2024 Heilbron Lecture Transcript

“No Choice but to Trust – The Predicament of the Powerless.”

Lecture delivered by Flora Page KC on 19th November 2024

Thank you so much, Seema. I'm so proud to be able to stand alongside you in front of this really lovely audience. You are an inspiration. Thank you very much also to Dana, and many thanks to your patron, your board, your champions and your fellow trustees.

I'm very, very grateful to be given this opportunity to stand back and reflect on the work I've been engaged in over the past few years. When I was given this wonderful opportunity to stand back and have a little think about what I've been engaged with, I thought I'd try to ask myself the bigger questions, and the result of that is that I want to talk about trust and I want to talk about power.

When we come into the world, we have no choice but to trust. Our parents nurture us and they keep us alive until we can start looking after ourselves. And that is the original predicament of the powerless. Trust is built into the fabric of our lives from the very beginning. And so what does that mean?

Well, I've started with the sociologist Bernard Barber's views. He says that trust is primarily about expectations. First, we expect the people we trust to be competent and capable of performing their role. And second, we expect them to carry out their responsibilities and their duties in good faith, which includes, in some situations, putting our interests ahead of their own.

To my mind, the first of these is only partly about the trusted person's competence or expertise. It's also about whether they're sufficiently resourced to do what they are trusted to do, and whether they're sufficiently supported.

But the second of these carries rather more moral baggage, because it's not just about lack of expertise or resource or support; there's an emotional quality to it as well. Has this person acted venally? Have they put their own interests first when they shouldn't have done? And that kind of breach of trust is what strikes us more deeply.

Let's think about that in the context of parenting, that original predicament of the powerless. Many parents living in poverty or in the midst of war are unable to nurture their children in the way that they might want to. They simply don't have the resources or the societal support. But if we're lucky enough to live in financially and physically secure environments, a failure to put our child's needs or interests first is where most of us fail as parents: where we fail as caregivers, where we fail to give our children the home and the support that they need. That's where we do the damage, if we're honest with ourselves.

That doesn't necessarily mean, however, that we've acted in bad faith. The difficulty with children is that we can't always ask them, and they don't always know what's in their best interests. And so sometimes, when we're trying to put their best interests at the heart of what we do, we get it wrong. That's the danger of having power over others: we don't always know what's best for them.

But there's a very important moral distinction, isn't there, between those of us who are trying to put our children's best interests first and sometimes failing, and those who are not even trying at all, those who are not acting in good faith.

Well, what does all of this have to do with the Post Office scandal? Here's Nick Read, with an analysis from his early days as Chief Executive of the Post Office, on 8 April 2021:

"For too long, Post Office Limited has assumed a parent and child relationship with its postmasters, rather than a partnership of equals. There has been a pronounced imbalance of power in the relationship between us, creating a situation in which the company has felt that it has all the answers and has expected postmasters to follow its lead unquestioningly."

So the Post Office thought it was always right and behaved accordingly. There was indeed that imbalance of power, and yes, the Post Office did indeed behave as if it was always right. But the Post Office was wrong.

It was parental in that way, but it was a deeply authoritarian parent. And at some stage it got worse. It crossed that line. It wasn't even trying to put the interests of the subpostmasters first. It became abusive. It was no longer acting in good faith. And the trouble is that there's no natural end to that power dynamic.

The wonder of families is that the original predicament of the powerless comes to its natural end as we reach adulthood. As we reach adulthood, we gain a growing sense of our own power, and what we expect of our parents changes because we're no longer dependent upon them. We no longer have to trust them to keep us alive. Hopefully we do still trust them, but in a different way. It's a more voluntary way.

Our expectations change. We're no longer expecting them to keep us alive, to give us a home. The whole nature of the trust relationship changes once the imbalance of power is removed. And that interests me, because beyond the family, we remain childlike in our relationships with powerful institutions.

We're kept in the dark. We're kept on a string. We're lacking any real agency or control. We're in that blind, childlike position. It's often up to the institution to decide whether or when we get control over our lives. It's often up to the institution to decide when to keep control for our own good. And if it does that, we have no way of knowing whether it's doing so in good faith. We have no choice but to trust.

