

# Independent Review, Miscarriages of Justice, and Computer Evidence: Brian Altman KC's General Review and the Post Office Scandal

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## Executive summary

The Altman General Review (General Review)<sup>2</sup> links the discovery that the Post Office Limited (PO) had prosecuted sub-postmasters and sub-postmistresses on the basis of partial, unreliable evidence; the Clarke Advice (Simon Clarke, Barrister);<sup>3</sup> the subsequent Swift Review (Jonathan Swift KC); and the conduct of the Bates litigation and the Hamilton appeals.<sup>4</sup> The Altman General Review is an important, perhaps central, document in the PO Scandal. It was a review prompted by the discovery of unreliable expert evidence on an unreliable software system in 2013 that had been relied on to prosecute hundreds of sub-postmasters. That discovery led to a review of prosecutions that had been conducted for the Post Office by Cartwright King. This review (the CK Sift) was also conducted by Cartwright King. Brian Altman was instructed to conduct a review of that review (the General Review).

In spite of that discovery, the Post Office continued to deny, including to Parliament in 2015, that there was any evidence of miscarriages of justice until appearing before the Court of Appeal in 2020/21. Those denials were founded in significant part on Altman's and related work. He told the PO the review of prosecutions being conducted by their solicitors, Cartwright King, was fundamentally sound; this paper looks at the quality of the judgments arrived at to come to that conclusion.

This working paper analyses the Review.

We identify:

1. The limits of the evidence base showing it is not as stated a 'statistically significant' review of prosecutions.

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1 <https://evidencebasedjustice.exeter.ac.uk/current-research-data/post-office-project/>.

2 Brian Altman KC, Post Office Limited Horizon System General Review: Conduct of Prosecutions (15 October 2013) (General Review), published in Documents Supplement, 20 Digital Evidence and Electronic Signature Law Review (2023), and available at <https://www.postofficehorizoninquiry.org.uk/sites/default/files/2023-01/POL00006581%20-%20Review%20of%20PO%20prosecutions%20by%20Brian%20Altman%20KC%2015102013.pdf>.

3 Simon Clarke, Barrister: Post Office Limited Advice on the use of expert evidence relating to the integrity of the Fujitsu Services Limited Horizon System (15 July 2013); Simon Clarke, Barrister: Post Office Limited Horizon Disclosure The duty to record and retain material (2 August 2013), both published in Documents Supplement, 20 Digital Evidence and Electronic Signature Law Review (2023).

4 *R. v Hamilton* [2021] EWCA Crim 21, [2021] 1 WLUK 116, [2021] 1 Cr App R 17, <https://www.bailii.org/ew/cases/EWCA/Crim/2021/21.html>.

2. A number of other concerns with the judgement that Altman's Review offered, that Cartwright King's (CK)<sup>5</sup> review of its own prior prosecution was 'fundamentally sound'. A disconnect between the substance of the report and its reassuring tone.
3. Substantial problems with the review process documentation, the rationales for tests used (such as that critical one on timing), the process (whether CK had a conflict of interest and how this was managed), and the flexibility with which the tests should be used.
4. These problems are countered or minimised by a post-facto judgement by Mr Altman KC that 'implicitly' or 'generally' the judgements taken by CK in reviewing their own work are correct or within reasonable bounds. This is an approach consistent with post-facto rationalisation.
5. Early advice that the Sift was fundamentally sound was maintained by the end of the process mainly on the basis of evidence that was not considered by Mr Altman KC early in the process. The evidence base for that initial view is not explained but should or would have contained the problematic documents which set out incorrect review tests.
6. The CK Sift was bounded by a case start date (2010) based on a rationale that comes, in large part, from an understanding of the technical differences in the Horizon system before and after 2010. The only source of that technical rationale appears to be the descriptions of a Fujitsu engineer (Gareth Jenkins) who was regarded as 'tainted' by Mr Altman by reason of his prior failures as an expert witness for Post Office.

The General Review document contains a number of indicators consistent with resisting rather than properly exploring potential miscarriages of justice. The main examples are the advice not to include Fujitsu in the disclosure process; the failure to explore the depth of Jenkins knowledge about integrity concerns and his reasons for non-disclosure; the obliqueness of references to shredding solely as a 'cultural problem'; and attitudes to future disclosure risks demonstrated in relation to the mediation scheme.

The General Review also demonstrates how the 'Jenkins problem' was known about, in detail, in 2013, by the PO legal team and the solicitors' firm that came to conduct the Bates litigation by the Post Office. This casts a most concerning light on decisions taken in the Bates litigation by the Post Office and its lawyers. Whilst we should await the detailed consideration from the Inquiry,<sup>6</sup> relying on information from Jenkins suggests a willingness to rely on a tainted source. That the Post Office had relied on a tainted source, suggested the courts and the Post Office's opponents had been misled during their criminal proceedings and continued to be misled during the Bates litigation. That some of the same lawyers appear likely to have been involved suggests that the risk of misleading them may have been taken knowingly or recklessly.

The conduct of the CK Sift, the General Review, and the Bates litigation all led to less extensive disclosure than now appears to be appropriate. The judgements of Altman in this review and the way those judgements were presented likely played an important role.

There is an important question as to whether Mr Altman's role in matters prior to the Hamilton hearings was sufficiently and accurately disclosed to the Court of Appeal and the appellants. His ability to independently represent the Post Office on Ground 2 during the appeal may also have been rendered more difficult by his prior involvement.

There are now bigger questions over the Swift Review given the way that it dealt obliquely with the Jenkins' problem. The Swift review was commissioned to advise an incoming Chairman on how to deal with the burgeoning questions around Post Office propriety as a prosecutor. Unless the Swift review authors were confident the Chairman, and the Post Office Board, already had a solid knowledge of the Jenkins' problem their obliqueness about it is extremely concerning.

There are limitations on our analysis. It is written with the benefit of hindsight, but we think fairly. There may be some critical piece of the jigsaw missing that justified the apparently sanguine approach to the various reviews and Jenkins' proxy evidence in the Bates litigation.

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<sup>5</sup> AWH Acquisition Corp Limited trading as Cartwright King.

<sup>6</sup> Post Office IT Horizon Inquiry, <https://www.postofficehorizoninquiry.org.uk/>.

There are lessons to be learned on the nature of human and professional relationships that encourage lawyers to absorb and reflect back their client's view without sufficient independence and critical detachment.

The General Review demonstrated a tendency to treat with cynicism the appellants and to disregard entirely the human costs of the Post Office's conduct. This blindness to the humanity of others is sometimes reified in practice (and the Bar's Code of Conduct) as fearless advocacy. The General Review stands as a monument to that approach, showing how the decision-making of the lawyers can be limited or corrupted by excessive zeal.

Substantial arguments can be made that disclosure was deliberately inhibited by the Post Office and the legal work done for it during the Sift, in the design and/or execution of the Altman Review, in the handling of the Swift Review, and the Swift follow-up work. We expect these will be tested by the Inquiry.

We encourage the profession to reflect more urgently and candidly on its approaches to solicitor-client and organisation-client relations and organisational culture. Where leading lawyers, connected with the Post Office case, appear to have sold their services on the basis they can turn, 'a pile of refuse into something that looks great' or on the basis that, 'he won't deviate from his path and will crush anything that gets in the way' we are entitled to ask if the culture they laud influences their judgement and behaviour in ways they should take personal and collective responsibility for.

Reviews of this kind engage obligations of candour to the clients; obligations not to mislead or be complicit in misleading anyone, including significant constituencies within the client; and obligations of independence. Regulators need to consider practical ways of emphasising the priority of independence when conducting reviews for clients commissioned to be, or to be held out as, independent.

### Introduction

In 2013, at a critical juncture in the history of the Post Office Horizon Scandal, Brian Altman KC conducted a 'General Review' of Cartwright King's review of criminal prosecutions (the CK Sift, as it was called). This review covered cases wholly or mainly conducted by Cartwright King between 2010<sup>7</sup> and 2013.<sup>8</sup>

Second Sight Support Services Limited (Second Sight) were forensic accountants appointed by the Post Office under pressure from Parliament to investigate a series of complaints about the Horizon system. Second Sight became aware of undisclosed bugs in the Horizon system during their investigation. The Post Office became aware of this issue in the middle of 2013 and instructed Cartwright King (CK) to undertake an independent review of these matters. CK are a solicitors' firm that had conducted many of the Post Office's prosecutions, utilising evidence from Horizon.

CK quickly discovered that Gareth Jenkins was the source of the information on the undisclosed bugs. Gareth Jenkins was a Fujitsu engineer and had acted as the expert witness for the Post Office on Horizon's reliability in criminal prosecutions. A further internal Post Office report in February 2013 from Helen Rose (the Rose Report<sup>9</sup>), a Post Office Security analyst, also evidenced that Jenkins had prior knowledge about 'integrity issues' with Horizon.

Simon Clarke, a barrister employed by CK, advised in July 2013 that Jenkins' knowledge and his evidence in past criminal cases concerning Horizon raised 'profound' problems for Post Office prosecutions past, current, and future. That led to the 'CK Sift' to see if further, limited disclosure should be made on those cases.

Brian Altman KC was quickly called in to conduct a review (which we refer to as Altman's General Review or the General Review by reasons of the document produced at what was presumably the end of that process dated 15 October 2013) of the 'CK sift'. As we discussed in Working Paper 5,<sup>10</sup> this further review was subsequently also reviewed by Jonathan Swift QC (as he then was) and Christopher Knight (a junior barrister): this resulted in the Swift

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<sup>7</sup> Broadly speaking. The particular situation may be more complicated.

<sup>8</sup> General Review.

<sup>9</sup> <https://www.postofficetrial.com/2019/03/the-helen-rose-report.html#:~:text=Helen%20Rose%20is%20a%20security,integrity%2C%20and%20possibly%20his%20livelihood> .

<sup>10</sup> <https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2022/10/WP5-The-Swift-Review-October-2022.pdf> .

Review.<sup>11</sup> Swift pointed to potentially substantial problems around the issue of Fujitsu/Post Office having remote access to Horizon and plea bargaining, in particular. Swift recommended follow-up work, including further advice, potentially from Brian Altman KC. The follow-up work was stopped on legal advice from leading counsel in anticipation of what became the Bates litigation. The identity of this lead counsel is not known to us.

Altman's General Review included a series of conferences and meetings. The General Review itself forms part of a larger series of 'advices' given by Altman to the Post Office from 2013 onwards, culminating in his representation of the Post Office in the Hamilton appeals in 2020 and 2021.

