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Comments on POL "Initial Complaint Review and Mediation Scheme"

I agree that the process set out in 5.2 is appropriate, sustainable and consistent with the relevant principles relating to criminal convictions and the appeal process – it is much how I would have drafted the section. Such a process also avoids the danger of pre-empting any decision of the Court of Appeal – I would not wish to have to explain to that Court how it is that POL, by compensating a convicted claimant before appeal, had effectively tied their hands in determining an appeal against conviction. (This latter consideration is alluded to in the 'Background' preamble to section 5.2.)

I do have some concerns about the first bullet-point under the heading 'Process' which reads:

- "The Applicant's application, case questionnaire and any investigation findings should be forwarded to Post Office's criminal lawyers (Cartwright King – "CK")"

Disclosure to CK should not be limited to the material indicated: we would also need to see the material behind the investigation findings both because: (i) it may determine our approach to the particular case and (ii) in any event we would have to apply the general disclosure policy to such material.

General

I have seen an email from AP to MS on the topic of disclosure and AH's views.

AH suggests that it was "obvious" that as part of its disclosure duties, Post Office should be disclosing anonymised details of each application in prosecutions where Horizon is being questioned. I disagree with this generalised approach to disclosure (and AP was right to adopt his somewhat uncomfortable fence-sitting position!) and so does the House of Lords (as was). The correct position remains that it is the duty of the prosecutor to consider material in the light of the test for disclosure and to disclose material which meets that test. The higher courts have long-since deprecated the practice of "throwing open the warehouse doors" and disclosing everything in the prosecutor's possession. Such an approach has been described by the House of Lords as an abdication of the prosecutor's duty.

In circumstances where a case is concluded, the correct approach is for POL to "....comply with its common law duty to .....act fairly and to assist in the administration of justice" by disclosing any material which might cast doubt on the safety of any conviction.

Accordingly we should not disclose anonymised details of each application in prosecutions where Horizon is being questioned; rather we should consider issues of disclosure on a case by case

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basis. This is the approach we have consistently taken and, it is worth noting, approved of by BAQC in his "Post Office – General Review" (see paras 126 & 127).

Having said that CK must, as a policy, consider every application to the scheme, identify and categorise all material which might meet the test for disclosure into a searchable library, retain that library and refer to it when considering each criminal prosecution. Similarly, CK should consider that library in the context of those cases already reviewed as, I think, BAQC has suggested. This approach will facilitate the (proper) case-by-case approach.

Returning to the topic of applications to the Mediation Scheme: because all such applications will involve some asserted failings with Horizon, training and/or backup, such assertions themselves may meet the test for disclosure in other cases, but only on a case specific basis. And of course, any material supportive of such assertions will also meet the test for disclosure in other prosecutions, past and present. Accordingly POL would be in breach of their disclosure duties if all such material were not considered within the context of their wider disclosure duties.

Thus the definitive position is this: we should be reviewing all applications to the scheme, whether from those convicted or otherwise. In every application to the scheme we should be provided with the Applicant's application, case questionnaire, material behind the investigation findings any the findings themselves. I agree with AP's sentiment on this point.

Second Sight Material.

Here I quote directly from AP's email:

> "..... SS believe that they have "lots of information" that may be relevant to Defendants and asked whether PO should be disclosing this material. Tony said that such information was not under POL's control (as SS were independent) so it was for SS to decide whether to send this information to POL – so just a heads up on this point but I hope that SS won't actually be bothered to do anything about this."

I am afraid that, in the criminal disclosure arena this is simply wrong. The correct position is this: the fact that material is in the possession of a third party is nothing to the point. A prosecutor has a duty to pursue reasonable lines of enquiry in relation to material held by third parties (*e.g. SS*) and if it appears that a third party is in possession of material which may meet the test for disclosure the prosecutor must take reasonable steps to obtain and consider such material. Where a third party declines to release the material in question, the prosecutor must obtain a witness summons compelling him to do so. All of this is clearly set out in the Attorney-General's Guidelines on Disclosure and other protocols. In concluded cases such an approach would be consistent with our common law duty to "....act fairly and to assist in the administration of justice"

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Thus here, we are duty-bound to consider any material in SS's possession which, to quote them, "....may be relevant to Defendants...." It is not for S to decide to send it to POL: it is POL's duty to obtain that material, if necessary by the issue of a summons (not, I think, in this case), and to consider whether or not it should be disclosed to any defendant (past or present) within the confines of POL's duties of disclosure.

Finally, I think it may be useful if a criminal lawyer formed part of POL's mediation team. I am concerned not only about the issues discussed in this response, but also more generally as to what may come out during the process and what may be said by AH or any individual claimant. Certainly anything said in a mediation has the potential to meet the test for disclosure.

SC **4th November 2013**