Another sociologist has argued that industrialisation has increased our exposure to this kind of involuntary, blind trust. William Freudenberg pointed out that from the early 1800s to the 1990s, the percentage of the USA workforce engaged in food production reduced from 75 per cent to roughly 2 per cent. He argued that the result, us having far less control over food production, which is what we need to survive, increased our vulnerability to exploitation or opportunism from others. Now that very few of us work on the land and nearly all of us work in specialised, interconnected jobs, we're dependent on a much wider network of people for our survival.

Some of you may remember that in 2015, a YouTuber called Andy George set about making a chicken sandwich from scratch. "I spent six months," he said, "and $1,500 to make a sandwich completely from scratch, including growing my own vegetables, making my own

salt from ocean water, milking a cow to make cheese, grinding my own flour from wheat, collecting my own honey, and killing a chicken myself."

So there he was, without a supply chain, without technological advancement, without global food networks. And so it took him six months and $1,500. He could afford to do that because it made an interesting YouTube video, and presumably he wasn't left out of pocket at the end, but obviously it's not a viable way of life.

It illustrates that for most of us, most of the time, we have to trust this intricate, polycentric web of trust that's developed over the industrial era. And yes, there are contracts and there are laws and there are regulations to firm up those bonds of trust, but law can only ever be enforced at the margins. The overall system depends on most of us, most of the time, doing what's expected of us, and it means that many more people can affect us if they don't do what's expected of them, if they breach that trust.

Freudenberg did also note, by the way, that over the same period, as fewer and fewer people worked on the land, there was actually also a decrease in unexpected deaths. So that increase in the web of trust, and in people blindly trusting each other, the sheer size and resilience of that web, does actually protect us from extreme danger. And it makes it easier to get a reasonably priced chicken sandwich.

But the trouble is, as the delicate and elaborate web of trust evolves, it becomes harder and harder for individuals to know and understand the institutions that we're depending on to keep us all safe and to keep our homes secure. This increases the imbalance of power between individuals and institutions. And we don't even know all the powerful, parent-like institutions in our lives. We don't even know who they are.

Any one of those parents, at any given time, can become authoritarian. At any given time, they can even cross that line, become abusive, and no longer even be trying to act in good faith and put our interests first.

And from there, it doesn't take much to cross over into what the Post Office scandal was all about. Britain's most trusted brand, already authoritarian, one might argue, but then adding a faulty IT system into the mix. It was something the Post Office was determined to make work, because after all, it was in the subpostmasters' best interests to automate the network.

But once it became apparent that the system didn't work, the Post Office crossed over that line into being authoritarian, persisting with the faulty system, denying and suppressing all evidence to the contrary. And this was no longer the act of a well-intentioned parent. This was acting in bad faith, putting the interests of the Post Office ahead of the interests of the subpostmasters.

And it wasn't just the Post Office that proved to be untrustworthy. It was international corporations, in the form of Fujitsu. It was government departments. And perhaps worst of all, it was our laws and our courts.

Consciously or unconsciously, we trust these institutions (corporates, government, the law) to do what is expected of them, and we have no choice but to trust them. They are parental in that sense. Just as a child has no choice but to trust their parents to nurture them and raise them in a safe home, we have no choice but to trust these institutions for our security, our survival, the safety of our homes.

When trust is abused, it leaves us feeling like we want to "take back control". A successful political slogan, because we can all relate to that feeling when we're caught in the predicament of the powerless.

This is not new. Religious institutions have probably been abusing trust on and off for as long as they've existed. Sadly, as the John Smyth Review has demonstrated, they still are. And governments likewise. For much of pre-industrial history, those working on the land had no choice but to trust whichever chief or lord claimed the right to protect and exploit them.

But the modern Leviathan is a much more complicated beast than the one Thomas Hobbes envisaged in the 17th century, because we now live in pluralist democracies, and authoritarian power has to come in disguise. Corporates, governments and even the law do not admit to the parent–child dynamic.

In the modern world, communications professionals and lawyers cloak the parent–child dynamic with words that suggest a more democratic and equal relationship between institutions and the public: "Creating our future together." This sort of wording gives an illusion of control, a capacity to choose whom to trust.