The General Review document is dated 15 October 2013, but elements of the work had, at the Post Office's request, been completed by 15 August 2013. Altman was plainly instructed very close to the advice provided by Simon Clarke of July and August 2013. Interestingly, Altman's terms of reference were not settled until 23 September 2013, a considerable period after a large part of the work must have been done. The October document provides some clues as to how the lens he was asked, or agreed, to look through shifted.

Brian Altman's central conclusion in the General Review was that the CK Sift was, 'fundamentally sound'. Like the claim that there were no 'systemic flaws' in Horizon software these two words may have provided something that the Post Office Board could cling to.

Altman's conclusion may well have informed Paula Vennells' evidence to the Business, Innovation and Skills Committee on 3 February 2015<sup>12</sup> when, as then CEO of the Post Office, she made the claim to the Committee that,

'If there had been any miscarriages of justice, it would have been really important to me and the Post Office that we surfaced those.'<sup>13</sup>

And in a letter to George Freeman, a Government Minister, a few months later, Vennells went further and said,

'Through our own work, and that of Second Sight, we have found nothing to suggest that, in criminal cases, any conviction is unsafe.'<sup>14</sup>

Whether the 'fundamentally sound' view was justified on the evidence is only one of many questions of particular note about the General Review.

Some of those questions are for Mr Altman KC, some for CK, some are for those who conducted the Swift review, and some are for (Womble) Bond Dickinson,<sup>15</sup> the solicitors' firm at the heart of the Bates litigation.

### Early reassurance to the Post Office Board

Altman's General Review indicates that he was expected to, and presumably did, report to and/or meet the Post Office's Audit Committee and/or the Board to provide his views on the efficacy of the process adopted by CK.

We are told he provided interim views almost immediately, although we do not know whether this was to the Board and/or the Audit Committee. It seems the Post Office got to hear that their preferred suppliers of criminal prosecution services were reviewing their own cases in a 'fundamentally sound' way. The General Review states:

'Overall, my view, as expressed in my Interim Review document is that Cartwright King's review is fundamentally sound, and I have not detected any systemic or fundamental flaws in the review process, or in the evidence arising from it, but because the review is a continuing process, and Post Office Ltd has a continuing duty of disclosure (not only in cases subject to the Criminal Procedure and Investigations Act 1996 but in practice should also adopt a similar or identical approach to past conviction cases falling within

<sup>11</sup> Richard Moorhead, Karen Nokes and Rebecca Helm, 'The Perils of Independent Review The Swift and Knight Review: Working Paper 5', available at <https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2022/10/WP5-The-Swift-Review-October-2022.pdf>.

<sup>12</sup> <https://committees.parliament.uk/committee/365/business-energy-and-industrial-strategy-committee/news/97254/post-office-mediation-scheme-and-the-horizon-it-system/>.

<sup>13</sup> Paula Vennells, Business, Innovation and Skills Committee, Oral evidence: Post Office Mediation, HC 935, Tuesday 3 February 2015

<sup>14</sup> Letter to George Freeman MP dated 26 June 2015, available at [https://data.parliament.uk/DepositedPapers/Files/DEP2015-0555/Baroness\\_N-R\\_to\\_Andrew\\_Bridgen\\_MP-Post\\_Office\\_Horizon\\_System.pdf](https://data.parliament.uk/DepositedPapers/Files/DEP2015-0555/Baroness_N-R_to_Andrew_Bridgen_MP-Post_Office_Horizon_System.pdf).

<sup>15</sup> Womble Bond Dickinson (International) Limited.

the current review), Post Office Ltd and Cartwright King must be prepared to keep under review, and reconsider, past case reviews and disclosure decisions.’ (paragraph 5(xii))

In the next sections, we will assess the claim to fundamental soundness. Our conclusion is that, at best, this is an optimistic construal of the somewhat shaky evidence base before Mr Altman KC. To be fair, many of the flaws with the review *are* raised in the Executive Summary of the General Review (as set out in paragraph 5). Examining in depth the way the problems are described by Altman will enable the reader to judge if this overall judgement appears to be either wrong or overly generous.

The General Review concentrates on two main questions on the CK Sift. The first question is scope. Cases were quickly reviewed to see if they were prosecutions which had been based on Horizon evidence within the relevant time-period (from 2010 onwards). The second question is about disclosure. If the cases were based on Horizon evidence and within the time-period, the cases went to a full review which decided whether the Second Sight report and the Rose report (see below) were to be disclosed. Understanding decisions on the time-period requires us to look at the third major element of the General Review, Altman’s handling of the ‘Gareth Jenkins problem’.

### The relevant time-period

The CK Sift was deliberately limited to cases involving shortfalls identified by Horizon after 1 January 2010. The logic of this time-period was that the Horizon bugs that Jenkins failed to disclose in Seema Misra’s case only applied to Horizon Online, a system in operation from 2010. Cases before that date could thus be ignored.

Altman says, in his executive summary, that the time limits on scope are, ‘logical, proportionate and practicable in light of all the known circumstances.’ (paragraph 5(i)). He does not say the time limits are right, merely that they are justifiable. The reference to *known* circumstances is also interesting given some of the known unknowns that are identified elsewhere in the General Review, a point to which we will return when we look at Gareth Jenkins below.

Altman’s analysis later in the General Review is in tension with this apparent approval. Altman describes Simon Clarke’s reasoning for the time limit,

‘was that any sub-postmasters prosecuted under the former Horizon data regime would have served any sentence of imprisonment or performed any unpaid work requirement or paid a fine; and at all events the publicity from SS’s report would put those defendants on notice.’ (paragraph 62)

This reasoning shows Simon Clarke basing the scope of the review on a factor that is patently, one might fairly say, crassly irrelevant. The logic is older injustices would be just irrelevant as merely historical matters. Altman notes people who have served their sentence nevertheless, ‘have an interest if their conviction was unsafe.’ Altman also says, ‘Resourcing and POL’s reputation are also beside the point,’ suggesting that these two further factors have inappropriately influenced Clarke’s decision-making. And that when he, ‘queried the rationale behind the cut-off date,’ he was told, ‘prior to each branch rollout, a cash audit was done so that each branch balanced,’ and that this justified the date being chosen. Offering the cash-audit point might suggest this is a post-facto rationalisation rather than a well-justified time limit, founded on a considered decision at the time. The cash-audit would also have depended on the accuracy of Horizon data, a point not mentioned in the General Review.

Interestingly, although approving the time-limit, Altman’s concerns, expressed in his interim review, seem to remain in residual form:

‘I advised in the conference and repeat here that although POL has no positive duty to seek out individuals before the 1 January 2010 start date for a review of their case, nonetheless if POL was approached it would need to make ad hoc case-specific decisions about the need for disclosure.’ (paragraph 64)

One such case would have been Seema Misra’s case<sup>16</sup> and Altman is plainly very aware of it. One interpretation of this is that he is warning the Post Office that the 2010 date might not hold, whilst also suggesting that they can let pre-2010 related cases remain undisturbed, unless they are raised by the defendants themselves. Effectively, it shifts

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<sup>16</sup> The transcript of the trial of *Regina v Seema Misra*, T20090070, in the Crown Court at Guilford, Trial dates: 11, 12, 13, 14, 15, 18, 19, 20, 21 October and 11 November 2010, His Honour Judge N. A. Stewart and a jury, was published in full in (2015) 12 Digital Evidence and Electronic Signature Law Review, Introduction 44; Documents Supplement, available at <https://journals.sas.ac.uk/deeslr/issue/view/328> .

the onus for action; there is no need for the Post Office to be proactive in reviewing such cases, but the door could not be closed to the Post Office needing to take reactive action, if they were approached to do so. There is a caveat placed on any further action – the need for the Post Office to be ‘approached.’ It also conveniently meant that the Post Office would not need to deploy further resources to a wider review.

Indeed, Altman specifically mentions Seema Misra’s case as an example of the type of case where, ‘the issues raised in the case, which were made late by the defendant in one or more defence statements, were very similar to those generally being raised currently in relation to the Horizon Online system.’ (paragraph 65)

It is a subtly made point if it is being made deliberately; Seema Misra was raising a concern about the system pre-2010 which suggested the type of bug discovered in 2010 might also have existed before Horizon Online was introduced. He seems to be saying, if other cases raise a similar defence, adding weight to Seema Misra’s claim, then this would suggest the 2010 date might be wrong. And so, ‘if POL was approached it would need to make ad hoc case-specific decisions about the need for disclosure.’ (paragraph 64)

Altman finds another reason to support the 2010 cut off. Second Sight’s review, in his words, ‘not discovering (by that time) bugs with the Horizon software that predate 2010’. And so, he concludes:

‘In my judgment, the 1 January 2010 start date for CK’s review is both a logical and practicable approach to take. That is not to say however that if a case pre-dating the rollout of Horizon Online presents itself POL and CK should exclude it from consideration.’ (paragraph 71)

So, the scope test applies generally but the line should not be taken as a hard and fast one. It is a bit of a ‘have your cake and eat it’ argument. The cut-off period is logical, but it should also be ignored in appropriate cases. How the cut-off period could be ignored in appropriate cases is not made clear. Unless the defendant asked them to review a case or CK spot something that suggests an ad hoc review is merited. On the latter, if they are excluding pre-2010 cases from anything more than a cursory look, it is unlikely to arise.

This suggests that Altman is not confident about the January 2010 cut-off which he nonetheless formally supports as logical, proportionate, and practicable.

It is also worth noting that the view that the January 2010 cut-off had been decided in, ‘a telephone conference held on 4 October 2013, in which representatives of POL, BD, CK and myself participated.’ There is a possibility, but this is speculation, that Altman has made himself comfortable with a collective view about the time-period and this is a decision that he does not fully share.

Seema Misra’s case was a pre-2010 case in these terms even though her trial took place in 2010, and Jenkins gave what was apparently misleading evidence at it. One would have thought that this gives rise to an obvious question: how can a case involving a witness deemed unreliable by Simon Clarke’s advice, not automatically require disclosure of information indicating his unreliability? It is not a question answered in the General Review, although Gareth Jenkins does feature as a particular focus of discussion and advice.

### **Relying on evidence from Jenkins**

There is another rather startling problem with the General Review. It appears to rely in part on evidence emanating from a witness statement of Gareth Jenkins (dating from 2013) and appended documents (from 2009 and 2012 respectively). Altman justifies it in these terms:

‘Although there are issues about Mr Jenkins’ independence and objectivity (with which I deal below), I am content to rely on Mr Jenkins’ witness statements (based as they appear to be in whole or in part on the Horizon integrity reports) for these purposes as providing a reasonably adequate, and almost certainly accurate, summary of the Horizon system.’ (paragraph 16)

Altman sets out points of relevance from this evidence that include:

1. The sense that Horizon Online was ‘a complete re-implementation of Horizon’ which ‘utilised a central database to hold details of all transactions rather than the Message Store used by the original Horizon system.’ Complete reimplementation is a strange phrase, it suggests both that the system is (completely) different and it is the same (a reimplementation).

