

Submissions to the Horizon Post Office IT Inquiry made by Richard Moorhead, Professor of Law and Professional Ethics, University of Exeter, made based on the work of the team researching the Post Office Scandal at Exeter's Evidence Based Justice Data Lab , with Dr. Rebecca Helm (Exeter) and Dr. Karen Nokes (UCL).¹

I have three points, some are of general application but I will concentrate on BEIS objections to including legal work on civil shortfall cases and prosecution in the Inquiry. My three main points are

1. Centrality. Legal work, including legal work on civil shortfall cases and prosecutions are central not tangential to the case. Legal work is the mechanism through which the victims of Horizon were harmed. And the mechanism by which justice has been delayed and denied.
2. Practicality and evidence. That for the Inquiry to grapple properly with the implications of Horizon it will have to look at such cases for practical and evidential reasons. You need the best evidence and some of it will be here.
3. Feasibility. That this can all be done efficiently if properly targeted and resourced

Let me start with the Centrality. Legal advice and legal work is central, not tangential, to understanding Horizon.

As we set out in our submissions, we think a detailed understanding of the Second Sight Investigation; the role of legal advice on shortfall cases, civil and criminal; and the conduct of the Bates litigation are fundamental to understanding the harms arising from the Horizon system and the culture of POL. We don't think there can be any argument that Horizon Harms directly arose from the way legal work was managed and conducted: people were threatened, sued, fired, and prosecuted via legal work. When POL and Horizon came under scrutiny, denials, non-disclosure, and delay were enabled, at least in part, by legal work. At least as much as, probably more so than, the software errors themselves, the legal work was the harm visited on the SPMs. And legal work supported or failed to challenge the corporate governance failures that mark this scandal so profoundly.

Let me deal briefly with Second Sight's investigation, a pivotal period from start to finish, likely to reveal in rich and uncomfortable detail a great deal about the culture of POL, and the practices of the professionals and managers involved in setting up, helping, and then hindering that Investigation. Not considering this would be to blot out a crucial period of Horizon's history; not least because of the blizzard of activity, again much of it legal, taken to respond to Second Sight's work in 2013. The same can be said for the Bates litigation. The litigation is culturally revealing, and practically of immense importance.

¹ The version given to the Inquiry was somewhat abridged given the desire of concentrating on live issues on the morning.

I will concentrate on the shortfall cases civil and criminal given BEIS objection. All that I have said about the centrality of legal work applies to these cases. Firing, threatening, suing, investigating, prosecuting was partly or mainly a legal endeavour.

My second point is practicality... the Inquiry can't accurately assess with reliable evidence what actually happened during the period of enforcement and prosecution and why it happened without looking at individual cases.

We know from the Hamilton and Bates cases that: shortfalls were pursued oppressively; prosecutions were pursued unconscionably; and the safety of those convictions was considered inadequately. But we do not know: how and by whom oppression and unconscionable approaches were put in place. There are a range of possibilities: individual bad apples providing misleading information (to POL's lawyers and others); willing blindness, hubris, or inappropriate group-think at various levels of the organisation; through to more overt or conscious conspiracies. The Court of Appeal found non-disclosure deliberate and raised the possibility, quite self-consciously I think, of bad faith. But we do not know who did things deliberately; how they came to do that; under what influences; and if anyone was acting in bad faith; who they were; why they were doing so; under what influences and so on.

How can the Inquiry examine the who's whys and how's of this if not, in large part, through considering individual cases?

Where there are records, individual cases are likely the best or one of the best sources on what happened on the ground. Legal advice, action and supervision (or, sometimes importantly, its absence) will be highly relevant as will the facts and assumption on which such legal action was based. The patterns of behaviour should be evident

Your alternative is to rely on policy documents and high level or general explanations from witnesses. These are almost bound to be somewhat presentational; even without what Mr J Fraser called a "PR driven" approach to evidence in the Bates case.

It is especially hard indeed to imagine another approach to collecting meaningful and reliable evidence given the time-period the Inquiry must cover, and the fallibility of memory that faces all such investigations. How for instance, is the Inquiry going to examine lawyers or managers on charging, pleas, disclosure, and post-conviction review without looking at individual cases? Common judicial practice (I am thinking of the case of Gestmin) leads strongly in the direction of the documentary detail. This would be so even if the Inquiry were not looking at what looks like serious misconduct. The Inquiry has to be across that detail.

Let me turn to my third point. Feasibility.

I recognise the Herculean task that faces the Inquiry, and that the timescale looks extremely challenging, but getting this right is imperative. There cannot be a situation where key elements of the Scandal are left out for reasons of expedience. We do not want this to be like Hillsborough where issues fester, are unresolved, and even after multiple tries, are

inadequately dealt with. There needs to be a full, comprehensive, and convincing account of all the key dimensions of the case. I repeat, we are not talking of something peripheral here. The legal work was central.

Nor do I see this element as a particularly difficult one in practical terms. The time this takes will depend largely on how much can be done through analysing in the back-office documentary evidence and then putting emerging patterns and representative points to those decision maker and lawyers within POL who give evidence. Much of this work can be done outside of, but in preparation for, hearings. With proper resourcing this should be capable of being done efficiently and effectively.

The matter of Legal privilege has been raised. POL and Fujitsu should waive this. Morally— they cannot come to the Inquiry and claim to be cooperating given the problems exposed already in the conduct of legal cases. These problems include apparent abuses of privilege; Also privilege has been effectively lost in large part in any event; their confidentiality punched full of holes. And if I am wrong about that, there is a strong prima facie case, for saying crime-fraud or as it is better described iniquity, vitiates privilege here. Iniquity is evident in abundance including in the litigation and prosecution of shortfall cases.