But in fact, the division of labour in society, which became so elaborate and is becoming all the more elaborate all the time, leaves us with choices which are very marginal, like the choice we might make between this or that energy company. But whichever company we sign up with, we can't opt out of burning fossil fuels. And we all see the effects of Putin's invasion of Ukraine in our bills. We can't opt out of these kinds of relationships, and our powerlessness is the perfect screen for abuse of trust.

In all that complexity, how does the individual know whether a particular corporate or a particular government department, even a particular regulator or a particular lawyer, is performing its role competently and in good faith? The communications professionals and the lawyers who do reputation management are there to stop us from finding out.

There is an insurmountable imbalance of knowledge and expertise, and that's the nature of the division of labour. We don't even know about all the forces that bring a reasonably priced chicken sandwich into our lives, let alone the IT systems, the economic systems and the communication systems that affect our bills next month and affect whether we can stay in our home. That's why the powerful institutions are able to keep us in the dark, keep us on a string, and ultimately keep us in their power. Childlike.

Seema's story epitomises this. When she and Dev bought their post office in West Byfleet, they had the illusion of self-determination and choice. They were small business owners who had chosen to enter into a contract with the Post Office, which appeared to be a trustworthy business partner. Little did they know that the Post Office had abdicated its responsibility to ensure that Fujitsu would provide them with a reliable electronic point of sale system.

Those who had produced the electronic point of sale part of the Horizon system were not technically competent. The Inquiry has learned that it was in fact well known at the time within Fujitsu that parts of the EPOS system, the electronic point of sale system, were made up of, quote, "terrible code". It fell over all the time.

So that was the original breach of trust in the Horizon saga. It was a breach of the first kind of trust that I talked about at the beginning: a failure of competence. But the people higher up, in

both Fujitsu and the Post Office, moved into that even more blameworthy category of bad faith. Fujitsu managers were under a contractual duty to the Post Office to provide a reliable electronic point of sale system. Knowing that their system was no good, they deliberately decided to press on with rolling it out, with a view to just fixing the problems ad hoc as they came up.

That led to what we know of as remote access. When problems with branch accounts did come up, as they were bound to, Fujitsu IT support just hacked into branch accounts remotely, making adjustments as they saw fit.

Now, that would not have worked for any length of time were it not for the Post Office managers also failing to do their duty. Because rather than taking on the international might of Fujitsu and enforcing the Horizon contract, it was easier to accept the faulty system and push the consequences of it onto the subpostmasters. The infallibility myth began: Horizon could do no wrong.

And meanwhile, the standard form subpostmaster contract was misrepresented and enforced to make the subpostmasters responsible for all shortfalls in their accounts, howsoever caused. As Mr Justice Fraser's Common Issues judgment found, this was not in line with the true contractual relationship. It was, in effect, pushing the adverse consequences of Fujitsu's original breach of trust outwards, from the centre of the web to the powerless people at the fringes.

And it left Seema, and many, many, many others, at the end of a phone line in despair. It left her borrowing money from her family, taking money from the shop, wondering how she could ever make up the mounting shortfalls. The illusion of being an equal contracting partner was long gone. Through two tiers of contracts, Seema had trusted the Post Office and, ultimately, Fujitsu, and now she was at their mercy. She had no choice but to keep going, keep the faith, trust that everything would come right.

And when it didn't come right, and when the Post Office goons came for her, the web of trust and power took on a further layer. Once the legal process was engaged, Seema had no choice but to trust that it would ensure a just outcome. And she did. This is Seema's evidence to the Inquiry, referring to the day of sentence:

"I didn't take any bags. I didn't take any bags until the last minute. Until the last minute I had a faith in the system that I won't be sent to prison. Why should I be sent to prison for a crime I never committed? So the probation officer did mention about the bags. I said, no, I have faith. It will be all fine. It will be all fine."

She had faith. She had no choice but to trust. Her liberty, her home, her family's lives were in the hands of lawyers, a judge, an IT expert, but ultimately the powerful institutions that lay behind them: the Post Office and Fujitsu, yes, but also the polycentric web of people and institutions that we call the justice system.