2. The scope of the CK Sift is confined to 2010 onwards because Horizon Online is felt to be different from legacy Horizon.
3. The timing of migration from the original Horizon system (again critical to the temporal scope of the review).
4. Descriptions of how Horizon stored and replicated counter data, captured data failures, created and securely stored audit files against tampering and corruption (paragraph 19) detected lost records (paragraph 20) and rendered failures visible to the user (paragraph 21).'

The description of Horizon is extensive and would, to most readers without knowledge of the case in the light of history, convey a sense of a system that was inherently accurate and secure. A particular and important point that arises from reliance on Jenkins' evidence is that it is very difficult to see how one could come to view that the time-period of the review is correct without understanding the changes made in Horizon in 2010 and the way that Horizon operated before and after this date. Mr Jenkins is seen as an unreliable witness, and it is clear they have not been able to identify an alternative expert.

The idea that Horizon Online is significantly different from the Horizon system pre-2010 is a fundamental assumption. Other than this passage describing information provided in Gareth Jenkins' witness statements, and a reference to Second Sight not discovering pre-2010 bugs, it is an assumption without any evidence which should have been explored and subject to critical, and perhaps expert, scrutiny. Indeed, as we have seen above, Altman has spotted that Seema Misra's case suggests the post-2010 type problem may also have arisen before the 2010 cut-off date. It is possible that Altman's references to the potential for new material coming to light over and above the Second Sight and Rose reports through hub meetings and complaints from other 'pre-2010' sub-postmasters are relevant here also.

This must accentuate doubts about the appropriateness of the scope test and may indicate that Altman, though suggesting his ad hoc approach, and his awareness of Seema Misra's claim, had doubts too.

### **If the case is in scope, is it one requiring disclosure?**

The temporal scope is one of two absolutely critical substantive judgements made on each prosecution review by CK. The second is once a case is in scope (and therefore reviewed), whether disclosures needed to be made.

The most fundamental question about the review is the test applied to decide whether evidence needed to be disclosed. CK concentrated on whether disclosure of the Second Sight and Rose reports should be made. This might well have been too narrow an approach, but for now let us concentrate on a more basic question: in reviewing cases during the CK Sift, were CK using the correct test to decide whether for any Horizon Online case, disclosure of those two reports needed to be made?

Altman's answer, in essence, is they have documented the scheme using the wrong tests, but *generally* seem to have been applying the right tests *implicitly*.

CK documented their tests. And the tests used were, Altman advised, the wrong tests for disclosure. CK relied on the tests, 'under the CPIA [Criminal Procedure and Investigations Act], the Code of Practice made thereunder, the Protocol for the Control and Management of Unused Material in the Crown Court, and the Attorney General's Guidelines on Disclosure.' Essentially, they posed themselves the question of whether the relevant materials would have been required to be disclosed had they been available during a particular prosecution (the disclosure test). So, in the case of the Second Site report, they asked:

'Had POL been possessed of the material contained within the Second Sight interim report during the currency of any particular prosecution, should/would we have been required to disclose some or all of that material to the defence?' (paragraph 75)

It is that question that CK state has defined their approach to the issue. Importantly, CK's approach seems to explicitly rule out considerations of safety (paragraph 175), despite these issues being tightly linked to issues with disclosure. However, Altman notes that technically the disclosure test that CK used did not apply to the cases being considered as part of the Sift, since they were not active trials. Rather a general common law duty applied to disclose evidence that might cast doubt on the safety of the conviction (the safety test). Safety is clearly relevant to this test.

Although the disclosure test CK used is arguably as or even more exacting a standard than the safety test, Altman appears worried about the way in which CK's testing document appears to exclude the consideration of safety while sifting cases (paragraph. 175). He seems to suggest that safety should be considered, but then that it does not matter that it is excluded from the test because it is sometimes considered anyway. In 'the full reviews,' Altman says, 'counsel **do not always** limit themselves to making decisions on disclosure,' [our emphasis] and look at 'a realistic prospect of conviction' for live cases, applying the test where some decisions 'might, objectively, be regarded as generous,' to discontinue cases. In reviewing past convictions,

'counsel **tend** also to provide advice about what POL or CK's stance should be to possible appeals by offenders to the Court of Appeal, **which must mean consideration of the "safety" of the conviction**, thus the likely stance to any application for permission to appeal the conviction based on the disclosed material and/or to any substantive appeal, if permission is granted.' [our emphasis] (paragraph. 84)

Altman also made it clear to CK in conference that they must be alive to changing circumstances. 'They must therefore not adopt an over rigid approach; each case must be approached on a case-by-case basis.'

Notice what Altman seems to be saying is that counsel should consider safety, and 'tend' to (so do not always) advise on appeal stances which implicitly ('must') but do not *explicitly* involve thinking about the safety of convictions. So, Altman is inferring or assuming tests on what he is seeing in the reviews rather than the tests as documented by CK and he is only saying a safety test, which he suggests is the correct test to apply, is being applied in a proportion of cases. Also, note Altman warns against over-rigidity.

Furthermore, for full reviews,

'The instruction provided that **it is not necessary to consider whether or not a conviction may be said to be "safe"**, which is a consideration for the Court of Appeal, appears to me generally to be ignored.' [our emphasis] (paragraph 91)

So, the Sift instructions say ignore safety but Altman suggests safety should be considered (and that generally, implicitly it is). Whilst one could argue, as Altman appears to, that pragmatically the tests are sufficiently similar and safety considered sufficiently regularly, albeit implicitly, for this not to be a substantial problem. Equally, we wonder if Altman's own analysis dwells on safety more than appears consistent with this relaxed view and we struggle to understand from the text of the General Review itself why. It is certainly open to question whether a procedure which specifies the wrong test and excludes from consideration what is implied to be a highly relevant point (safety) is fundamentally sound because the reviewers are generally, implicitly ignoring the instructions they have been asked to follow and are looking at safety anyway.

It is a generous interpretation of fundamental soundness. A basic requirement of a fundamentally sound process would be a) documenting and b) applying the right tests to c) each case, particularly where something as important as the safety of a conviction is at stake. What he does not say is the correct test appears to be being applied to every case he has reviewed. The Sift fails a, and sometimes fails b or c.

We can get a sense that consideration of safety is important, and that Altman recognises this, because elsewhere in the General Review there is a more explicit discussion of the obligations of the Post Office in cases post-conviction. Here Altman says the following (paragraph 126):

'Following the conclusion of the proceedings, POL has a general common law duty to act fairly and to assist in the administration of justice.

... as there are (so far as I know) no appeal proceedings outstanding that relate to Horizon issues but POL has, in the special circumstances obtaining here, very properly acknowledged its duty to consider cases for disclosure, which is inevitably interlinked with considerations of the safety of convictions.'<sup>17</sup>

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<sup>17</sup> *Makin v R* [2004] EWCA Crim 1607, <https://www.bailii.org/ew/cases/EWCA/Crim/2004/1607.html> ; and see paragraphs 59-60 of the Attorney General's Guidelines on Disclosure: ("... if material comes to light after the conclusion of the proceedings, which might cast doubt on the safety of the conviction, there is a duty to consider disclosure."). [This is as quoted in a footnote to para 1266 in Mr Altman KC's General Review]



As noted above, he also points out that, as well as erroneously purporting to exclude a consideration of safety, CK is using the wrong test in another, perhaps more technical sense, using the 'CPIA' test (which would guide disclosure obligations pre-conviction) although in substance he says this would make no difference, 'it is hardly likely to be criticised for doing so'.

Overall, and this presumably helps him form the view that the review is fundamentally sound,

'CK has **tended** also **to advise** on its likely stance to any application for permission to appeal, or to any substantive appeal, should permission to appeal be granted. That **amounts to consideration of the safety of the conviction.**' (our emphasis) (para. 162)

The CK lawyers *tend* to advise in a way that *amounts to* considering safety even though they say they are not considering the issue of safety. Altman's analysis suggests considerable unease about an issue central to the whole process which as we have noted elsewhere is not apparently wholly met by their application of the CPIA test. Towards the end of his opinion, he summarises the position as follows in a way which seems to capture his ambivalence:

'Although CK points out that it is unconcerned with the question of the safety of convictions, there is an inexorable link between the disclosure decisions it makes and the view it might take towards possible appeals, based on its view of the strength overall of the other evidence in the case. It is right to observe that even where there has been non-disclosure in a given case that does not mean that any appeal based on it is likely to succeed. But CK must not adopt any over-rigid or overly robust approach to any possible appeals, and should be prepared to adapt to the circumstances of individual cases.' (paragraph 175)

CK are applying a test inexorably, implicitly, most of the time rather than clearly, explicitly, all the time, in accordance with accurate guidance. Moreover, the concern about being overly robust might suggest inflexibility in the application of the very safety test that they are applying only implicitly.

Any suggestion that such a process is fundamentally sound is generous; it may be consistent with the approach in criminal appeals to harmless error, but the number of such errors appears high and the lack of independence significant in the extreme. It also suggests a form of post hoc rationalisation – 'the tests that should have been properly applied were not, but it is ok because a by-product of what they did, might have filled the gap.' A question for the Inquiry will be whether it was the kind of view to which a reasonable practitioner of Altman's considerable experience and skill, with the material before him, could reasonably come to.

### The abandonment of a safety review?

It should also be noted that a review of the safety of convictions was taken out of the terms of reference at some point. The ways in which the safety question makes its way back into the analysis suggest the problems with this limitation.

More importantly, it is also suggestive of a review which is less searching or questioning of the quality of the CK Sift than it could have been and perhaps of how it was planned to be. This would be consistent with the ways in which the potential for further disclosure through, for example, the mediation process, is seen as a risk. Conversely, it may indicate that Altman and/or the Post Office had planned to review the safety of convictions more fully but was persuaded by the perceived quality of CK's work that this was unnecessary.

The general concerns about quality which we identify in this report and Altman's identified concern about inflexibility would not be consistent with this, but that does not mean it was not their justification.

### The problems Altman identifies with the CK Sift

Whilst Altman says the CK Sift review is fundamentally sound, a premise that our analysis suggests is unjustified, he does identify several problems with the CK Sift. Many of those problems are given reasonable prominence in his executive summary (paragraph 5).

According to Jason Beer KC, in his opening submissions to the Inquiry,<sup>18</sup> in the early stages of his work Altman picked up concerns about the Review, being 'limited to Cartwright King cases, and English Cartwright King cases, and the

<sup>18</sup> <https://www.postofficehorizoninquiry.org.uk/hearings/opening-statements-12-october-2022> .

temporal limit that had been applied. This had been limited to a period of only three years.’ (page 137, 21-22). The concern about it being confined to Cartwright King cases is not reflected in the General Review document.

