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Professor Christopher Hodges OBE
Horizon Compensation Advisory Board
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Your Ref

Our Ref: BM/DF

Date: 27 October 2023

BY EMAIL ONLY

Dear Professor Hodges

RE: POST OFFICE CONVICTIONS AND COMPENSATION

I refer to your letter of 29 August 2023 and to subsequent email correspondence. I write on behalf of the Board of the Scottish Criminal Cases Review Commission. We have, as you are aware, considered in advance the response of Helen Pitcher delivered to your Board on behalf of the Criminal Cases Review Commission (CCRC). We have also seen the responses of the Department of Work and Pensions and the Crown Prosecution Service.

Your letter and subsequent email correspondence with our staff raise various issues, both factual and normative and ranging from the general to the specific. We note that your committee is unfamiliar with Scots law or procedure. It seems sensible in the circumstances to begin by addressing that subject.

Criminal Procedure in Scotland/Correcting Miscarriages of Justice

Although technically competent, private prosecution in Scotland is vanishingly rare. For present purposes, the only relevant prosecutor is the Crown Office and Procurator Fiscal Service (COPFS). Uniquely in modern European practice, the law of criminal evidence requires the Crown to establish a corroborated case to secure a conviction. Each criminal charge must be supported by two or more independent sources of evidence.

Criminal investigations in Scotland are generally handled by Police Scotland. In some specialised areas of the criminal law, other agencies (termed “specialist reporting agencies”) may act as lead or sole investigator. In the case of crimes against Post Office Limited (POL), COPFS has designated POL a “specialist reporting agency”. POL’s investigative branch is thus empowered to make reports of criminality to COPFS, potentially initiating criminal prosecution.

Sections 106(3) and 175(5) of the Criminal Procedure (Scotland) Act 1995 provide that the single test for success in a criminal appeal in Scotland is “miscarriage of justice”. In the period under discussion (which we have taken to be 2000-2015) the High Court of Justiciary dealt with all criminal appeals, whether from solemn procedure (ie with a jury) or summary (without). A possibility existed in limited circumstances for further appeal to the Judicial Committee of the Privy Council, and latterly to the Supreme Court of the United Kingdom.

The Scottish Criminal Cases Review Commission (“the Commission”) has powers and responsibilities analogous (but not identical) to those of the CCRC. The Commission may refer to the court any criminal case in which it believes both that there “may have been a miscarriage of justice” and that it is “in the interests of justice” to make the referral (s194C of the 1995 Act). The legislation permits the Commission to make a referral whether or not it has received an application by or on behalf of the convicted person (s194D(1) of the 1995 Act). Further information about the Commission’s interpretation of these provisions may be found in the Commission’s position paper entitled “The Commission’s Statutory Test”, available online [here](#). For present purposes, two court decisions are particularly relevant. In *DP et al v SCCRC* 2006 SCCR 433 the Court of Session held that the term “miscarriage of justice” must bear a single meaning throughout the 1995 Act. In other words, the Commission is bound to apply the appellate jurisprudence of the High Court of Justiciary in reaching its decisions on that question. In *Carberry v HMA* [2013] HCJAC 101 the High Court took the view that the interests of justice are not served by referring to the court cases that stand no prospect of success.

Sections 194H-194I of the 1995 Act allow the Commission to seek orders requiring individuals to provide precognition on oath (sworn statements taken *in camera* before a sheriff) or to oblige any person or public body to provide it with any material that it considers relevant to the discharge of its functions. These powers are not circumscribed by any explicit restrictions. The High Court has in the past resisted efforts to read restrictions into the document recovery power (*SCCRC V HMA* 2000 SCCR 842). In practice, the strength of these provisions ensures that it is rarely necessary to have recourse to them. It is almost invariably possible to secure by negotiation the compliance of third parties.

