

Lord Advocate makes statement to Scottish Parliament

Following questions asked at First Minister's Questions the Lord Advocate appeared before MSPs on Tuesday afternoon to make a statement relating to the Post Office scandal.

After appearing in the chamber for almost an hour and a half and answering many questions from MSPs, Ms Bain left without making any further comment to the waiting media.



Lord Advocate Dorothy Bain, KC, after leaving the chamber at Holyrood. Photo The Edinburgh Reporter

In the address Dorothy Bain KC explained what Scotland's prosecutors have done in relation to Scottish subpostmasters and subpostmistresses accused of wrongdoing in relation to the Horizon IT system.

The statement is as follows:

Presiding Officer, Members, I am grateful to the Parliament for inviting me to address this very important matter.

I wish to take a moment at the outset to acknowledge the harm caused to the people in these cases who have suffered a miscarriage of justice.

The wrongly accused and convicted sub postmasters and postmistresses are due an apology from those who have failed them, and I do that today as head of the system of criminal prosecution in Scotland. The Post Office is part of that system and I apologise for the failures of those in the Post Office who were responsible for investigating and reporting flawed cases.

As a prosecutor, preventing and correcting miscarriages of justice is as important to me as inviting a court to convict for a crime. That is fundamental to my commitment to the rule of law.

Today, I shall set out what Scotland's prosecutors have done to protect the rights of postmasters, and what they have done to uphold the proper administration of justice. There is a great deal which could be said on this but I am limited in time. However, I am determined that the public should understand the issues which have arisen, and I am committed to future transparency and the publication of information when I can appropriately do that, being mindful of ongoing legal processes.

The Crown Office and Procurator Fiscal Service is the only public prosecution service in Scotland. It acts independently and makes prosecutorial decisions in the public interest. It receives reports of alleged offences from over 70 investigative agencies, including the Post Office.

The relationship between a prosecution authority and an investigating agency must be based on absolute candour and trust. As an investigating agency, the Post Office must act fairly, and this includes an obligation to reveal to prosecutors all material which may be relevant to the issue of whether the accused is innocent or guilty.

It is clear that the Post Office failed in its duty of revelation and as a result some individuals were prosecuted when they should not have been.

Where miscarriages of justice have happened, it is because prosecutors in Scotland accepted, as they were entitled to, evidence and explanations at face value from the Post Office.

When it became clear that these explanations could no longer be relied upon, prosecutors changed policies, dropped cases and subsequently supported the work of the Scottish Criminal Cases Review Commission, the Court of Appeal in Scotland, and the UK Public Inquiry.

To help Parliament understand the impact of the Post Office's failures in this duty of revelation, I shall summarise the history of the work of Scotland's prosecutors when dealing with the Horizon cases.

Between 2000 – 2013 there is no record of prosecutors having been made aware of the bugs and error in the Horizon system that we know now, significantly these bugs and errors impacted the reliability of evidence submitted by the Post Office.

In May 2013 the Post Office, via its external lawyers, first contacted prosecutors to address public concerns that had been raised regarding the Horizon system. In the months that followed, the Post Office and its external lawyers sought to provide assurance to prosecutors that the system was robust. In providing these assurances, Post Office lawyers referred to two reports, one of which had been prepared by the independent auditor, Second Sight, which concluded that there were no

systemics defects with the Horizon system. Further, Post Office advised prosecutors that it had instructed an independent law firm to review all potentially affected concluded Scottish cases and no concerns about the accuracy of the evidence submitted by the Post Office in reporting these cases for prosecution were raised.

Despite these assurances, in particular, the independent report which concluded that there was no systemic issue with the system, on 7 August 2013, recognising the continuing public concern, Scottish prosecutors were advised to carefully consider any Post Office case to determine if Horizon impacted it whilst information was awaited. That advice was shared to assist prosecutors to consider how best to proceed.

On 5 September 2013, a meeting took place between Scottish prosecutors and Post Office officials including their external legal Counsel. At that meeting, Post Office officials repeated their assurances to Scottish prosecutors, but moving forward, it was agreed that Post Office would obtain expert evidence and a further report to support the integrity of Horizon evidence. Meantime, Scottish prosecutors continued to follow the approach set out in the advice issued on 7 August 2013.

Post Office failed to deliver these assurances timeously and as a result, in the months that followed, prosecutors took the decision to take no further prosecutorial action in several newly reported cases.