CK were advised against adopting an ‘over-rigid or robust approach, and must remain alive to changing circumstances and the need always to reconsider their stance,’ (paragraph 5 (xiii)). Altman never identifies precisely what it is he is concerned about here. It appears to be a substantial concern based on things he has seen happening, but he is not clearly identifying it. This is especially important given the apparent, potential interest of the Board in his advice.

Altman is also concerned there has not been, ‘an analysis for reconciliation purposes of all Second Sight’s spot reviews,’ with CK’s Sift reviews (paragraph 5(xii)). It follows that CK had not compared the results of their own review with a critical external benchmark available to them – indeed a benchmark that had been prepared by a company that was independent of the Post Office.

The executive summary also confirms that a second initial Sift review was required part way through the process suggesting the first initial Sift had been inadequate.

There is an extended discussion of the counting and recording of reviews that suggest that CK have not been able to accurately record the numbers of cases they have reviewed. The extensiveness of the discussion suggests this very basic point is more than a clerical error.

Altman raised concerns about individual lawyers within CK having reviewed their own cases, or cases they were involved in, when conducting their reviews. He softens this by saying also, ‘there is benefit in Cartwright King and its internal counsel identifying and engaging in the review of impacted cases, as they are familiar with their case files and intimate with the process’ (page 138, 7).

Altman recommended some corrective steps to the marking their own homework problem (paragraph 5(iv)). There is some suggestion that these corrective steps, which had been recommended during his interim review (paragraph 94), had not been adhered to; he noted that two solicitors were ‘involved in sifting some of their own cases’ (paragraph 93) and ‘[s]ome of the barrister reviewers have occasionally had some input into cases’ (paragraph 93). Altman again comforts himself and the Post Office that these might be addressed by a re-Sift by ‘senior counsel’. Although he says, ‘it would be better if those cases were not re-sifted by counsel if they were involved in prosecuting the case at trial or advising on any aspect of it,’ (paragraph 96) he does indicate that it needs to be done; the issue of prior involvement is thus not, it appears, fully addressed.

Such concerns place to one side the more fundamental question, which is whether it is possible for an independent review to be conducted by the same firm that conducted the original work. Independence is a matter which Cartwright King solicitors and barristers would have been required to have proper regard to as solicitors under their own Code of Conduct. It is hard to see such a review as anything other than compromised by this prior involvement. Whether they knew this or not, the review was used covertly it seems, to limit the impact of Second Sight’s work that had prompted CKs involvement.<sup>19</sup>

Altman addresses this with curiously tentative language when dealing with the ‘possibility of the suggestion of a commercial conflict of interest, given CK’s professional relationship with POL and the fact that the very counsel and solicitors making decisions about POL cases are those who rely on CK and POL for this work.’ And says this:

‘I have considered this issue with some care and, having met with representatives of CK, and having considered the many Advices and other material I have seen emanating from CK representatives, I have seen no evidence other than a professional and independent approach to this review. Consequently, on the material available to me, I would reject any suggestion that CK’s solicitors and counsel cannot act, or have not acted, with an independent and professional approach to the Horizon issues, which have arisen, and to their review.’ (paragraph 99)

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<sup>19</sup> Our understanding is that Second Sight experienced a change in the levels of cooperation from the Post Office at around the time of, or subsequent to, the review by Cartwright King. They were not, as far as we are aware, told of their review but were told by Post Office’s acting GC that they could not have access to prosecution files. They had previously been allowed access to these and had raised problems with investigation and prosecution as a result.

Reading between the lines, this suggests there was some discussion, and perhaps, but this is speculation, pressure, around this issue. The scope of the review was not settled until late.

It is notable he does not discuss in this context his concerns about CK employing an overly rigid approach, or Simon Clarke's flawed reasons for suggesting the first January cut-off (see below), nor the post-facto rationalisation of those same time-limits, the writing and application of incorrect tests to safety issues, and the failure to fully implement his recommendations on avoiding lawyers in reviewing cases that they had some role in.

Many of these phenomena could be explained by any lawyer at CK consciously or subconsciously struggling to deal with their lack of independence.

Importantly, Altman also says,

'As a cautionary warning, I have noted from the product of the hub meetings that there appeared to be possibly greater focus on the fix to a problem rather than focus on actioning the issue for the purposes of disclosure. While the hub meetings may well serve a dual purpose, the central point of the hub meetings must not be overlooked or marginalised.' (paragraph 118)

This too might well be explained by the same struggle with independence and prior involvement. This is important because the CK Sift concentrated purely on whether the Second Sight Interim Report and the Rose Report need to be disclosed, whereas the hub meetings, Altman says, have,

'produced information, which requires further investigation, and they and other future issues may highlight other Horizon-based issues, which POL was previously unaware of. CK must keep an open mind to any new Horizon issues as they arise and if it is considered that any information emanating from the hub meetings affects, or might affect, any of the cases previously sifted or fully reviewed, then CK will have to remain alive to the possibility of broadening the criteria for the review and having to re-Sift or re-review cases already considered, both past and pending cases.' (paragraph 113)

All of these problems, recognised by Altman, might cause one to pause and ask whether a claim that the process was fundamentally sound, and conducted professionally and independently, was justified.

The hub meetings also lacked, 'a person who is nominated to take responsibility for its management.' Hub meetings were set up to coordinate and manage disclosure within the Post Office.

### **The comfort blanket? Context, tone, and language**

Jason Beer KC's opening submissions to the Inquiry suggest a need to look at the broader context to understand why and how Altman was instructed. Beer points to another Altman Advice in December 2013 where (at page 141, 17), 'He concluded that there was no good reason to recommend that the Post Office should discontinue its prosecution role.' Beer draws attention to that advice recording that Altman,

'...had been First Treasury Counsel and was, amongst other things, a recorder of the Crown Court and a Bencher of Middle Temple.'

The Inquiry will consider what role advice of this kind, presented in this way, had in the Post Office's subsequent conduct and whether advice of this kind provided the Post Office and its leadership with a comfort blanket.' (page 141, 23)

Saying that a General Review is fundamentally sound when it has the problems described above suggests that the review was conducted and written with the giving of comfort as a central purpose. We have discussed in our paper on the Swift Review some of the psychological biases that lead lawyers to tell clients what they want to hear, rather than what they should hear when conducting independent reviews.<sup>20</sup>

It is also important to note that Altman's interim review was conducted on a shallow evidence base but came to the initial conclusion that the CK Sift was fundamentally sound.

It is not clear what the evidence base for the initial review was, but he had not, for instance, received the 31 full case reviews which he considers as part of the final General Review (see paragraph 4). Altman's basis for concluding it

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<sup>20</sup> Moorhead, Nokes and Helm, 'The Perils of Independent Review The Swift and Knight Review: Working Paper 5'.

was fundamentally sound by the time he comes to write the General Review appears to rely substantially on the 31 reviews as a counterweight to the inadequacies in the other evidence (notably the written procedures, which he presumably had early in his work). This raises the interesting question as to what his initial view was based on. His initial review might be expected to have included documented sift criteria, for instance, which were plainly so lacking in accuracy and justification.

There are many potential examples of optimistic or generous construal of the evidence, and language, that provide a marked contrast to, in particular, Simon Clarke's advice of 2013. An interesting question is whether such choices are deliberate or simply reflect a judgement that the problems which Clarke had considered as profound, Altman sees as much less serious. We now set out examples of occasions where the analysis or the language used may be overly generous.

Altman uses a minimising tone about the non-disclosure problem. For example, 'anyone who wants access to the SS report can gain it through POL's website.' This is one of several examples where something factually true (they could get Second Sight's report if they looked for it on the website) but legally largely irrelevant (because the Post Office were obliged to disclose it) is used to counterbalance a problem for the Post Office presentationally only.

The Rose report he says, 'adds very little, it seems to me, other than to point to a particular issue at Lepton, and the implication from the report that as early as February 2013 Gareth Jenkins was aware of integrity issues with Horizon, none of which he revealed.' (paragraph 173) Clarke's advice later that year was that Jenkins presented a profound problem concerning Post Office prosecutions past, current, and future. The conclusion that Clarke came to was that Jenkins could not be used as a prosecution expert again. It was a disaster for the Post Office as a prosecutor. And yet, Altman's language appears to be defusing the situation and doing so without getting any evidence mitigating Jenkins' apparently 'tainted', in Altman's words, evidence.

Similarly, elsewhere in the General Review, we see the concerns about the shredding of disclosure records raised in Clarke's August 2013 Advice in firm language emphasising the potential professional misconduct and criminal offences posed by such behaviour, described as, 'early teething and "cultural" problems' (paragraph 112). There is no discussion at all of the alleged shredding of documents by the Post Office's Director of Security. A critical question is why is this, for a review which is designed to advise or reassure the Board? One possibility is that some in the Post Office are keen to keep the shredding concerns from documents which might go to the Board.

Although Altman is asked to identify, 'any flaws in the process' problems with the review *as conducted* are not framed as problems that *have arisen* but as matters which need to be considered as the review proceeds (paragraph 5 (iv) (vii)(ix)). This helps give the impression that Altman might be helpfully pointing out risks that they can successfully manage rather than identifying problems in the process which might lead one to question its soundness.

This is particularly true of the executive summary but even in the more detailed review, where one gets a sense that some of the problems had actually manifested, they are described as recommendations to guard against future occurrence rather than as identified flaws that have arisen. The tenor is: this might be a risk rather than this has happened. Hence, where Altman says, 'they should not adopt an over rigid or robust approach,' this is consistent with having seen some evidence of rigidity or robustness problems, but Altman is not explicit about what those problems are. It may also reflect a desire on Altman's part to be seen not to be giving carte blanche to CK in future reviews where cases outside the 2010 deadline raise safety concerns.

It is arguable that the problems with Mr Jenkins are downplayed. Altman discusses, in a rather academic way given he accepts that Jenkins is tainted and cannot be used, that there is 'no impediment' to an employee giving expert evidence (paragraph 138). What Simon Clarke saw as profound unreliability Altman says raises, 'issues about... Independence and objectivity' (paragraph 16). The potential conflict-of-interest as an employee giving expert evidence is downplayed (paragraph 139). Jenkins' prior knowledge of integrity issues whilst a 'grave concern' (paragraph 142) also merely, 'lends itself to the reasonable interpretation' that he had not been candid in his evidence and is treated as something which, 'may be argued, possibly correctly' as not amounting 'to very much in terms of the overall integrity of the system'. The tenor is very different to the June 2013 advice from Simon Clarke.

