there are obvious resourcing and budgetary constraints that are outside my knowledge/qualification to comment upon. Also, it is difficult to see

what that role should be, without it in effect transferring responsibility to the CPS, which would be to subvert the idea and right of private prosecution.

46. Mr Justice Fraser found that the Post Office was aware of the weaknesses in its Horizon system. Indeed, from inception it was apprehended that the system might not be adequate for its purpose. It nevertheless prosecuted SPM victims of the computer system's errors and failures. It is not greater restriction - or qualification - of the right to bring a private prosecution that will address the more fundamental problem. Greater restriction will treat the symptoms, not the underlying problem.

47. I know that there is at least one instance of the Post Office lawyers having, in writing, stated that there was no evidence of fraud. The Post Office nevertheless prosecuted. This strongly suggests that the Post Office discounted the risk of weaknesses in the prosecution being exposed. The reasons for such an expectation I have explained above. It was correct.

POST OFFICE CORPORATE GOVERNANCE – A STUDY IN FAILURE

48. The Post Office scandal is another, were one to be required, example of widespread failure in corporate governance. It is a study in its own right well beyond the scope of this statement.

49. Parody is inadequate to the facts that:

a. Paula Vennells went from being CEO to appointments as a non-executive director of the Cabinet Office and to chair Imperial College Healthcare NHS Trust. In the process, she collected a CBE for services to the Post Office.

b. Tim Parker went from being chair of the Post Office to appointment as the chair of Her Majesty's Courts & Tribunals Service.

Together, while at the Post Office, they presided over what is arguably the most extensive miscarriage of justice in English legal history.

50. Mrs Vennells has recently made a very long, highly 'lawyered', statement[27] to the Department for BEIS in response to a letter from Mr Darren Jones MP,[28] Chair of

[27] https://committees.parliament.uk/publications/1621/documents/15462/default/

[28] https://publications.parliament.uk/pa/cm5801/cmselect/cmbeis/correspondence/BEIS-Committee-Chair-to-Paula-Vennells.pdf

the Select Committee. The statement is striking for her distancing herself from the fact and policy of the prosecutions by the Post Office and an energetic removal of herself from decisions described by her and trivialised as 'operational'. She asserts that the Post Office relied upon Fujitsu, and also upon internal and external lawyers. In any event, she says, government ministers knew what was going-on.

51. There are at least two major reasons for considering Mrs Vennells' self-exculpatory statement to be unsatisfactory.

52. The Post Office abruptly ceased its policy of prosecutions from 2014. That was the same time that the Post Office had taken counsel's advice (above). The obvious inference, in the absence of alternative explanation, is that the policy was identified as being open to question/unsound. The grounds for such a view are legally privileged.

53. The importance of the timeline is that this was before the 2015 BBC1 *Panorama* programme '*Trouble at Post Office'* broadcast 17 August 2015. It was this programme that was a significant factor in launching the *Bates* litigation.

54. The importance of the *Panorama* programme is that it was that programme (now 5 years' ago) that asserted that the Post Office had the facility to remotely access SPM branch computer terminals. Mrs Vennells was concerned to dismiss that possibility. Mrs Vennells' personal involvement is recorded in Mr Justice Fraser's judgments. The importance of it was that, if correct, the fact of remote access would have undermined every one of the Post Office's prosecutions. The Post Office issued a public statement denying the possibility of remote access. That statement, as Mr Justice Fraser said in his December 2019 judgment was "untrue"[29] - *viz* a lie. Fraser J deals with this issue at length between paragraphs [520]-[554] of his *Horizon Issues* judgment and uses the word '*untrue*' of the Post Office's statement on four separate occasions.

> "[520] Another document from 2015 upon which the claimants rely is an internal email chain, which originated from Paula Vennells then the Chief Executive of the Post Office, on 30 January 2015. This was prior to her appearance before the House of Commons Select Committee in February 2015. She posed the following question in an

[29] *Horizon Issues* judgment paragraph [536].

email sent internally to Mark Davies and Lesley Sewell, both of the Post Office:

> *"Dear both, your help please in answers and in phrasing those answers, in prep for the SC:*
>
> *1) "is it possible to access the system remotely? We are told it is."*
>
> *What is the true answer? I hope it is that we know this is not possible and that we are able to explain why that is. I need to say no it is not possible and that we are sure of this because of xxx and that we know this because we have had the system assured."*
>
> (emphasis added)

[521] Ms Vennells obviously needed to know whether the answer matched her understanding, which was – as she put it, both "I hope" and "I need" -- that it was not possible to access the system remotely. This query was passed on through various people, including at one stage from James Davidson who has both a Fujitsu and Post Office email address, who answered to Mark Underwood:

> *"As discussed, can you hook up with Kevin to review what answers have already been provided to second sight as this should form the Post Office response."*

[522] The answer was provided by Mark Underwood on 30 January 2015 in an email which is part of the same email chain or string:

> *"Can Post Office or Fujitsu edit transaction data without the knowledge of a Subpostmaster?"*
>
> ***Post Office confirms that neither it nor Fujitsu can edit transaction data without the knowledge of a Subpostmaster.***
>
> *There is no functionality in Horizon for either a branch, Post Office or Fujitsu to edit, manipulate or remove a transaction once it has been recorded in a branch's accounts.*
>
> *The following safeguards are in place to prevent such occurrences:"*
>
> (various matters are then listed in the remainder of the email)
>
> (bold present in original)

[523] This then was subject, in the email chain, to a degree of refinement. Kevin Lenihan forwarded the email onwards to Mark Underwood and others, and stated:

> *"Mark / Mel,*
>
> *James has had a look at your answer to Q1. And thinks there's too much detail for Paula – this was written for a different type of audience. He has captured the same points but in a more appropriate format :-*

He states:-

> *Having looked again at the request from Paula, it appears that the fundamentals around this question (remote access) are not understood. I suggest that Paula is briefed along the lines of the following.*
>
> *1) No transaction data is held locally in any branch. Transactions are completed and stored in a central database and copies of all data is sent to a secure audit database.*
>
> *2) Sub-postmasters directly manage user access and password setting locally so system access (to create transactions) are limited to approved local personnel only who are responsible for setting their own passwords. Users are only created following an approval process which requires authorisation by the sub-postmaster. All subsequent transactions are recorded against the id used to log on to the system.*
>
> *3) Once a transaction has been completed, there is no functionality (by design) for transactions to be edited or amended. Each transaction is given a unique number and 'wrapped' in a digital encryption seal to protect its integrity. All transactions are then posted to a secure and segregated audit server.*
>
> *4) On approval, there is the functionality to add additional transactions which will be visible and have a unique identifier in the audit trail. This is extremely rare and only been used once since go live of the system in 2010 (March 2010)*
>
> *5) Support staff have the ability to review event logs and monitor, in real time, the availability of the system infrastructure as part of standard service management processes.*
>
> *6) Overall system access is tightly controlled via industry standard 'role based access' protocols and assured*

independently in annual audits for ISO 27001, Ernst and Young for IAS 3402 and as part of PCI audits."

(emphasis added)

[524] I do not see how the statement that "I do not know how the fundamentals around this question (remote access) are not understood" can sensibly be made. Nor do I know what the expression "the fundamentals around this question" in fact means, in plain English. The question from Ms Vennells was very straightforward. It was as follows, using her words, and separating out each clause of the enquiry:

1. "Is it possible to access the system remotely? We are told it is."

2. "What is the true answer?"

[525] Both of these are really very simple questions. Question 1. means can it be done, because Ms Vennells is being told it can be done. Question 2, "what is the true answer?" means she is seeking the true answer to question 1. This is not complicated, either in linguistic, computing or even business terms, nor is it difficult to understand. She then expressed her aspirations in terms of what the true answer might be. "I hope it is that we know this is not possible and that we are able to explain why that is. I need to say no it is not possible." (emphasis added)

[526] This trial has shown that the true answer to the enquiry she made in early 2015 was "yes, it is possible." It has taken some years, and many tens of millions of pounds in costs, to reach that answer."

55. That the Judge considered that the 'remote access point' of great importance is revealed both by his extensive and detailed treatment of it and also by the un-sparing nature of his criticisms. Mrs Vennells approach to her *requirement* to be able to say that remote access was not possible is very telling (as the judge emphasises). She was not, of course, a party to the litigation and she did not (perhaps prudently) give evidence.

56. Unethical conduct is deeply corrosive and damaging. While there is no direct remedy for unethical conduct in legal proceedings, ultimately it undermines public confidence in the rule of law. From 2001 to 2003 The Honourable Justice Neville

Owen, a distinguished judge of the Court of Appeal of Western Australia, headed a Royal Commission into the failure of the HIH insurance group that had collapsed with a loss of Australian $5.3 billion. At the time, it was the biggest corporate failure in Australian history. In April 2003 he produced his report. In his introductory remarks the judge said this about corporate governance:

> "It would be a mistake, I believe, to dismiss the case of HIH as simply a corporate aberration. There was at least a semblance of standard governance mechanisms at work. By and large the people who were involved were not inherently bad or in some way set upon being part of a corporate disaster. HIH is a reminder, if one is needed, that a drastic fall from corporate grace can occur if those in charge lose their way."