Post Office and Crown Officials again met on 06 October 2015. During that meeting, Post Office officials advised that they remained confident in Horizon. Indeed, the then CEO of Post Office Limited had given evidence to that effect at a Parliamentary Select Committee in February 2015, advising that they remained confident in the Horizon system. Notwithstanding that, Post Office confirmed that they were unable to provide a final expert report or provide expert

evidence which would support the integrity of the Horizon system and defend challenge in Court.

At that stage, in light of the failure to provide a final Second Sight report or provide any expert evidence regarding the Horizon evidence, Scottish prosecutors formalised their cautious approach. On 22 October 2015, prosecutors were advised to assess all Post Office cases and report for Crown Counsel's instruction with a recommendation to discontinue or take no action in cases which relied on evidence from the Horizon system to prove a crime had been committed.

During this period, the Post Office did not disclose to Scottish prosecutors the true extent of the Horizon problems as they are now known to be. Scottish prosecutors received assurances that the system was robust. These were assurances that prosecutors, without the benefit of hindsight, were entitled to take at face value. They would not have known, nor indeed suspected, that the Post Office may not have been revealing the true extent of the Horizon problems.

Because of the failures by the Post Office, we know that a number of people in Scotland may have suffered a miscarriage of justice.

In circumstances such as these, our justice system enables those who may have suffered a miscarriage of justice to appeal a conviction by virtue of an application to the Scottish Criminal Cases Review Commission who may themselves review and refer a case to the High Court of Justiciary for appeal.

The findings in the English group litigation headed by Alan Bates which were later endorsed in 2021 by the English Court of Appeal when quashing 39 convictions of those it held had suffered a miscarriage of justice are significant. It was these judicial determinations which identified and confirmed, beyond doubt, the extent of the problems with Horizon and the adverse impact these had on prosecutions across the United

Kingdom.

In September 2020, supported by Crown Office, and with information provided by the Post Office, the SCCRC wrote to 73 individuals who may have been convicted in Scotland on the basis of unreliable evidence from the Horizon system with the purpose of inviting an application for their case to be reviewed. To date, to the best of my knowledge, 16 individuals have come forward to the SCCRC. This has resulted in 7 referrals to the High Court, 4 of which have resulted in convictions being overturned.

In addition to those individuals who have been written to by the SCCRC, in recognising the role it can play in assisting the SCCRC in its work, Crown Office identified potentially affected cases with a view to identifying whether any other individual may be impacted to ensure that no possible miscarriage of justice is missed. This was the basis for the recent information from Crown Office that around 100 cases may be Horizon cases. Work is ongoing to review these cases and as of today that number has reduced to 54 cases which are being considered by prosecutors as potential Horizon cases most of whom have already been written to by SCCRC.

It will be noted that, of those written to, only a small portion of people have come forward to identify themselves as possibly affected. This may be indicative of the fact that not every case in which Horizon evidence is present will represent a miscarriage of justice. It is important to recognise that in Scotland, there is an established route of appeal in circumstances such as this. That route involves the SCCRC considering cases in the first instance prior to referring appropriate cases to the Court of Appeal. This is an important process because not every case involving Horizon evidence will be a miscarriage of justice and each case must be considered carefully and with regard to the law. It is also important to recognise the important and established constitutional role of our Appeal Court in Scotland and that

due process must be followed. Scottish prosecutors have taken appropriate steps to expedite those Appeals where possible. This has included obtaining a Court order against the Post Office in order to recover essential documentation relevant to the appeals.

Presiding Officer, before I finish, I want to say this:

I am very deeply troubled by what has occurred, and I remain acutely concerned that the Crown Office and Procurator Fiscal Service was repeatedly misled by the Post Office. Assurances which were just not true were repeatedly given.

To those wrongfully convicted, I understand your anger and apologise for the way you have been failed by trusted institutions and the criminal justice system. I stand beside you in your pursuit of justice.

I want to assure this Chamber, those wrongly convicted, and the people of Scotland that I will do all I can to prevent such an affront to our justice system from ever happening again and to right the wrongs which have occurred.

I commit to transparency in the information which is held by the Crown Office and Procurator Fiscal Service, subject to the restrictions of the ongoing Appeals and the ongoing Public Inquiry.

I can also advise this Parliament that I have sought urgent advice on the continued status of the Post Office as a reporting agency in Scotland. I know there are calls for allegations of criminality in the Post Office to be investigated. That is a step which requires to be tackled at a UK national level. The consideration of any criminality in Scotland on the part of those responsible for the failures of the Post Office will require to wait until the public inquiry has concluded and the full scale of their actions is understood.



L-R Ruth Charteris, KC, Solicitor General and Dorothy Bain, KC, leaving the chamber at The Scottish Parliament