Altman identifies in a subtle way the fact that Jenkins' knowledge about integrity problems might go beyond the two defects identified in the Second Sight report ('his true level of knowledge about the integrity of the system *in general*, and two defects in particular, was far greater than he was prepared to reduce to writing...' (paragraph 144,

our emphasis). At no point in Altman's opinion is the potential significance of this known unknown developed. Altman suggests that it may arise in the future that Jenkins be asked to explain himself but does not more directly address the possibility that Jenkins' prior knowledge may be worse than already appears.

There is selective reporting of Second Sight's Interim Report, with Altman very clearly emphasising the positives for the Post Office from it (paragraph 35 and paragraph 70) and taking one conclusion of their review as the central conclusion, i.e., that there is no systemwide problem with the software (paragraph 38). Reporting of Second Sight's extensive concerns about the lack of training and support are confined to three lines. Whilst there is a detailed rebuttal of the impact of identified bugs, which emphasises, where Altman is able to, the absence of financial loss, there is no detailed consideration of the contents of Second Sight's spot reviews.

In paragraph 50, there appears to be a recognition of the fact that Horizon system data does not accurately record 'system created reversals' so as to ensure they were 'clearly identifiable'. This appears to be a recognition of secret, or poorly documented, remote access altering Horizon entries. If Altman understands the problem, and that is debatable, he does not clearly identify it in his opinion. Secret remote access is crucial and became central to the Bates litigation. It may be another example of oblique identification of problems, or it may be a failure to spot the significance of the evidence before him.

Paragraph 57 on the genesis of the CK Sift centres on, 'POL, having accepted that in light of SS's interim inquiry report appropriate action had to be taken by it towards cases that might be impacted by their findings.' The language is curiously tortuous. The cause of the review appears in reality to have been the discovery of the Gareth Jenkins nondisclosure, not Second Sight's Interim Report. This may be another example of downplaying the significance of Gareth Jenkins or trying to treat the Second Sight and Rose reports, rather than Jenkins himself, as central.

One possible interpretation of paragraphs 64-66 is that Mr Altman KC is pointing out, in an oblique way, that Seema Misra's case is an example of the problems with the 2010 deadline and that her case would need to be considered for disclosure on an ad hoc basis. His defence of the 2010 date as 'logical and practicable' is immediately followed, in the same paragraph, by the need to look beyond this deadline should a case raise 'thorny technical issues'. In this way difficulties with the 2010 deadline are being stated, but in an oblique way, which allows such problems to be dealt with in an ad hoc manner. It raises the issue to the Post Office that they should look, but only if 'thorny' issues arise.

One of the Sift tests ('Was or might Horizon reasonably have been more than just the information provider?') Altman says was somewhat cumbersome but is excused as being caught by a second Sift which means the question 'may be sufficiently understood'. It reads like post-facto rationalisation of a problem.

Paragraph 134 discussed CK's pro forma letter and evidences the view that CK are applying the wrong test when making disclosure. Altman describes the letters as 'not strictly accurate' but offers a justification which is that the test they appear to be applying, is not, 'necessarily misplaced.' (paragraph 135). These letters could have had the effect of disguising the real reason for disclosure (that the disclosed material casts doubt on the safety of the conviction). This is only indirectly addressed by a suggestion that reference to safety is included in future letters.

There are other examples already discussed in previous sections. The analysis of the way the tests are designed and applied to sift and then disclosure in cases is replete with the benefit of the doubt being given to CK. The potentially significant failure to compare what Second Sight says in their spot reviews with what CK report in their Sift and full reviews is presented obliquely as a suggestion they conduct, 'an analysis for reconciliation purposes'. And Altman's criticism of the training material is described as an inability to reach a positive conclusion about it (paragraph 27) whilst the substance of his analysis suggests what he was told about training bore little relation to the training as experienced by sub-postmasters and sub-postmistresses. This is another example of an obliqueness about a substantial negative. It is important not least because he recognises elsewhere the importance of training and related matters to sub-postmaster cases about Horizon (paragraph 56). The point that CK do not appear able to accurately record the number of reviews done, a basic failure, is obliquely referred to as 'the statistical position'.

### Prosecutorial failure

A question raised by, and discussed to a degree in, Altman's review is how far from a prosecutor's obligation of fairness extend beyond conviction itself. The leading case of *Nunn* suggests a duty to cooperate reasonably with

reasonable defence requests for post-conviction disclosure.<sup>21</sup> The case does not deal explicitly with the obligations on prosecutors when they, rather than the defence, discover problems which might need to be disclosed or investigated but Altman recognises an obligation to be fair. It is open to question whether this recognition is borne out by his more specific advice.

In parallel to the CK Sift, a mediation scheme was created to deal with complaints being raised by dissatisfied sub-postmasters and sub-postmistresses, some of whom had been convicted as a result of evidence of Horizon shortfalls. Interestingly, Altman sees this as risking unnecessary disclosure. ‘Cartwright King should,’ he advises, ‘exercise supervisory control over the dissemination of information and material during the mediation process.’ Whilst he suggests this may give rise to the discovery of situations where further disclosure was necessary, the stronger view seems to have been the ‘concern that offenders might use the mediation scheme to gain information as a platform from which to launch a fresh or new appeal, and so CK wish to exercise a measure of control over the dissemination of information and material during the process.’ (paragraph 129)

And there is also some comment on Second Sight potentially being ‘directly involved in the mediation process, which adds yet another dimension of possible uncontrolled dissemination of information and material.’ Similarly, ‘If there is any Horizon-related civil litigation between any present or former sub-postmaster and Post Office Ltd, Cartwright King should be given complete visibility of the litigation in case this should affect any decisions they are making about criminal cases.’ (paragraph 5(xvii))

Interestingly, given that Altman recognises that the mediation might give rise to a legitimate need to disclose evidence in relation to criminal convictions, in September 2013, Altman had advised the Post Office against allowing the convicted to participate in the mediation process, ‘I thought there lurked real dangers in it,’ he says. Whilst he was against it, he saw some tactical advantage for his client; forestalling any potential need for the Post Office to refer cases to the Criminal Cases Review Commission (CCRC). He says, ‘If a policy decision has been taken to permit those convicted of crime against POL to participate in the mediation process, then there is no case to refer convicted cases wishing to engage in mediation to the CCRC.’ And he immediately reiterates his advice, ‘that POL through CK must exercise a measure of control over the dissemination of further information and material to guard against participants using the process as a platform to launch an appeal out of time.’ (paragraph 167)

So overall, the view appears to have been that the mediation scheme increased the risk of inopportune disclosure but decreased the risk of CCRC referral of cases to the Court of Appeal.

An interesting footnote to this tactical point is that Sir Anthony Hooper, Chair of the Mediation Working Party, had, ‘suggested (quite firmly) that it might be more appropriate for cases that have been through the courts to be referred to the CCRC rather than go through the mediation scheme,’ although his view may have softened once, ‘the mediation process and CK’s review was explained to him’. (paragraph 166) So a former criminal judge had said these cases ought to be referred to the CCRC but had relented.

It is of note that it was around this time, that Second Sight reported a change in approach regarding their access to prosecution files as part of their review. It provides important context to evaluate the mediation scheme as a whole and whether the Post Office, assisted by multiple lawyers, was living up to the obligation of fairness required of it.

There are signs within Altman’s advice that might indicate an inclination against disclosure either from Altman or those instructing him.

Whilst Altman warns CK to be on the look-out for legitimate disclosure points, he also says,

‘Given the adverse publicity about Horizon thus far, it would be unsurprising if a “bandwagon” effect were soon to be evident (if not already so) and even in those cases where Horizon was not in issue at trial or before a plea of guilty may, following a process of post-rationalisation, suddenly become Horizon issue cases.’ (paragraph 55)

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<sup>21</sup> *Nunn, R (on the application of) v Chief Constable of Suffolk Constabulary* [2015] Crim LR 76, [2014] 2 Cr App R 22, [2015] AC 225, [2014] 4 All ER 21, [2014] 3 WLR 77, [2014] UKSC 37, [2015] 1 AC 225, [2014] WLR(D) 265, <https://www.bailii.org/uk/cases/UKSC/2014/37.html> .

The executive summary records that a decision was taken to exclude Fujitsu from disclosure meetings. This would seem to us to make disclosure of evidence less likely as it would reduce the chances of Post Office becoming aware of disclosable evidence that only Fujitsu would be aware of. Altman says,

‘I advised at the conference that I had considered whether or not FSL should be invited to participate in the Wednesday hub meetings, but upon mature reflection I considered they should not be, and should be kept at arm’s length as a third party.’ (paragraph 121)

An important question is why?

And as noted above, either Altman, the Post Office, or the solicitors instructed by the Post Office, had decided against him considering whether the convictions being reviewed were safe,

‘After consideration, my remit was not broadened to encompass advice upon the “safety” of any of the Horizon-based convictions, and CK’s review has essentially been limited to the review of the question of disclosure in past convictions and in present and on-going prosecutions.’ (paragraph 161)

Jason Beer KC discusses the inhibitory approach to disclosure marked in part by Altman’s advice in these terms, specifically raising Seema Misra’s appeal being 8 years after Altman’s involvement, ‘What role did legal advice of this kind’, he asks, ‘provide about exercising considerable caution in relation to mediation cases?’ (page 140, 5-6)

We can say with little doubt that it made the earlier disclosure of that information less likely. The question to be asked seems to be, was legal advice being used as a comfort blanket but also a smotherer of disclosure?

Given Seema Misra’s prominence in Altman’s General Review advice, and Beer’s question, we note a remark made by Mr Altman KC in the Court of Appeal when discussing why it was that Seema Misra did not receive the disclosure she ought to have done in her trial.

‘The why, the why it didn’t happen, we have put, you may recall, in our short response skeleton of 8 January. We don’t know. Was it incompetence? Was it individuals not understanding their duties? Or was it deliberate? There is no evidence before the court to say which it was, but the plain fact of the evidence is it was not disclosed ....’<sup>22</sup>

It may be true to say he does not know why disclosure was not made in her trial, and that may be all he is talking about here, although the 8 January response deals with both disclosure at trial and allegations that disclosure subject to trial (up to and including 2013/2104) was part of the Ground 2 basis of these appeals.<sup>23</sup>

It is another interesting example of the way in which his role in the Court of Appeal hearing comes into tension with his prior role in 2013 and beyond (Altman and Johnson in their written submissions to the Court of Appeal argue that post-conviction behaviour is irrelevant to a Ground 2 appeal against her conviction). The resistances to disclosure in 2010 which so concerned the Court of Appeal continued well beyond 2013 were based, in part, on Mr Altman’s advice. The General Review also presumably informed Paula Vennells’ testimony to the Business, Innovation and Skills Committee on 3 February 2015 that there were no concerns about the safety of convictions.

