

## POST OFFICE LTD

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### ADVICE ON PAPERS FOR POST OFFICE LTD BOARD

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#### Introduction

1. At the end of January, I was asked to consider two papers and appendices that were sent to me titled **Project Sparrow – Paper on Stacked Cases** and **Project Sparrow – Paper on Prosecutions Going Forward**. In essence I was asked to conduct a fatal flaw analysis of the proposals and propositions contained in both papers.
2. On 5 February I was sent a third paper titled **POST OFFICE AUDIT, RISK AND COMPLIANCE COMMITTEE – Prosecutions Policy** dated February 2014 that supersedes **Project Sparrow – Paper on Prosecutions Going Forward**. I understand that EXCO clearance is required for the paper to be amended and circulated to the Audit, Risk and Compliance Committee (“ARC”) in time for a meeting on 11 February. As regards this paper, I am asked in particular to advise on whether any of the proposals, if adopted and embodied in a POL Prosecution Policy document, might lead to difficulty for future POL prosecutions.
3. At the same time, I was informed that my views on **Project Sparrow – Paper on Stacked Cases** were inessential at this stage. However I had already written in draft that part of this Advice dealing with that paper, and I note that at paragraphs 4.5 and 5.4 of the new paper direct reference is made to that work, so for those reasons my comments about it are included in this Advice.

4. Finally, by way of introduction, I hope I may be forgiven if anything below appears to be nit picking or trivial or technical. I have commented only where I have considered I should do so. Whether, and to the extent, any of my remarks are adopted will be a matter for the authors of the papers.

### **Project Sparrow – Paper on Stacked Cases**

5. This paper seeks decision from the Board on the future of so-called “stacked” cases. Attached to it are Appendix A and Appendix 2. I have also been provided with a further document prepared by Cartwright King (“CK”) which lists in two parts a series of 29 cases that have been “stacked”, 22 of which require a Horizon report, the remainder of which do not.

#### *Paragraph 1*

6. Appendix A, which is attached to the paper, and referred to at paragraph 1.a, lists some 40 stacked cases divided under three separate heads (I deal with these below).
7. I note that the paper states (at paragraph 1.c and d) that POL is currently progressing the appointment of, and working with, Horizon experts and Fujitsu to agree the scope of their remit. Although beyond the scope of this Advice, I would impress that whoever is being appointed (I note the paper speaks of *experts* (plural)), that any remit is supervised by CK, and that they understand their duties as experts in criminal proceedings (for which see the Criminal Procedure Rules 2013 (S.I. 2013 No. 1554), Pt. 33, in particular rule 33.2 and 33.3).<sup>1</sup>

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<sup>1</sup> <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu#general>

*Paragraph 2*

8. Whilst I realise the paper is designed to be easily digestible for Board directors whose time is limited, to be candid I am not comfortable with the term “stacked”.
9. It must be borne in mind that if there is any delay built into the prosecution of its cases, and an issue arises about the delay in a given case, then disclosure on that issue might involve consideration of the policy underlying it, which may arguably involve disclosure of the papers to the Board.
10. The term “stacking” in such a context is not one I have heard before. Although used as a coded term to mean cases, which are yet to be proceeded with, it implies an element of deliberation in piling them up, and in my view should be avoided as it creates the wrong impression.
11. I take the term “in motion” to mean proceedings that have been initiated or commenced.

*Paragraph 3*

12. The full title for the full Code test cited at paragraph 3.e of the paper is the Code for *Crown* Prosecutors. The first sentence of the paragraph provides an adequate summary of the two-stage test for Board purposes. However, I would be surprised and concerned if any prosecution had been stopped on evidential or public interest grounds due simply to the frailty of an elderly witness. In the kind of cases POL prosecutes, the elderly witness is likely also to be the victim, and the public interest in favour of prosecution is even stronger where the victim is vulnerable.<sup>2</sup>

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<sup>2</sup> Paragraph 4.12(c) of the Code for Crown Prosecutors:  
[https://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf); this is also reflected in the 2013 draft policy document that CK has been developing at paragraph 4.5.vi

13. Whether or not in the given example the elderly witness is also the victim, without wishing to become over-technical about it, these days obstacles such as infirmity, which in the past might have given rise to evidential problems, no longer do so, because an application to adduce the evidence as hearsay under the Criminal Justice Act 2003 may be made.
14. Of course if prosecution is likely to impact adversely on a victim's health then that may make prosecution less likely but the seriousness of the offence would need considering, and the victim's views would have to be canvassed first.
15. The defendant's illness may be considered but even ill defendants can be tried after a suitable postponement.