So Seema was pulled in, and the result was a tragic and terrible abuse of her trust in the justice system. She told the Inquiry about the effect it had on her:

"I lost my faith in the system completely. I couldn't believe anybody. Anything is possible. If I can be sent to the prison for the crime I never committed, anything is possible in this country. I was scared to go out, that I'm going to cross the road, Post Office will probably hire

somebody and they might crush me. I was scared to drive, that, you know, they might get me involved in an accident. That's how I was afraid. My eldest son studied at university in London. I was, like, calling him, you know, like, when you coming home and everything, speak to me every hour, let me know where you are. I was so scared of everybody's safety, that anything is possible."

Anything is possible. Once we can no longer trust the courts to dispense justice, anything is possible. And that is the ultimate parent–child dynamic, because what we're told, and what we all hold dear, is the idea that no one is above the law. No matter how powerful a person or a corporate or a government becomes, the power of the law should be almighty. That makes it all the more important that the justice system must show itself capable of responding to this most grave abuse.

There is a proper and important emotional reaction when powerful people nestled within the web of trust abuse their position. This is another quote from sociologists, forgive me, but I think it captures the important point:

"When recipients of public trust turn that trust to their personal pecuniary advantage, they inflict serious damage to the heart of civil society. It is this abuse of trust, much more than the simple illegality of individual actions, that provokes our emotional wrath."

That is reflected in the language of the Hamilton judgment. Seema's conviction was not just illegal; it was not just wrong. It was an affront to the public conscience. The only proper response to that is to identify the individuals who abused the trust placed in them, those who acted in bad faith, and prosecute them.

It is inconceivable that the Post Office scandal was nothing but a 20-year-long mistake. The secrets of remote access and the endemic bugs and defects in the Horizon system could not have stayed secret if the truth was not being actively suppressed. That meant misleading the courts and the justice system over many, many years. So the conspiracy to pervert the course of justice must be prosecuted.

The principal victims are, of course, the wrongly sued, the wrongly prosecuted and their families. I would like to name them all. The tragedy is there are too many to name. I can at least name my lovely clients who are with us tonight. We have Teju Adedayo. We have Vijay Parekh. We of course have Seema. And we have Lee Castleton. They've brought members of their families with them, and I'm really so delighted that they have. They are all heroes.

Seema willingly became a flag bearer for the hundreds who were prosecuted, because, as we know, her trial became something of a show trial: the prosecution which vindicated Horizon, the perfect sequel, in fact, to poor Lee Castleton being taken to the civil court some years before.

But each and every one of my clients, and each and every one, no doubt, of the subpostmaster community as a whole, has lived through the crippling loss of faith that Seema has articulated. When you know that anything can happen, when you know that your home, your family, your safety can be taken from you without rhyme or reason, every day is a struggle. Yet every one of them spends every day showing us how to live a good life: their quiet decency, their constant kindness, and their courageous determination to keep going until some measure of justice is done.

I've said it many times before and I will say it many times again: it has been the greatest honour of my career to act on behalf of these wonderful people.

So yes, they are the principal victims, but those who have deliberately and selfishly abused their positions of trust have affronted us all. We are the public conscience that has been affronted by this. We all need to see that there is one law for all, and that means that the criminal justice system must rally itself and bring the true criminals to justice.

I'm afraid that is not enough, because there is a distinction, as I said, between those acting in bad faith, those who were criminally responsible for the conspiracy to pervert the course of justice, and the huge number of others who breached trust in a lesser way. We've seen witness after witness coming to the Post Office Inquiry and showing just how this system failure affected not just the top, but the whole set of institutions involved.

So many people failed to perform their responsibilities and duties according to expectations. So something was wrong with the structures and the systems they were working within. We need to identify and rectify the system failures as well as the individual failures.

Professor Richard Moorhead's profoundly important work on legal ethics (he's somewhere in the room) needs to be seismic for the profession. This is not just about making individual lawyers accountable. Ultimately, his work will help us to understand why it was apparently so easy for the Post Office to hire and instruct lawyers to manipulate the justice system. So many of them. So many lawyers.

And his colleague Dr Rebecca Helm's work is also interesting, because she's looking at one aspect of the flip side of that: why didn't those representing the subpostmasters act as a sufficient guard against that perversion of the system?

But to my mind, this systems analysis has got to go wider than the legal profession and the legal system. Going back to those parental institutions, system failure is clearly present across the board, and there is no natural end to this institutional power over us. There's no point at which we will grow up and become less dependent upon these institutions. Given the ever-present tendency towards authoritarianism, it is essential to get a grip on these institutions, which have so much power over us as individuals.