### Failing to address the known unknown

Knowledge that Jenkins may have been aware of more integrity problems than the two bugs identified in Second Sight’s report raises the final central problem with the General Review. The General Review proceeds without, it seems, Jenkins being spoken to in-depth about the omissions in his original evidence.

A fair prosecutor could discover whether the problems in his evidence were aggravated or assuaged through such an investigation. The tactical reasons for not doing so are obvious; if they find out it is worse than they think then their disclosure problems get a whole lot bigger. Perhaps the Post Office did not want to risk further jeopardising the prosecutions they had conducted and were about to conduct. The principled reasons for doing so nonetheless are, we would venture to suggest, stronger; and it is arguable that a prosecutor’s obligation of fairness demand it.

<sup>22</sup> ‘Day 2 Transcript: Court of Appeal Hearing *R v Hamilton*, accessed 26 April 2021, <https://www.postofficetrial.com/2021/03/day-2-court-of-appeal-hearing-42.html> .

<sup>23</sup> Brian Altman KC and Zoe Johnson KC, ‘R-v Seema Misra, Response to Draft Case on Second Category Abuse of Process of 11 December 2020’ (2021) paragraphs 24–29.

We should wait to hear the reasons why this was not done but it should be pointed out that Altman's terms of reference made clear to him that he could, 'meet and interview as a fact-finding exercise anyone else you or POL consider relevant to the process **of the investigation and commencement of prosecutions.**' (Paragraph 2.4, our emphasis). An interesting question is whether factual points *beyond* the commencement of proceedings were beyond the scope of his Inquiry and so prevented him speaking to Jenkins. If so, why was this ruled out of scope? And by whom?

As noted above Altman is interestingly emollient about Jenkins' ability to give evidence as an expert in theory; Jenkins' and the Post Office's culpability appears to be subtly reframed to reduce the intensity of his failure, and to absolve the prosecutor of some responsibility, whilst rehearsing the kinds of arguments that might be made to defend an appeal. Notably, also, although Altman notes Clarke's view that Jenkins' credibility is, 'fatally undermined, and that he could no longer be relied upon to give expert evidence,' he does not formally endorse those conclusions, instead he says this:

' 148. **I am not clear** whether Mr Jenkins was challenged about the non-disclosure to POL and, if so, **what the explanation was** for it. But given the SS inquiry, based in part on his revelations, has led to the current review, Gareth Jenkins is **to that extent** tainted and his future role as an expert is untenable. It should be remembered that POL had been unaware of the existence of the second of the two defects revealed to SS by Mr Jenkins until a year after its first occurrence.' [our emphasis]

Not being clear on such a point strikes us as incredible. It suggests the CK Sift, and the Altman General Review proceeded without understanding how extensive the 'Jenkins problem' was. It contained the problem of the two bugs and two reports identified, whereas it may have been significantly worse than that. And it leaves Altman feeling able to speculate that the problem might not be as serious as it looks. That it might equally be worse, he might also be said to be very subtly, perhaps subconsciously, acknowledging that Jenkins' knowledge of integrity problems might, he says, extend to the 'system in general' beyond the 'two defects in particular.' With what now looks like a sickening irony he also says this:

'How much real capital may be made of the fact that Mr Jenkins will always be a background figure in the Horizon story is impossible to predict. But what I think I can predict with a degree of confidence is that in the hands of capable counsel, more is bound to be made of the non-disclosure issue than the mere instruction of a new expert will resolve for future trials.' (paragraph 149)

If this is the case, it is to be wondered how it is that *any* case which had involved Jenkins could be said to be safe at the end of the CK-Sift. Seema Misra's case, of which Altman is acutely aware, is one such case.

Given that he is, 'asked to consider the impact of Gareth Jenkins on possible appeals' and the potential for Jenkins to loom large in future cases, it seems surprising that Altman neither seeks Jenkins' explanation nor advises that it should be sought. Also, interestingly, Altman emphasises the limited base of his knowledge on Jenkins.<sup>24</sup> He prefers to advise that speaking to Jenkins might be needed should a case go to the Court of Appeal,

'which could require Mr Jenkins to provide a full explanation for not mentioning the two defects he revealed to SS for the purposes of their inquiry, **and any other undisclosed issues** that ought to have been revealed as relevant to any issues raised in the appeal.' (paragraph. 151, our emphasis)

Here, we see Altman acknowledging the possibility that the Jenkins problem might be bigger if only someone looked to check. Instead, everyone seems to have been happy to allow the extent of the Jenkins problem to remain uninvestigated.<sup>25</sup> We expect the Inquiry will examine how this laissez-faire attitude to the 'Jenkins problem' was thought to be justified; perhaps founded on the belief that they could allow the CCRC and any potential appellants to take the lead on potential appeals in spite of the Post Office being advised on their common law obligations of fairness.

Jenkins' presence and absence hangs over the Bates litigation and those who had conduct of it and to a degree it must now hang over the Swift Review. The tainted thread of Jenkins' evidence, evidence which helped send Seema

<sup>24</sup> 'I have only seen and read two only of his reports .... For the remainder, I have taken my knowledge of the general nature of his principal case reports from Simon Clarke's analysis in his Advice of 15 July 2013....'

<sup>25</sup> Where Fujitsu was and is based.



Misra to prison, looks like it ties these things together, and yet no one seemed keen, on what we know so far, to find out how thick that thread was. Save perhaps the Swift team; they met Jenkins, but we gain no clue from the review itself as to what they learned from that.

### Altman and the Flat Earthers

For all that the Altman General Review raises lots of critically important questions about the substance and form of his opinion, there is another serious element.

The solicitors' firm that had provided the instructions on the Altman Review (Bond Dickinson) were, for our purposes, the same firm that had conduct of the Bates litigation as Womble Bond Dickinson (WBD).

Bates is the case that was run, according to Mr Justice Fraser, as if the 'Earth were flat'.<sup>26</sup> Furthermore, two lawyers named in the Altman General Review document are as of April 2023, partners in WBD

This means, barring something remarkable, those conducting the Bates litigation knew, or at the very least ought to have known, about the 'Jenkins problem' in some detail. Bond Pearce (as it then was) also had conduct of the Castleton Litigation;<sup>27</sup> the costs of which bankrupted a sub-postmaster, Lee Castleton. It was recently suggested in the Inquiry that this latter case was fought by the Post Office not to recover the money but to make an example of Mr Castleton.

As we have discussed elsewhere,<sup>28</sup> Mr Justice Fraser's Flat Earth epithet was based on a raft of concerns about the substance of Post Office's case and their conduct in the Bates litigation (2017-2019). In the judge's view, the case was one of bare assertion and denial; pleadings and evidence ran the gamut from weak to wrong to deliberately misleading; and witnesses gave evidence about things that were not within their own knowledge. Some of those witnesses relied on information supplied to them by Gareth Jenkins who, as we know, Altman agrees in the General Review is, 'tainted and his position as an expert witness ... untenable.' (para 5(x))

Instructions for the General Review came through Bond Dickinson, as 'solicitors advising POL'. The Clarke advice came to light when a member of one of the appellant legal teams (Paul Marshall) spotted a notification from Bond Dickinson to the Post Office Board that there was a problem with one of their prosecution witnesses.

Jason Beer KC in his opening statement points to the problem revealed by all of this:

'We know from the Horizon Issues judgment that Gareth Jenkins contributed to the evidence that was relied on in the Group Litigation, albeit the Post Office chose not to call him as a witness and thereby subject him to cross-examination.

The Inquiry will ask whether it was appropriate in the light of the advice received from both Mr Clarke and Mr Altman, to behave in this way, to approach the litigation in this way.'

A sentence with a light touch reveals weighty concerns. In Bates, Post Office's lawyers provided an explanation for not calling Jenkins which indicated,

'Post Office was concerned that the Horizon Issues trial could become an investigation of his [Jenkins] role in this and other criminal cases.'<sup>29</sup>

Calling more witnesses like Jenkins would have slowed the trial down inappropriately. And,

'the relevant parts' of evidence given by one of the witnesses relying on Jenkins, 'were most unlikely to be controversial. For example, the Misra trial was a matter of public record, the four bugs were covered by

<sup>26</sup> *Bates v the Post Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB), [929], <https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html> .

<sup>27</sup> *Post Office Ltd v Castleton* [2007] EWHC 5 (QB), <https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html> ; Paul Marshall, 'The harm that judges do – misunderstanding computer evidence: Mr Castleton's story', 17 *Digital Evidence and Electronic Signature Law Review* (2020) 25-48, available at <https://journals.sas.ac.uk/deeslr/article/view/5172> .

<sup>28</sup> Richard Moorhead, Karen Nokes and Rebecca Helm, 'Issues Arising in the Conduct of the Bates Litigation, Post Office Project: Working Paper 1' (University of Exeter 2021), <https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2021/08/WP1-Conduct-of-the-Bates-Litigation-020821.pdf> .

<sup>29</sup> *Bates v the Post Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB), [929], [512].

contemporaneous documentation and Post Office had no reason to doubt Fujitsu's account of the documents it held.<sup>30</sup>

The justification for offering that explanation is keenly awaited. Given the Post Office, and (Womble) Bond Dickinson, who had conduct of the litigation, should/would have known about the tainted witness, there is a sense they might be trying to squirm around this problem by saying they had, 'no reason to doubt Fujitsu's account of the documents it held.'

One possibility is that Altmans' conjecture that the 'Jenkins problem' might not be quite as bad as it first appeared provided WBD with sufficient comfort to enable them to rely in information coming via Jenkins in the Bates litigation. That the advice on Jenkins by Clarke and Altman will have been given with the ostensible benefit of legal professional privilege which would have reduced the risk that Jenkins' vulnerability to challenge would be exposed. Even if privilege did protect against disclosure here, as it well might, those with conduct of the litigation cannot assert a misleading position, if that is what it was.

Or perhaps they took steps that reassured themselves into allowing them in good conscience not to call Jenkins but rely on his evidence by proxy. They would probably need quite compelling evidence that his evidence was not as tainted as appeared in 2013 to be properly reassured on that point.

### **Are there any tensions with what Altman told the Court of Appeal and what is revealed by the General Review?**

Mr Altman KC led the Post Office team in the Hamilton appeals in 2020-21. His role prior to the appeal itself does not seem to have been discussed during the main oral hearings in Hamilton, but there was some disclosure of Altman's prior role in written submissions for preliminary hearings.

One such submission, in November 2020, was in response to Nick Wallis' application to publish from Simon Clarke's July 2013 advice (the advice that said that Jenkins' unreliability cast a profound shadow over all the Post Office prosecutions). In that submission, Altman's role is described as follows:

'To ensure that the post-conviction review being conducted by Cartwright King was appropriate, the Respondent instructed Brian Altman QC, among other things, to conduct a review of the process (although not the individual decisions in reviewed cases).'