*Paragraph 4*

16. As to paragraph 1.c, again I understand that the paragraph is written for Board purposes and is not a legal opinion.
17. There are two bases on which delay may form a basis for an abuse of process argument to stay the proceedings in the Magistrates or Crown Court: (1) (as is correctly stated at paragraph 4.c.3 of the paper) where the delay compromises a fair trial and (2) where the delay is such that it breaches the reasonable time requirement under Art. 6(1) ECHR.
18. As for the first sub-category, the effect of delay can normally be accommodated within the trial process by, for instance, the exclusion of evidence, directions to the jury about the effect of delay on memory etc. All other things being equal, in POL cases the effect of delay will be less marked as many such prosecutions rely on Horizon records, and at all events the time between summons/charge and trial should be relatively short. There is no rule of thumb to the measurement of delay that may lead to a successful abuse of process argument. The kind of delay that tends to find its way into

the reports is of far longer duration, ordinarily measured in years. But the cases are fact-specific, and a stay is an exceptional remedy.

19. As for the second sub-category of abuse grounded in delay, the period is measured between the time the defendant was officially alerted to the likelihood of charge (usually by summons or formal charging) and the time of trial. In light of the fact that summonses are not being issued, and for the reasons I have already given, it is hardly likely that any POL cases should fall within this sub-category.
20. However, I note in paragraph 4.c.5 that CK has advised that a 6 month delay should not stop a prosecution, but (absent good reason) a delay of over a year runs that risk. POL should be very cautious before adopting or relying on any such prescriptive approach. At all events it seems to me that CK has limited that advice to abuse on the grounds of the impossibility of a fair trial on grounds of delay.
21. The category of abuse of process I had in mind when in early January 2014 I was first apprised of the fact that POL was considering the possibility of postponing cases while it sought a new expert was not the compromising effect of delay on the fairness of the trial, but on the misuse or manipulation by the prosecution of the process by taking a deliberate policy decision to build delay into the initiation of proceedings in order to shore up its cases. This category does not rely on the impossibility of providing a fair trial where there has been delay but on balancing the competing public interests of permitting the prosecution of serious crimes against the public interest in not allowing the prosecution to use any means to justify the end.
22. At a time when the integrity of Horizon is under the spotlight, to decide deliberately to “stack” cases – i.e. to delay cases awaiting summons or charge – in order to improve the chances of conviction is a legal if not a PR disaster waiting to happen.

23. For this reason, it is incorrect to represent to the Board that “The law does not allow us to stack prosecution cases *indefinitely*.” This is because the sentence implies that the law *does* permit a prosecution authority to postpone cases (albeit not indefinitely). If that is the implied representation then it is incorrect.
24. Such an implication would run contrary to the “overriding objective” expressed in the Criminal Procedure Rules 2013 (S.I. 2013 No. 1554), Pt. 1, to deal with cases “justly”, in particular rule 1.1(2)(e) (to deal with the case efficiently and expeditiously) and rule 1.2(1) (obliging each participant in the conduct of each case to prepare and conduct the case in accordance with the overriding objective); in-built delay also offends Pt. 3, where, by rule 3.2(2)(f), the court has, among other duties, a duty to discourage delay, and where, by rule 3.3(a), each party must actively assist the court to fulfil its duty under rule 3.2.
25. In early January, I was asked to consider the question how long POL could hold off charging SPMRs whilst it was looking for an expert witness, and whether there is a point when the delay (between offence and charge) is so great that the prosecution may not proceed.
26. As I advised at the time by email, in most POL cases this will still mean a decision has to be taken once the investigation is complete and after all the available information has been reviewed. It is not open to a prosecutor to sit on the evidence and make no decision to prosecute if the evidence meets the full Code test, and then come back to it later.
27. If in the absence of an expert no decision can be taken whether or not the test is met then that might well justify a delay *in the individual case*, assuming it could not be said the delay was a capricious or improper exercise of prosecutorial discretion and that the decision could have been taken far sooner on the then available evidence.

28. As I have said, it would be an exceptional case that would meet with a stay of the indictment as an abuse of the process based solely on grounds of delay, but if POL took a general across-the-board policy decision to delay all prosecution decisions to get an expert in place - not to meet evidential insufficiency *in the individual case* - but to replace Mr Jenkins for all cases, then it is taking a risk of exposure and the failure of its cases for that reason.
29. As I also said, and repeat, there is no rule of thumb at all, and, on the information I was provided with in early January, delay in terms of weeks or months is not the real issue here. The real issue is the taking of a global approach to delaying decisions to prosecute for want of an expert to support later prosecutions. Thus my advice was and remains there should be no such approach and each case has to be looked at on its own facts.
30. For the sake of absolute clarity, my advice is that any decision to adopt any *wholesale* postponement of cases without individual consideration is to court an unacceptable risk of a finding of abuse.
31. By paragraph 7, the paper retains the option for consideration by the Board that delay might be built into POL prosecutions. I return to this below.

*Paragraph 5*

32. Appendix A to the paper lists the 8 “prosecute now cases” mentioned in paragraph 5.b.2. Confusingly, CK’s Appendix suggests there are 7 cases in which an Horizon expert is not required, which I assume are cases capable of being prosecuted now. Closer analysis of both lists shows however there are only 3 common cases between them: Cottingham, Coventry and Redman.
33. Brown, Jadega, McVeigh and Armajit appear within the “Horizon-dependent” category on Appendix A, but are located in CK’s document in the “stacked cases for which no Horizon expert report is required” category. I note that Brown appears in both the “Horizon-dependent” and the “no further action” categories in Appendix A.

