

Strictly Confidential – Subject to Legal Privilege – DO NOT FORWARD**POST OFFICE AUDIT, RISK AND COMPLIANCE COMMITTEE****Prosecutions Policy****1. Purpose**

1.1 The purpose of this paper is to:

- update the ARC with respect to certain aspects of Project Sparrow;
- seek the ARC's (directional) views on potential changes to the prosecutions policy; and
- seek the ARC's views on the further work we are proposing to undertake prior to a formal recommendation being put to the ARC with respect to a new prosecutions policy.

2. Background

2.1 In the last (October) CEO report to the Board, an update was given on Project Sparrow in which it was noted that ".... a paper [will be submitted] to the November ARC reviewing our overall policy for investigating and prosecuting future cases."

2.2 Since that update, Brian Altman QC has prepared two separate reports, one commenting on "[POL's] strategy and process for reviewing past and current criminal prosecutions in light of Second Sight's Interim Report" (the "backward looking report") and the other making recommendations as to the future approach to the conduct of prosecutions (the "forward looking report"). This second report did not seek to comment on whether continuing with prosecutions was itself a sensible course of action, either from a business or reputational perspective, simply whether it was an effective use of resources from a criminal law perspective, and if so, whether there was scope for improvement.

2.3 The headline conclusion of the backward looking report is that the "...review [of the cases that had been prosecuted over the last few years] is fundamentally sound" and that no "systemic or fundamental flaws in the review process" were detected. In addition, a number of relatively small procedural recommendations were made regarding matters such as document retention etc.

2.4 The forward looking report is similarly positive in tone, with Brian Altman commenting that he had "..... seen no evidence to suggest that Post Office Ltd exercises its investigations and prosecution function in anything other than a well-organised, structured and efficient manner, through an expert and dedicated team of in-house investigators and lawyers, supported by Cartwright King solicitors and their in-house counsel..." That said, it was noted that "Post Office Ltd's prosecution role is perhaps anachronistic...", and that "POL is the only commercial organisation (albeit Government owned) I can think of (apart from RMG who retains a residual prosecuting function) that has a prosecution role, and it is, to that extent, exceptional if not unique."

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- 2.4 An important, and previously little-appreciated, finding to emerge from the 2 reports is that **Post Office does not have any special statutory power to bring prosecutions**; rather it brings prosecutions in a purely “private” capacity further to section 6(1) of the Prosecution of Offences Act 1985, which gives all individuals and companies the right to bring a private prosecution. Prior to Brian Altman’s review it was believed in many parts of the organisation that the Post Office had been given special powers by parliament to prosecute. In reality, no specific legislation or regulation currently requires Post Office to undertake prosecutions, nor is there any current legislative policy that mandates that prosecutions should be brought.
- 2.5 The fact that prosecutions are conducted on a private basis does not mean that the standards of evidence are in any way reduced, or that the process is less rigorous than would be the case with a public prosecution. It simply means that Post Office steps in to assume a function that typically would be undertaken by the CPS, after the referral to it of a case by the police.
- 2.6 The reasons why Post Office developed a private prosecutorial capability are historical; reasons given for its retention include:
- It serves as a “deterrent” i.e. it provides a clear signal to the whole network that offences of dishonesty will be taken seriously;
 - It assists Post Office with its relationship with insurers; and
 - It re-assures employees that “securing the company’s assets will be taken seriously”.
- No empirical evidence has been given in support of the above, though from first principles it would seem doubtful that the cost of, or the terms on which, insurance can be obtained would be materially impacted by the existence, or non-existence, of a prosecutorial capability.
- 2.7 In addition, it has been said that one consequence of using the criminal process against sub-postmasters is that the associated debt recovery actions (done under the Proceeds of Crime Act) are quicker and “more efficient”. This is clearly true, though the criminal recovery process, albeit very efficient, is a fairly blunt and sometimes brutal process that involves the forcible sale of assets against the backdrop of a criminal conviction and possible prison sentence. In the case of sub-postmasters that are in financial distress, this may well involve the sale of their main residence.
- 2.8 A similar outcome could be achieved using the civil recovery process, though making claims through the civil courts is a more cumbersome process, and the ability to obtain orders “freezing” assets ahead of trials is much more restricted than it is in criminal cases (in criminal cases, a “prosecuting authority” has the right to request a judge to make an order freezing the defendant’s assets once the investigation has commenced, but before it has gone to court).