I would add here too the need to lift any extant NDAs and similar agreements also needs to be considered.

As well as being the best evidence of what was done on shortfall cases and prosecutions; the best evidence of the nature of instructions given; the advice given; and its implementation, I would expect a review of cases to yield contemporaneous evidence of what was influencing the process. The court cases suggested the influence of ideas such as “protecting public money”; and of concerns about adverse publicity and ‘future legal proceedings’ effecting disclosure. Similar evidence about influences may be seen in individual cases or the patterns of behaviour those cases reveal. It might tell us how often individuals were told they were the only ones experiencing Horizon problems; or how often investigators raised the lack of dishonesty evidence only for those taking charging decisions to go ahead and charge anyway.

Importantly also, it will tell us something of how cases that were unsuccessfully prosecuted were dealt with; why they were different and how these Horizon “losses” were understood within POL. It may relate good and bad outcomes to particular individuals in POL, to solicitor firms prosecuting, to counsel advising as well as the structures and policies in place more uniformly within POL. So too whether NDAs silenced concerns about Horizon after cases.

The detail and variation within individual cases is likely to be highly illuminating as to what caused, contributed to, exacerbated, or reduced poor practices.

We should not rule out the possibility of other influences being revealed. It seems unlikely to me that Government oversight would explicitly and directly influence specific individual cases, but it may well have an impact at a general level that shows up in those cases. And at key instances, when Horizon was under critical challenge, it may have been that oversight interests became more visible or somehow percolated down into individual cases.

I hope too that the evidence taken from the SPMs (and their colleagues) explores how they experienced threats and legal process. It seems to me very important that the Chair has the opportunity to hear how lawyers' tactics are experienced by individuals. I have seen in another area, non-disclosure agreements, how differently lawyers and lay people experience legal documents for instance.

One further matter on issues of practicality. It may be that the Inquiry can get sufficient understanding of POL's approach from sampling cases. If this is to be done, it might be helpful to suggest some ways of doing this. There are obvious cases which merit a closer look:

- Seema Misra's given its timing and the disclosure problems shown in Hamilton
- Cases where Second Sight have investigated and found problems (such as Jo Hamilton)'s
- Lee Castleton's case, given it proceeded to a contested trial.

The focus so far has been on cases the Post Office won but it will be important too to look where cases did not proceed to trial or where trials were aborted or lost, for instance. We understand there are about 130 or so of such cases. Very little is known publicly about these cases and they are important. How for instance were losses shared within the organisation? What was learnt from them? How did losses affect future instructions and case handling?

Sampling should ensure a good spread of the different solicitors' firms prosecuting (were there 6?) and perhaps also counsel representing in such cases. As well as looking at whether who ran cases internally impacted on outcomes or approach.

There is one small matter before I wrap up. If I can quickly, but I hope not too superficially, dismiss the Department's suggestion that the victims in individual cases can get this kind of accountability through pursuing cases of negligence through the courts or by professional conduct complaints. I think this is both unreal, it likely won't work, and unkind. I think it is an extraordinarily hard-hearted and cynical person who would say to these people, go to law again if you want to find out why you were so badly wronged.

I'd like to end by *contextualising* my plea to look in-depth at the lawyering. I've said, in essence, Horizon is not solely or even mainly a computing scandal. It is, or is also, a lawyering scandal, but it is above all a corporate governance scandal. You will have seen a submission from a group of GCs and others with great practical knowledge of lawyering and governance. That came about after they signed up for a whole day and one night with me talking about POL. They took on this penance because they see the same governance problems evident in Pol too often in other boardrooms. There is a critical public interest in this issue.

So, the Inquiry needs to understand what lawyers did, but also how they were led, what the incentives and relationships and culture were. Ultimately lawyers may have contributed to that culture but it is not likely they were solely or mainly responsible for it. There is one potentially telling moment discussed in the Bates case where, when dealing with remote access, Paula Vennells says, in effect, she needs to be able to say that remote access is

impossible. The willingness within the organisation to have facts fit preferences does not come from the lawyers but it may be helped by them, through commission or omission. Let me end with one last example, Mrs. Vennell's says in a letter to an MP, now a government minister, in 2015, "Through our own work, and that of Second Sight, we have found nothing to suggest that, in criminal cases, any conviction is unsafe." [2]

That statement is, we can see now from Hamilton, one that was palpably false, whether Mrs. Vennells knew it or not. It is a statement made by the senior manager of the Post Office, and very likely indeed, with the assistance of lawyers directly, reviewing or drafting the letter, or indirectly, through previous advice which is being used or abused here. Lawyers and managers were involved *and responsible*. Lawyers and managers are likely to be *mutually* responsible for this irresponsibility. You must investigate them both if the lessons are to be learned and similar problems are not to occur again. They cannot hide behind privilege whilst shifting blame. Both the managers and lawyers need to be held accountable for any wrongs they have done, and that requires looking at the legal advice along with everything else.

If I can end by putting the case metaphorically for a moment. Considering the Horizon saga without considering the lawyering, and without lifting professional privilege, would be a bit like considering Watergate without considering the White House Tapes. Essential, telling perhaps vital information will be missing. The abuse of power, the injustice, who did it and why will not be properly understood. Sir, you must, to discharge the Inquiry's remit, you must do the equivalent of listening to the tapes.

[1] The version given to the Inquiry was somewhat abridged given the desire of concentrating on live issues on the morning.

[2] http://data.parliament.uk/DepositedPapers/Files/DEP2015-0555/Baroness_N-R_to_Andrew_Bridgen_MP-_Post_Office_Horizon_System.pdf