Those 'other things' are not identified, but the important point for now is that there are some things said in Altman's General Review that suggest the submissions above were inaccurate.

Firstly, Altman's instructions included, 'the review of a statistically significant number of past prosecutions in which Horizon has been an issue in the proceedings.' (paragraph 2.A.2(c)) However, his instructions also asked him not, 'to review CK's decision-making or the individual judgments about the reviewed cases, merely to review their review process' (paragraph 4, unnumbered subparagraph).

We are told in the General Review that Altman had, 'seen and read two full case files in the cases of Khayyam Ishaq and Lynette Hutchings.' And by the time the General Review document was produced, he had also, 'read 31 full reviews,' (paragraph 52) and 'three sample files, which were sifted but did not go to full review.' (paragraph 86). Altman also seems to be very alive to the case of Seema Misra. Her name appears 15 times in his advice.

As will become clear, to be able to say the CK Sift was fundamentally sound, Altman had to, and did, speak about the quality of the decisions made by CK as he saw them, so the difference between reviewing the process and reviewing individual cases is vanishingly small. Altman would have clearly read decisions to review the process, but what he does not do in his advice, is comment specifically on those individual decisions. He does comment on some individual decisions, without identifying them, by implying that some are overly generous (paragraph 83 of the General Review).

We will have to wait to hear from Mr Altman KC as and when he gives evidence to the Inquiry as to how he sees it. Jason Beer KC, lead Counsel to the Post Office Inquiry, in his opening statement to the inquiry says this:

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30 *Bates v the Post Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB), [929], [512].

‘It may become relevant that, as part of the advice, that Mr Altman considered two copy prosecution files, something that does not appear later to have been reflected in a submission to the Court of Appeal in Hamilton, namely that this advice considered a review of the process, though not the individual decisions in reviewed cases.’ (page 138, 16-22)

The submissions made to resist Nick Wallis’ application were made on the basis that the first Clarke Advice may never need to be disclosed in open court, and so would remain confidential and not need to be published. At this stage, only a small group of the appellants sought to get the Court of Appeal to hear Ground 2 (asking the Court of Appeal to hear argument that the Horizon prosecutions were an affront to justice rather than more ordinary miscarriages of justice). The logic appeared to be this: if the Post Office could successfully resist Ground 2 being heard, it could then resist the Clarke advice being disclosed.<sup>31</sup>

If the Post Office had persuaded the Court of Appeal not to hear Ground 2, Clarke’s first, surprise advice might have remained secret, the Post Office Inquiry may not have been widened and given statutory powers,<sup>32</sup> and Mr Altman’s role (leading to Jason Beer’s comments) would never have been investigated.

This chain of events suggests that Mr Altman KC had a personal interest, whether he recognised it at the time or not, in keeping the Clarke advice confidential. Under Ground 2, the General Review and the CK Sift risked Altman’s role becoming directly relevant to some of the substance of the appeal. Had that happened, and it did not, Altman would have risked being a witness in a case he was leading. If that is right, it was a substantial risk of professional embarrassment, and he should not have been acting. There is the potential for a conflict of interest between his own and his client’s interests and a question as to whether given his previous involvement, he had sufficient independence to be leading the appeals. Matters of great importance were dealt with, including attempts to avoid Ground 2 being heard, the resistance of publication of the Clarke advice, and the raising of potential contempt against two of his opposing counsel; the possibility he might have had a personal professional interest in such matters, in addition to and not necessarily in full alignment with his client’s interests, should be subjected to rigorous scrutiny.<sup>33</sup>

The disclosure of the Clarke Advice in Hamilton, raised concerns about, in essence, a cover-up. A suggestion that the Criminal Cases Review Commission might have been uninformed about the Clarke Advice was dampened by Counsel for the Post Office in another written submission. In that submission, it was suggested the CCRC already knew about the Clarke Advice because they had seen the General Review:<sup>34</sup>

‘10.1 The CCRC has been on notice of the existence and the contents of the Clarke Advice since at least 27 February 2015. On that date the CCRC were provided with a copy of a document entitled ‘General Review’ by Brian Altman QC dated 15 October 2013 which, amongst other matters, extensively referred to the Clarke Advice and its contents and conclusions. Had the CCRC considered that seeing the actual Clarke Advice would have assisted them, it could have served POL with a s.17 notice (as it did in relation to many other such documents, all of which were provided);

10.2 Any suggestion that the fact of, and substantive content of, the Clarke Advice had not been revealed to the CCRC by POL is therefore factually incorrect.’

The implication that the CCRC should have picked up the issue and asked for the Clarke Advice in 2015 is a reasonable one; it suggests either the CCRC did not properly digest the General Review or were reassured, rather than worried by its contents. As we have argued, the tenor of Clarke’s advice, which emphasised the profundity of

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<sup>31</sup> As the submissions showed, Altman’s view was that ‘...the Clarke Advice will never be a document referred to during legal argument, as it would be unlikely to be relevant to any submissions advanced under the CCRC’s first ground.’ (Brian Altman and Zoe Johnson, ‘R v Hamilton & Others: Response to The Appellants’ Skeleton Arguments On Second Category Abuse Of Process, 12 Feb 2021’)

<sup>32</sup> The Ground 2 findings in *Hamilton* were almost certainly a large part of the reason why this was done.

<sup>33</sup> See also, Richard Moorhead, Karen Nokes and Rebecca Helm, ‘The Conduct of Horizon Prosecutions and Appeals, Post Office Project: Working Paper 3’ (2021), <https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2022/10/WP3-Prosecutions-and-Appeals-Oct-2021-2.pdf> .

<sup>34</sup> [Post Office Counsel Unidentified], ‘Regina v Hamilton & Others, Disclosure Note in Relation to the Context for ‘the Clarke Advice’’.

the problems posed by Jenkins to Post Office's prosecutions past and future, is significantly different to the tenor of Altman's General Review.

A question about the General Review is whether it was written to reassure the Post Office, with the CCRC's interest in mind; by the time of Altman's review, they had written to the Post Office raising concerns. If this is the case, and the General Review served to minimise concerns expressed in the Clarke Advice, then it might also have served to reassure the CCRC at this point.

### Some thoughts on what fair independence should look like

A final, useful way of thinking about the General Report is to consider what an independent review, paying proper attention to the fairness obligation on prosecutors, should look like. We do not suggest that what we set out below is comprehensive or general to all reviews commissioned to provide, or be presented as providing, an independent view, but we have identified some points of importance in our analysis of the document.

1. A reviewer should conduct the review based on as solid and independent an evidence base as possible. Here in essence Altman reviewed the work product from a review conducted by a firm of solicitors itself reviewing its own cases. It is a flimsy basis for a review of a process described as fundamentally sound.
2. The extent and nature of that evidence base should be clearly described and robust. In the instructions, one can see some attempt to require that the review should be based on, 'the review of a statistically significant number of past prosecutions in which Horizon has been an issue in the proceedings.' Whilst Altman says he has, 'seen for myself a statistically significant number of past prosecutions', this does not seem to be the case. He has seen three (or perhaps six) prosecutions and 31 reviews (which are not the prosecutions).
3. The claim to statistical significance is a term used outside of any proper context that we are aware of.<sup>35</sup> This suggests that those engaged in this process, including Altman, did not know what statistical significance meant or that they were deploying scientific phrasing to claim greater objectivity than was deserved. This should sit alongside that in paragraph 110 that Altman says he cannot reconcile the statistical picture (which suggests to us disorganisation in the fundamentals around choosing and recording cases for review). The report is devoid of any meaningful quantitative analysis beyond this, which is what you would expect in any report aiming for 'statistical' anything let alone 'statistical significance'.
4. The terms of reference for a review should be settled in advance, and all changes clearly justified with the reasons for those changes documented in the final review report to avoid the impression that reference terms have been changed for reasons of convenience to the client. Here we note again that a review of the safety of convictions was originally contemplated and then apparently removed from the terms of reference. This may partially explain why so few actual prosecution files were looked at.
5. There needs to be a balanced, even-handed, and documented assessment of the evidence, with adverse findings or problems for the client clearly articulated, objectively as possible. The problems of tone, and the lack of clarity engendered by describing what appear likely to have been manifest problems in CK's review as mere risks, is to be deprecated. This must be particularly the case when vaguely described problems are contrasted with poorly evidenced positives.
6. In our paper on the Swift Review, we emphasised the importance of being cognitively open to critical perspectives on the Post Office's position. In the Altman review we note a number of indicators of the reverse of that, in essence we see evidence that suggests to us a lawyer trying to see the world through their client's eyes. We think it fair to say there is sometimes displayed a distinct scepticism even sometimes cynicism about potential appellants. We draw attention to the treatment at paragraph 65 of the General Review where Altman criticises Seema Misra's 'late' amendment to the defence statement, when the timing

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<sup>35</sup> It is usually used to indicate statistically robust inferences drawn on the basis of robust, well-designed, quantitative analysis of data. It might have been used loosely here to denote a sizeable, well-chosen sample of cases. That is a sample chosen randomly or on an appropriately stratified basis. No such sampling process is described in the General Review. It may mean they see the sample of 31 out of X hundred reviews as being sufficiently representative of the X hundred cases. The question would then be on what basis do they think it is representative, which returns us to the question of how they were chosen.

was likely related to journalists only latterly questioning Horizon in turn causing the viability of the defence to become clear to her and/or her lawyers. The references to a bandwagon effect are similar, as is the discouragement of, or resistance to, disclosure being provided slowly, for example, through the mediation. Relatedly, we see no connection to the human costs of prosecutorial error, still less the scale of those human costs, which we now know to be profound. It is a document shorn of the human costs with which it was conjuring.

7. We do not see at any point in the review document a serious contemplation of the possibility that the appellants have legitimate points with evidence supporting them. This is in spite of Seema Misra's case identifying a bug type like a Horizon Online problem and the clearly inadequate evidence Altman is presented with on training (a known basis of defences/potential appeals). Even those cases that have been conceded by CK are described in terms which suggest the firm may have been overly generous without any explanation of the weaknesses in prosecution evidence and practice which they supported.

8. Eminence is not independence. An independent report cannot be undertaken by someone, however eminent, who either has already advised on issues in a way to protect the company's interests, or risks (unintended) bias where there is a possibility of future work for the company in connection with the same matters or within the time frame of those matters. This must be especially the case when difficult and weighty judgements about fairness, propriety, and innocence need to be made with such serious implications for the client.

Independent investigations should not, in other words, be a gateway to future mandates. The temptation to say sympathetic things to keep clients on board for future instructions risks compromising independence.