3. Activities/Current Situation

- 3.1 Typically, some 250 investigations are conducted each year into cases of suspected fraud or unexplained loss. In turn, this leads to around 50

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prosecutions being brought all of which result in the conviction of either a sub-postmaster (or very occasionally) an employee. The most common charge is “false accounting”, itself a very serious offence carrying a maximum tariff (7 years) not dissimilar to theft (10 years); this offence of false accounting is technically committed every time the end-of-day return is made on the Horizon system declaring that the sub-postmaster’s books balance when the sub postmaster knows they do not. Indeed, more often than not, criminal investigations are started when the books have not balanced. The internal “Network Support/Audit and Training” team (a team of around 200, some of whom are charged with responsibility for undertaking stock-takes in the network) identifies the fact that there is an unexplained cash or stock shortfall, and that the books don’t balance. In turn that team then notifies the security team which mounts an investigation and decides whether or not prosecute.

- 3.2 Prosecutions, however, are only brought to the extent that they fit within the internal prosecution policy. This policy focuses on 2 factors: sufficiency of evidence and likelihood of conviction – latterly a third factor has been added, which is the quantum of the loss (amounts below £5k are now not pursued). The highest “risk” group of offenders appears to be those sub-postmasters who have been in post for less than 5 years but more than 18 months. Amounts involved are generally less than £20,000, though there are a handful of high value cases involving outright theft of cash or very large stock deficiencies.
- 3.3 Immediately following the Second Sight report, work was done to rationalise and consolidate the pre-existing prosecution policy. That said, the consolidated policy is in substance no different to that which has been applied previously; in any event, it has in essence been held in abeyance and no further prosecutions have been initiated.

4. Options Considered

- 4.1 At a practical level, there are a number of alternatives to mounting our own criminal investigations and undertaking private prosecutions. In particular, most companies when faced with theft from employees, or agents, would simply contact the police, and if fraud were a persistent problem, develop processes for engaging with them.
- 4.2 Alternatively, it is open to companies (effectively) to bypass the police and go directly to the local prosecuting authority (e.g. the CPS in England and the Procurator Fiscal in Scotland); indeed for technical reasons, this is the approach that is adopted by Post Office in Northern Ireland and Scotland. The experience in those 2 jurisdictions, however, is that there is reluctance to prosecute all but the most serious, or the most clear-cut, cases, as to some extent it is seen by them as a debt recovery (i.e. civil) matter. We have been advised by Brian Altman that should Post Office go down the route of referring matters to the police or the CPS, there would be a limited appetite to prosecute, even if all the preparatory work (witness statements, fact finding etc.) had been done by Post Office in house.
- 4.3 In light of the above, four broad options were considered:

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- a) **Preserving the status quo** – i.e. retaining prosecutorial capability and continuing with a prosecutions policy that is not dissimilar to that which has been used in the past;
- b) **Pursuing a prosecutions policy focussed only on high value cases/cases involving vulnerable members of society**, and engaging with the police in relation to other matters;
- c) **Ceasing all prosecutorial activities** but instead actively involving the police/CPS etc where it is felt that they are likely to take matters forward; and
- d) **Ceasing all prosecutorial activities as per option c) BUT coupled with work** (as yet not formally defined but some of which has already started as part of Project Sparrow and NT):
 - **to gather better MI from the network;**
 - **to improve the overall control framework around the branch network; and**
 - **to provide more support to sub-postmasters.**

This last option is perhaps closest to that adopted by banks and other organisations facing serious losses through fraud and criminal activity.

- 4.4 As part of the evaluation process, however, consideration was given to broader policy factors, including:

- Post Office's brand image;
- whether undertaking prosecutions is consistent with a commercial franchisor-franchisee relationship; and
- the overall drive to develop better stake-holder engagement and a more mature working relationship with sub-postmasters.