It is competent, in terms of section 303A of the 1995 Act, to bring or continue criminal appeal proceedings on behalf of a deceased person. The court is obliged to make an order to transfer appeal rights to the executor of the estate or to any other person who may demonstrate a “legitimate interest”. The court has defined “legitimate interest” narrowly (*SCCRC v Swire* [2015] HCJAC 76)

It is competent to apply to the court to extend time limits relative to appeal process even if those time limits have already expired, although it is necessary to demonstrate that there are “exceptional circumstances” for the delay. In practice, the court rarely grants such

applications when the conviction is more than about two years old. The court has, in the past, encouraged potential applicants with convictions of significant age to apply to the Commission (*Graham v HMA* [2013] HCJAC 149 at paragraph 13). As far as we are aware, no potential Horizon appellant has sought leave directly from the court.

Horizon Applications in Scotland

The Commission maintains regular contact with colleagues in Birmingham. The Commission became aware in c. 2016 that the CCRC had received various applications from subpostmasters relative to Horizon. The Commission had not received any such applications at that point. The Commission was aware that there were certain potentially significant structural differences between Scots and English criminal procedure (ie the identity of the prosecutor and the requirement of corroboration).

The Commission received its first application for a “Horizon” review in March 2020. Very shortly thereafter, the Commission opened lines of communication with COPFS and (via Peters and Peters) POL. The potential scale of the problem was by that stage already clear. In the spring of 2020, the Commission decided as a matter of policy that it would make any reasonable effort available to it to locate those who might be affected and encourage them to apply to the Commission. This was a departure from the Commission’s normal practice, which is usually applicant-driven.

In the pursuit of its goal in this class of cases, the Commission obtained from POL the details of all of the individuals whose cases Peters & Peters had identified as potentially related to Horizon. COPFS provided (where it held them) the most recent address details it had available for each of these people. In September 2020, the Commission wrote to each by recorded delivery mail, enclosing an information sheet and a letter from its Chief Executive encouraging anyone affected to make contact. I have attached a copy of this correspondence. This was, as the Commission understands the position, the first systemic effort in any of the jurisdictions of the United Kingdom to contact all of those individuals potentially affected. The Commission publicised its actions with a press release. One of our legal officers appeared on the main Scottish BBC news bulletin, again reinforcing the message that those affected should come forward.

The Commission monitored using tracking information the status of the various letters that it had sent. In 2021-22, the Commission retained the services of enquiry agents to assist it in obtaining up-to-date address details for individuals who had not signed for one of its letters. Where it became apparent that the individual had died, the Commission sought the details of their next of kin.

In 2022 the Commission received for the first time an application from an individual who did not appear in POL’s data. That individual was an employee of one of POL’s “strategic

partners”, which is to say another commercial organisation that serves as subpostmaster for a number of branches. The Commission established that the strategic partner’s internal security staff had investigated the issue and had reported it to the police rather than to POL. The possibility thus became apparent to the Commission that there were individuals affected by Horizon whose details were unknown to POL. In order to address this, the Commission obtained from POL the details of each of its strategic partners in Scotland. Over the course of 2023, the Commission met representatives from seven major retailers to obtain information and, where possible, details of anyone who might have been affected.

As is hopefully apparent from the foregoing, the Commission has appreciated the gravity of the situation from the outset of its consideration of these cases. The policy of the Commission’s Board has been consistently aligned with that expressed in your letter in the sense that we have proactively sought to identify cases of potential miscarriage of justice and encourage those affected to take action. Nevertheless, the Commission’s Board agrees entirely with the CCRC that it is important not to infringe upon the agency of those individuals identified as potentially affected by Horizon. The Commission would not support measures that sought to compel participation in appellate process or otherwise to engage in such an undertaking without the consent of the subject or, if deceased, their relatives.