So how should we reconstruct them? The fact is, regulation becomes increasingly important as the increased division of labour makes the web of trust more intricate and impenetrable. Once we can no longer understand all the different parts of the web that have an effect on our lives, we have to rely on regulation and regulators to keep an eye on those parts of the web that we can't see, and wouldn't understand even if we could.

But there is a problem with regulation. Susan Shapiro identifies a tendency towards what she calls an inflationary spiral. Regulators are what she calls trust guardians, but there are levels of trust guardians beyond that: the press, the government, academia, consumer bodies. These further layers of the spiral are meant to ensure that the regulator has not been captured by the regulated community. But paradoxically, these further layers in the spiral must also be trusted by us, the powerless, who remain impotent.

The argument goes that the proliferation of trust guardians, the proliferation of regulators, may actually increase exploitation of trust. It certainly increases exposure to blindly trusting

relationships, because we understand no more about the trust guardians than we do about the people that they're supposed to be watching.

Maybe this is one reason why politicians regularly announce a new bonfire of regulation or war against red tape. We will often hear calls in the very same news cycle for new regulation. The calls will come from all sorts: lobbyists, pressure groups, MPs, victims. The aim is always to counter some new area of risk that has caused fear.

And at root, the fear is always the same. We're scared that people or institutions will fail to do what is expected of them, thereby exposing us to unexpected harm coming at us out of the blue, taking our security away, taking our homes away. It's the predicament of the powerless.

Some people talk about society becoming more risk averse. That seems to me to be a gross simplification. We want to be able to take our own decisions on risk, but now that we're in this intricate, impenetrable web, we are disempowered from taking informed decisions. We just don't know what the risks are. How can we take risks when we don't know what they are? In effect, what we need, much of the time, is a benign parent to decide what's in our best interests.

So we're back to the parental institutions. Whether we like it or not, we have to rely on regulation to keep the parental institutions under control, because a well-regulated parental institution can take appropriate risks on our behalf. But how do we do regulation without engaging that inflationary spiral of red tape and potentially untrustworthy trust guardians?

Inspiration comes from the brilliant economist Elinor Ostrom. Her foundational point is this (it's a bit dense; hopefully I won't make it too boring): in a system governed by a rule of law, the rules-in-form are consistent with the rules-in-use. In other words, the words written down on a piece of paper are what people actually do. In a system that is not governed by a rule of law, there may be central laws and considerable effort made to enforce them, but individuals attempt to evade them rather than obey the law.

A system governed by rule of law effectively needs buy-in. As I said at the beginning, laws can only be enforced at the edges. Our complex, polycentric web of trust works on the basis that most of us, most of the time, perform our duties as expected. In this way, we buy in to the rule of law.

Towards the end of her career, looking back over it when accepting the Nobel Prize, she said:

"The most important lesson for public policy analysis derived from the intellectual journey I have outlined here is that humans have a more complex motivational structure and more capability to solve social dilemmas than posited in early rational choice theory. Designing institutions to force or nudge entirely self-interested individuals to achieve better outcomes has been the major goal posited by policy analysts for governments to accomplish for much of the past half century. Extensive empirical research leads me to argue that instead, a core goal of public policy should be to facilitate the development of institutions that bring out the best in humans."

That's her intellectual journey over her whole career. Bringing out the best in humans: how's that for an idea?

Her point is that a lot of regulation is designed around the rather simplistic idea that all humans behave in a perfectly rational but perfectly self-interested way all the time. Her research has actually debunked that idea again and again. She and her colleagues studied hundreds of regulated systems which depended successfully on bringing out the best in humans.

So what kind of regulation brings out the best in humans? Many of the systems that Ostrom and her colleagues studied had a flat power structure. They became known as commons-based systems, because all the participants were engaged in managing the same natural resource, something like water, timber or fisheries. And there was no one person who needed to be more powerful than everybody else.

Well, unfortunately, of course, this stands in contrast to the parent–child power dynamic that we have with big institutions like international corporations and government departments. But surely we can still design regulations that bring out the best in humans. And to my mind, the key is to acknowledge when the parent–child dynamic is there.