In light of these considerations:

- Option a) above was felt to be, at best, sub-optimal and was not explored to any great extent, other than to ask the question of Brian Altman whether it was "efficient" in terms of the criminal process (which it is).
- Option b) carried with it the risk that any residual prosecutions undertaken by Post Office would be conducted so infrequently (probably only a handful each year) as to mean that it was not efficient to maintain an internal team to handle them. Accordingly, it too was discounted for the time being; and
- Option c) was rejected as carrying an unacceptable risk of fraud and loss given the scale of the "losses" currently suffered through theft and false accounting.

5. Proposal

- 5.1 Option d) is the favoured way forward. That said, before a final recommendation can be made, further work needs to be done. Accordingly, it is proposed that:

- Work now commence to ascertain the scope, and the cost, of the additional work that would need to be undertaken to gather better MI from the network

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(including MI as to the “deterrent” value of the current policy), improve the overall control framework, and provide better support to sub-postmasters whilst protecting public funds. Part of this work will also be focussed on exploring additional (non-criminal) sanctions that could be used as a deterrent against sub-postmasters who have deliberately committed fraud.

A programme director and sponsor has already been identified for this work, which will in part build upon work that has already been done as part of Project Sparrow and some of the work that has started in the Audit team;

- The Communications team develop a strategy for effectively delivering messages about any change in prosecutions policy, given that any move to change our prosecutions policy, once in the public domain, could:
 - i. attract significant comment in the media and amongst stakeholder groups, with potential for an adverse impact on brand and reputation; and
 - ii. be perceived as an ‘admission’ that past prosecutions are somehow flawed.
- A deeper analysis is undertaken of the financial impact of adopting option d). In particular, this will look at:
 - i. the ways in which civil proceedings (as opposed to criminal proceedings) can be used more effectively to reduce the financial impact once Post Office becomes unable to continue to use the Proceeds of Crime Act to recover money that has been mis-appropriated; and
 - ii. any headcount savings that may be available.

- 5.2 This last piece is important. Under the terms of the sub-postmasters’ contract, sub-postmasters are liable to Post Office for all “losses” of stock/cash etc. Accordingly, a “fraud” involving the loss of stock or cash gives rise to receivable in the hands of Post Office, which if not recovered leads to a bad debt. Although there is a dedicated team that keeps track of bad debts that arise in the normal course of events, and the recovery for them, anecdotal evidence from the criminal prosecutions team suggests that once matters are handed to them, around 75% of all bad debts are recovered. The evidence further suggests that around £1.5m is recovered annually. As noted above, it is likely that a civil recovery process would lead to a slower, and slightly lower, recovery rate. We will therefore need to consider and monitor closely the potential impact any policy change may have on the “deterrent effect” of the existing policy.

6. Commercial Impact/Costs

- 6.1 See 5.1 and 5.2 above. There may well be an offsetting impact on the headcount in certain areas, in particular the security team and the legal team, though this has yet to be quantified. However, there will be additional costs associated with enhancing the MI and control framework. These too have not yet been quantified, but should to some extent fall within BAU budgets (for example to the extent that they form part of the audit function, they may be part of that budget). Indeed, some of the work referred to in para. 5.1 above is already being undertaken given its importance to Post Office’s brand and wider business

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objectives, and therefore has a value which is independent of the issues discussed in this paper.

7. Key Risks/Mitigation

- 7.1 These pertain mainly to the potential increased risk of fraud, and being seen to be "soft" with public money, but should be capable of being addressed by enhanced MI and improvements to the control framework etc.

8. Long term considerations – horizon scan

- 8.1 Not taking action now in relation to the prosecutions policy could lead to, or exacerbate, the impact of further adverse publicity regarding Post Office's treatment of sub-postmasters.
- 8.2 Taking this action may assist in developing better stakeholder engagement.

9. Communications Impact

- 9.1 The communications team is already heavily involved in Project Sparrow, and it is proposed to manage the communications of the above through that channel. A key issue will be to ensure that any change of policy is properly positioned with MPs, the JFSA and the wider Network.

10. Recommendations

The ARC is asked to:

- 10.1 note the update set out above; and
- 10.2 approve the proposals set out in paragraph 5.1 above.

Chris Aujard
13 November 2013