The Commission’s Approach to Applications

The Commission had available, from the outset of its review, the decisions of Fraser J in the Horizon group litigation and of the English Court of Appeal in *Hamilton et al.* That material was invaluable in shaping the Commission’s approach to its review. However, contrary to the assumptions of some parties, the English decisions did not provide a pre-packaged route to the referral of the cases. As you will be aware from the above, the institutional arrangements differ significantly in Scotland. The law as it relates to criminal appeals in Scotland also differs quite profoundly from the English position. In particular, the treatment of cases in which a guilty plea has been recorded is not akin to English law. You will, I am sure, understand why that detail would be significant in this class of cases. In accordance with the policy approach that I discussed in the foregoing section, the Commission interpreted the law as favourably to its applicants as it believed it reasonably could. The Commission was anxious to ensure that it did not exclude any case in which there was a prospect of establishing that there had been a miscarriage of justice.

For reasons to which you advert in your letter, the available documentation has varied considerably among individual cases. The Commission has, nonetheless, managed to obtain some account of the factual background in every application that it has considered. In many cases the Commission has been able to obtain a report from the presiding sheriff. In some cases, the Commission has used unconventional sources of information, such as

reports from local newspapers. Peters and Peters, on behalf of POL, have generally provided the Commission quickly with the material that it has requested.

In order to initiate an application, the Commission requires the participation of the affected individual or, if the individual is deceased, someone who could be argued in terms of s303A of the 1995 Act to have a “legitimate interest”. This is an approach that the Commission adopted publicly in its second review of the conviction of Abdel Baset Ali al Megrahi. The reasoning is identical to that set out by the CCRC. An appeal with no appellant stands no chance of success. As noted above, the court has made clear to the Commission that it is not in the interests of justice to refer such a case. The Commission considers that it would act unlawfully if it were to do so, notwithstanding the terms of s194D(1). The Board cannot take a view on any potential law reform in this area without sight of a detailed proposal. It is, however, unclear to us how such a change in the law might operate and how it could avoid infringing the agency of individuals who do not wish to participate in the legal process.

Case Statistics

I am aware that Daniel Fenn provided you with the statistics as they stood earlier this month. The current position is as follows:

Tranche 1

Applications received:	9
Accepted for Stage 2 Review:	8
Referred to the High Court:	6
Refused (and suspended):	2
Successful Appeals:	2
Outstanding Appeals:	4

Tranche 2

Applications received:	7
Accepted for Stage 2 Review:	7
Referred to the High Court:	1
Refused:	1
Outstanding Applications:	5
Outstanding Appeals:	1

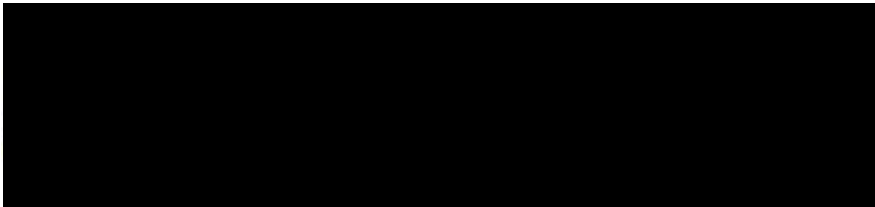
The Commission’s Board has today taken decisions in three cases (one acceptance to stage 2, one referral and one refusal). These decisions are reflected in the statistics. We will make

a press release on 1 November 2023. I would be obliged if you could embargo this information until then.

In your email of 10 October 2023, you expressed an interest in the tranche 1 case that the Commission refused at stage 1. That individual was represented by a firm with considerable experience in criminal appeals. Shortly after they had submitted the application, they phoned the Commission to advise that they had obtained and reviewed disclosure materials from the Crown. These established to their satisfaction that the case did not relate to Horizon. They were thus unable to support the application. The individual in question did not respond thereafter to our attempts to make contact with them.

I trust that the foregoing is of some assistance to you and to your Board. I can confirm that the Commission's Board consents to the publication of this letter on your website after 1 November 2023.

Yours sincerely



Bill Matthews
Chair

**cc Helen Pitcher, CCRC; Alison Riley, DWP; Laura Tams, CPS; James McLernon, PPSNI;
Jack Caster, COPFS**