We often need to trust institutions to know what is best for us, because we simply don't have the time or the expertise to stop sewage from flooding into our rivers, while also stopping flammable cladding from covering tall buildings, while also stopping IT support teams from hacking into Post Office branch accounts. We simply can't do it all.

I suggest that powerful institutions should, in fact, explicitly recognise the duty to protect individuals from harm, and that they should adopt a benign, honest and open parental style. I deliberately used the word "parental". I know it sounds like anathema: patronising, old-fashioned. But it's being honest about the power dynamic, and it calls on the parental urge to protect, to bring out the best in humans. But then the words "benign", "honest" and "open" are there to make it clear that the parental urge to protect must stop well short of authoritarianism.

The best way to keep institutions benign and honest is to keep them open. Corporates and governments need to dial back on the communications professionals and the reputation management people. They need to worry less about their reputations and more about doing the right thing by individuals in their power.

So hence the third sentence: institutions need to exercise the power they have over individuals with the greatest care, keeping the individual and their needs at the very centre of the decision-making. So I would suggest that this might be the foundation for reconstructing powerful institutions so that they bring out the best in humans.

Here's another gem from Elinor Ostrom:

"While external sanctions, or imposed sanctioning systems, may reduce cooperation, when participants themselves agree to a sanctioning system, they frequently do not need to use sanctions at a high volume, and net benefits can be improved substantially."

The point is that sanctions imposed by external regulators can actually encourage an attitude of trying to evade the law, rather than trying to obey the law. This is all part of buy-in. When rule compliance is monitored and enforced internally, because everyone is trying to obey the rules, the rules-in-form stay in step with the rules-in-use. What's written on the paper is what people actually do. The result is the rule of law.

This is what we see when British people spontaneously form an orderly queue. Sometimes all that is required to get buy-in is a sign saying "Queue this way".

And that stands in marked contrast to what happens when the rules-in-form depart from the rules-in-use. For example, wealthy people or institutions do not typically buy in to paying their tax. Instead, they engage advisers to help them get around the rules, to evade the rules. That often requires officials at HMRC to engage in closing what they see as loopholes, and the result is a game of cat and mouse.

In fact, the problem is not the rules but, as Ostrom says, that there is no rule of law. Individuals are not attempting to obey the law; they are attempting to evade the law. When the majority stop buying into the rules, and consider themselves to be above or beyond the rules that do, in theory, on the piece of paper, apply to them, the rule of law breaks down.

So we need powerful institutions to buy in. That's the new approach that I think we need, so that the majority of people are actively, scrupulously benign, honest and open in everything that they do, when what they do might affect individuals in their power. That leaves those who act in bad faith not just as a minority, but as an outlying minority, with a lot of clear blue water between normal conduct and malign conduct.

So we need a two-pronged approach. On the one hand, there must be individuals who face justice. For too long, British prosecuting authorities have let the powerful escape justice. That must end with this gravest of scandals. Those who acted in bad faith must be prosecuted.

And there must be consequences for individuals who fell into mistake as well: misjudgements, technical incompetence. Many lawyers, corporate directors, civil servants. They may not have been criminal, but they have done terrible damage, and there must be professional sanctions.

But that is not enough. My sense is that we have reached a point where there have been too many scandals, too many abuses of trust. The polycentric web of trust is becoming highly fragile. Too many powerful institutions simply do not tell the truth in real time, because they are so obsessed with spin and reputation management. And excavating the truth after the event via public inquiries, interesting and satisfying as it may be for lawyers like me, should be a rare event, not a regular feature of public life.

So we need the powerful parental institutions to be reconstructed to bring out the best in the humans that work in them. We need that buy-in to the rule of law. And now that we have institutions with the power to affect hundreds, thousands, millions of people's lives, protecting the individual needs to be embedded at the centre of the decision-making.

Most humans very naturally take our family responsibilities to heart. We seek to protect those who depend on us. We seek to make a home for them. And when we do it well, it's because we remember that we are fallible. We approach our duties cautiously and openly. If we're given half a chance, we can do the same at work.

And so can those at the top: the powerful, those in charge of parental institutions. They should not wield their power like medieval kings or Victorian fathers. They should be buying into their duty to protect the individuals in their power, aiming all the time to be benign, honest and open.