It is possible Altman's review was conceived as a one off, or instructions to prepare for dealing with the CCRC and appeals. The latter may explain the many advices and his representation at the Hamilton appeals. We would expect something along these lines to be provided as the justification for Mr Altman's acting in Hamilton even though he had previously acted in 2013 and onwards on material matters including this review. Whilst some will argue that he was in effect instructed on one matter that continued from 2013 until 2021, we think the ongoing relationship, as well as the nature of advice given during this relationship, indicate the difficulty of maintaining independence throughout. In 2013 he is representing the Post Office in relation to resisting the CCRC's interest (to simplify somewhat). By the time of Hamilton, he is defending the probity of the PO's prosecution practices of which he is a substantial, perhaps pivotal, part.

### Summary

In 2013, Brian Altman KC, through his General Review advised the Post Office (orally and in writing it seems) that the CK Sift was fundamentally sound. This 'sift' was a review of hundreds of CK's own cases (sometimes by the same lawyers that had conducted the cases) stimulated by the discovery that Post Office's sole expert (Gareth Jenkins) had given written and oral evidence on the reliability of Horizon that was tainted by a failure to disclose bugs he knew of, and possibly other matters which they did not yet know about. Critically, the potential that other undisclosed integrity problems might be within his knowledge was identified but not pursued. This was a critical known unknown: how bad the Jenkins problem was is a matter of fact which a responsible and fair prosecutor should have looked into. And that critical unknown was also relevant to an important feature of the sift, the time-period. The time-period of the sift depended on problems with undisclosed Horizon issues only having been identified in Horizon Online (post 2010).

There are a number of other reasons to be concerned about Altman's opinion and his view that the CK Sift was 'fundamentally sound'.

1. Altman's tendency to put a less pessimistic gloss on the significance of Jenkins' failures (a gloss based on speculation not on an investigation of those failures).
2. In advice that might have gone to the Board, his apparent minimisation of the shredding of disclosure documents, describing them obliquely as a 'cultural problem' without mentioning shredding.
3. His minimisation or acceptance of conflicts of interest and/or a lack of necessary independence in the conduct of the review on the part of CK.

4. Signs of over-rigidity in the conduct of the review including in relation to matters of scope (whether cases should be reviewed at all).
5. The critical time-period test being justified originally on an erroneous basis. In reality, although Altman does not discuss it this way, the time-period was a matter on which only an expert in the Horizon system could opine and they did not have a reliable expert to ask.
6. Altman appears to rely on factual descriptions of the system from Jenkins in spite of his being, in Altman's words, 'tainted'.
7. CK's written test for granting disclosure was wrong; it excluded the very test (the safety test) that Altman thinks they should apply. He comforts himself on this by saying it did not matter though because the safety test was *generally* applied at least *by implication* in the review documents he had read.
8. The scope of his review changed in interesting ways: in particular, consideration was given to him reviewing the safety of convictions and, in spite of his apparent concerns about rigidity in the approach of CK, this was decided against.
9. Altman's concerns and views, whilst emphasising the need to be flexible and paying heed to the prosecutor's common law obligation of fairness, tend to point towards his favouring inhibiting disclosure. He had warned against allowing convicted complainants into the complaints and mediation scheme and was worried by Second Sight's involvement in the process but saw the benefit that the mediation scheme meant not referring those cases to the CCRC (at least in the short-term).
10. That approach could be characterised as giving the appearance of fairness whilst resisting disclosure.
11. Altman's opines that a test, wrong on paper, applied potentially fairly (generally but not always) by lawyers working for a firm marking its own homework, in ways that may sometimes be too rigid, can be described as fundamentally sound. This occurs against a background of hub meetings which are not properly prioritising disclosure over 'fixing problems' and a process which sees the desirability of inhibiting disclosure during the ongoing mediation.
12. Problems that are discussed in the review are variously minimised by not being clearly identified, being stated as future risks to be on the look-out for rather than present problems, and by being bracketed with irrelevant exculpatory material.
13. A more sceptical, perhaps objective, assessment would have considered the significant failures in the system alongside the problems of independence and prior involvement of Cartwright King.

The General Review also demonstrates how the 'Jenkins problem' was known about, in detail, in 2013, by the same solicitors' firm that had conduct of the Bates litigation. In that litigation information from Jenkins was fed into the evidence of witnesses without calling Jenkins himself. This emphasises in stark terms concerns expressed about the conduct of the Bates litigation.

Whilst we should await the detailed consideration from the Inquiry, a conscious risk of misleading the court and the Post Office's opponents appears to have been taken in relying on material from a 'tainted' source in evidence placed before the court in Bates.

There is a particular question as to whether any lawyers involved in saying, 'Post Office had no reason to doubt Fujitsu's account of the documents it held,' were active or complicit, knowingly or recklessly misleading the court and others.

The conduct of the CK Sift, the General Review, and the Bates litigation all led to less extensive disclosure than now appears to be appropriate. The General Review is likely to have been an important reason for that.

There is a very important question as to whether Mr Altman's role in matters prior to the Hamilton hearings was sufficiently disclosed to the Court of Appeal and the appellants. There are important questions as to his representation of his role (as to the reasons why he sought to say individual decisions had not been 'reviewed' when individual decisions were plainly considered and an important part of his General Review). His ability to represent the Post Office on Ground 2 may also have been rendered more difficult, as had the CK Sift, and had the General

Review been a robust defensible process it might have formed a part of the Post Office's defence of the conscionability of the original convictions.

There are now bigger questions over the Swift Review, which had seen Altman's General Review, and yet seems to have dealt rather obliquely with the Jenkins problem. That is a very curious thing to do in a document that is advising an incoming Chairman on what the right thing to do is in the light of all the question being raised over the Post Office in 2015 unless that chairman, Tim Parker, already had a good understanding of the Jenkins problem.

We will not go further into these issues here other than to state a range of possible general views on what has happened.

One is that there is some critical piece of the jigsaw missing to us which nevertheless suggests that Jenkins' evidence was not tainted, in the serious ways it currently appears, and that this justified the apparently sanguine approach to the various reviews and Jenkin's proxy evidence in the Bates litigation.

The second is that in dealing with an organisation that could not grasp the possibility that Horizon and its prosecution process were flawed, the lawyers absorbed and reflected back their client's view. This is the opposite of what an independent review is supposed to entail but cognitive co-dependency is a real issue for lawyers (as we explored when looking at the Swift Review).<sup>36</sup> Also, lawyers are vulnerable to a range of psychological and social biases: they cannot help seeing the world *to some extent* through their client's eyes and powerful social, psychological, and economic forces encourage them towards optimistic construal of those situations. Not least, they want to help the person in a predicament on the other side of their desk. Such error can be compounded when lawyers get overly used to, or proud of, the power of their own intellect and skill enabling them to manage 'difficult' cases to excellent conclusions.

A third is that the conduct here was knowingly or recklessly improper in a professional (or even, potentially, a criminal) sense.

Substantial arguments can be made that disclosure was deliberately inhibited by the Post Office and the legal work done for it during the Sift, in the design and/or execution of the Altman Review, in the handling of the Swift Review, and the Swift follow-up work. The Swift follow-up work was stopped on legal advice so that 'equivalent work' could be absorbed into the Bates litigation itself, apparently partly in an attempt to protect it with legal professional privilege.<sup>37</sup> If the Post Office had successfully rebuffed consideration of Ground 2 in Hamilton, the Clarke Advice would never have been made public, because of the strategy and tactics of the Post Office.

The pattern of events over many years points in a concerning direction consistent with nefarious behaviour. Can they be explained by lawyers' tendencies to lean too hard towards secrecy, well and truly 'captured' by their client's interests? Is it mere hindsight that suggests the list of problems with the review; a review which is limited in scope and time, carrying risks of over rigidity, and basic administrative errors; a review that failed to check against the external evidence, Second Sight's review; a review that applied the wrong tests formally and did not apply the right tests invariably; and had substantial risks of conflict-of-interest at the individual and firm level. It does not seem to be mere hindsight which allows is to describe it as less than fundamentally sound.

Whether any of the lawyers involved in the complex web of events around Jenkins - the Sift - the General Review - Swift - Bates and Hamilton mislead the courts; their clients (Vennells, Parker, and the rest of the Board); or others (the sub-postmasters and sub-postmistresses in particular) is a more open question. Were any lawyers complicit in such misleading (e.g., of Parliament and government Ministers)? Were they without conflicts of interest or sufficiently independent at all times? Was their advice within or beyond the bounds of normal competent practice? Did their conduct show a lack of integrity? The Inquiry we hope will be considering these issues in detail.

We also encourage the profession to reflect more urgently and candidly on its approaches to solicitor-client and organisation-client relations and organisational culture. The extraordinary repeating of behaviours of interest, across a range of different lawyers in-house and in private practice, suggest a wider, deeper problem.

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<sup>36</sup> Moorhead, Nokes and Helm, 'The Perils of Independent Review, The Swift and Knight Review: Working Paper 5'.

<sup>37</sup> Tim Parker, 'Letter to Baroness Neville-Rolfe, 21 June 2016',

<https://www.whatdotheyknow.com/request/891962/response/2215812/attach/html/3/160621%20Letter.pdf.html> .

One way into this is to look at how lawyers sell their services. The two following quotes were until recently prominent on the websites of two lawyers in the Post Office case. The quotes come from legal directories, from happy customers – often other lawyers – and are used by lawyers and their firms or chambers, to help sell their services.

Lord Grabiner KC,<sup>38</sup> an important figure in the recusal application during the Bates litigation, had this laudatory quote on his website,

‘He is off the scale in terms of his ability to deal with difficult and serious matters. ...He can hold the board of a very large company in the palm of his hand.... He’ll turn a pile of refuse into something that looks great; it’s an absolute art form.’

And Brian Altman KC<sup>39</sup> had this one on his:

‘Brian is unstoppable. Like a steam roller, once he’s set his course, he won’t deviate from his path and will crush anything that gets in the way.’

These quotes tell us something about culture in legal services in moments of crisis for their clients. Grabiner is sold as a Midas with the Brown Stuff, and Altman is the Steam Roller who crushes anything that gets in his way. That such culture could influence their judgement and behaviour in theory is obvious; the question for the Inquiry will be has it in this case.

Independent review, or reviews presented as independent, engage obligations of candour to the clients; obligations not to mislead or be complicit in misleading anyone, including important constituencies within the client; and obligations of independence. Regulators need to consider practical ways of emphasising the priority of independence when conducting reviews for clients commissioned to be, or to be held out as, independent.

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38 <https://www.oelaw.co.uk/barristers/profile/lord-grabiner-kc> .

39 <https://www.2bedfordrow.co.uk/barrister/brian-altman-kc/> .