57. Owen J. referred to the *Cadbury Report* and the *Code of Best Practice*, observing that "… the statements of principle have a broader application. The [Cadbury] report said:

> "*The principles on which the Code is based are those of openness, integrity and accountability. They go together. Openness on the part of companies, within the limits set by their competitive position, is the basis for the confidence which needs to exist between business and all those who have a stake in its success. An open approach to the disclosure of information contributes to the efficient working of the market economy, prompts boards to take effective action and allows shareholders and others to scrutinise companies more thoroughly. Integrity means both straightforward dealing and completeness… .*"

58. Transparency requires that where public statements are made by public institutions, that are later discovered to be false, urgent and sufficient steps be taken to correct the impression given by such falsity. The Post Office only changed its position in the *Horizon Issues* trial when Mr Roll gave evidence that, not only was remote access to Post Office branch terminals possible, and also the alteration of data at branch terminals <u>without SPM knowledge</u>, but that he had done it. Until his second witness statement, the Post Office was willing to 'brazen it out'. That information would have subverted - and now *ex facie* renders unsafe - every single one of the Post Office's prosecutions.

59. The reference to openness and the disclosure of information, and the failure to be open and a failure to give disclosure of information, is a consistent theme in the conduct of the Post Office. It is impossible to infer that that such failures were often other than where legal advice had first been taken by the Post Office from either internal or external lawyers or both - and Mrs Vennells suggests as much in her statement.

60. Justice Owen, in his inquiry into the HIH failure, made some concluding remarks. In words that have since become famous in legal ethics, he wrote:

> *"From time to time as I listened to the evidence about specific transactions or decisions, I found myself asking rhetorically: did anyone stand back and ask themselves the simple questions – is this right? This was by no means the first time I have been prone to similar musings. But I think the question gives rise to serious thoughts… Right and wrong are moral concepts, and morality does not exist in a vacuum. I think all those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values. They must then apply those tenets in the decision-making process. .... In an ideal world the protagonists would begin by asking: is this right? That would be the first question, rather than: how far can the prescriptive dictates be stretched? The end of the process must, of course, be in accord with the prescriptive dictates, but it will have been informed by a consideration of whether it is morally right. In corporate decision making, as elsewhere, we should at least aim for an ideal world. As I have said, 'corporate governance' is becoming something of a mantra. Unless care is taken, the word 'ethics' will follow suit."*

61. Paula Vennells and Tim Parker as CEO and chair of the Post Office and others on the Post Office's board either:

a. failed to address the question '*is this right*' in connection with the policy of prosecutions that, by the time of the Second Sight mediation process in 2013, was known to have wreaked massive and widespread distress upon its

SPMs – and even better known as a result of the 2015 *Panorama* programme and from then to the trials in 2019. Both knew, or must be taken to have known, of the systemic unreliability of the Horizon system because there had been one replacement because of it (i.e. replacement of 'Legacy Horizon').

b. In the alternative, so far as they asked the question '*is this right*' at all, ineluctably, they answered the question incorrectly. Mrs Vennells says she relied upon others. While that may be true, it is the job of a board and a CEO to probe and to question and to test what they are told. Her repeated protest that she is not a lawyer is both unattractive and fails to address the point. The Post Office will have been institutionally very alive to how problematic the Horizon system was proving to be.

Given the enormity of the injustice and human suffering inflicted by the Post Office policy of prosecution and the (misleading) attempt by the Post Office to justify it, that so dismally failed in the *Bates* litigation - Fraser J ridiculed the Post Office's attempt to support the contention that the Horizon system was reliable as the 21st equivalent to the contention that the earth is flat - if corporate governance is to have any meaning and content (*per* The Hon. Justice Owen), as distinct from a mere slogan, Vennells and Parker are accountable for the Post Office's policy. As with the Lloyds Banking Group Reading branch Impaired Assets Unit Fraud, there are important questions as to (i) what was known, (ii) by whom and (iii) when. It was the Post Office as an institution, directed by its board members as individuals, that sanctioned the policy of prosecution that exploited the legal and judicial weaknesses to which I have referred.

62. I recognise that these latter important issues are beyond the remit of the Justice Committee's present inquiry.

63. It will be seen that, in my view, it was not insufficiency of control or regulation of private prosecutions that was the main cause of the very large number of convictions that the Court of Appeal will now be required to consider and review. The problem is more extensive and fundamental.

July 2020