34. Carter, James, Powar, Purohit and Smith appear in Appendix A within the “prosecute now” category whereas these cases appear in the “Horizon-dependent” category on CK’s list.
35. One case (Rees) does not appear at all on CK’s list. Appendix 2 sets out the cases that require no further action and replicates the third part of Appendix A with reasons for decision where available.
36. There is therefore a statistical mismatch on the material I have seen between CK’s Appendix and the Appendix attached to the paper, which may have been resolved in a further iteration of Appendix A which I do not have. If they have not been resolved, they do need urgent resolution.

*Paragraphs 7 and 8*

37. This paragraph seeks decisions on three possible options for stacked cases; they are (1) initiation of proceedings (setting them in motion), (2) keeping some or all of them stacked or (3) sending out notices that they will not be prosecuted.
38. While it may be that the Board makes decisions about prosecution policy, nonetheless, corporately POL will be accountable for such decisions if they are later found to be wrong.
39. Option (3) (and recommendation paragraph 8.a) merits a little discussion. If POL gives notice to individual defendants that, having considered the full Code test, they are not to be prosecuted then that will be regarded as a binding promise to which POL will be held should it later seek to renege on it. A breach of promise whereby the defendant has acted to his detriment may itself amount to an abuse of the process. The finding of detriment is not an indispensable factor. Thus an abuse may be found even where there has been no detrimental reliance on the promise.

40. In light of my advice above, adoption of decision paragraph 7.b and recommendation paragraph 8.b courts some risk for POL in that a global policy approach to cases without individual justification by case specific and documented review may, if subsequently challenged, lead to a stay of the proceedings, which, if it failed because of the global policy approach, would inevitably impact upon all other stacked cases.
41. I agree with recommendation paragraph 8.c.

**POST OFFICE AUDIT, RISK AND COMPLIANCE COMMITTEE –  
Prosecutions Policy**

42. Attached to the paper **Project Sparrow – Paper on Prosecutions Going Forward** was Appendices A-H. Attached to the paper superseding it is one Appendix, Appendix A. The new paper speaks of a paper that went to the committee in November. I have not seen it.

*Paragraph 4.1-4.5*

43. This paragraph focuses on three options, two of which ((a) and (c)) are not addressed in detail for the reasons given. The focus of attention is therefore option (b) – “pursuing a prosecutions policy more focused on more egregious conduct” and the possible “filters” that might be applied to POL prosecution policy to ensure that only cases displaying what is called an appropriate “fact pattern” are prosecuted.
44. Paragraph 4.3 discusses a financial filter set at various threshold levels between £15,000 and £100,000, which might be used to reduce the number of cases handled annually by POL.
45. The paragraph recommends there be a financial threshold set into policy (as a “guide” figure) as a factor to be taken into account when deciding whether or not to commence proceedings. What is envisaged is that below that figure (i.e. cases involving losses of less than that figure) they would typically not

be prosecuted except where there were special circumstances (e.g. the vulnerability of the victim).

46. The paper's proposal is to fix the figure at £20,000 but the figure would not be made public at any point.
47. At paragraph 4.4 the paper lists the kind of non-financial factors that might be introduced into any revised policy. I deal only with those factors that require comment.

#### The financial threshold

48. It is important to observe that if POL is exercising its decision to prosecute under the CPS Code for Crown Prosecutors then its approach to prosecution is whether the evidential test is satisfied and if so whether it is in the public interest to prosecute. Many cases may pass the evidential test (whether the evidence provides a realistic prospect of conviction) whatever the financial loss. It would be illogical to suggest that any guideline financial threshold goes in support of or against meeting the evidential test. But it can be a public interest factor.
49. Currently POL has no financial threshold before prosecuting. Of interest, the draft policy document thus far developed by CK for POL provides:
  - 1.1. In applying the provisions of the Public Interest Stage of the Full Code Test the prosecutor will have regard both to the matters set out in the Public Interest Stage of the Full Code Test and, additionally, to the following factors:
    - i. The quantum of any loss or shortage arising out of the alleged criminal conduct. Post Office Ltd. regard this as an important factor and accordingly consideration will be given to the following matters:
      - (a) **The value in monetary terms of the loss or shortage. Whilst a lesser value may militate against prosecution it does not follow that any particular value will be determinative. A**

substantial or significant loss or shortage will usually result in prosecution even where other factors tend to militate against that outcome.

- (b) Whether or not some or all of the loss or shortage has been repaid to Post Office Ltd. Again repayment may militate against prosecution but it does not follow that in all cases of repayment we will not prosecute.

- 50. A footnote to paragraph 4.5i.(a) adds, “In general and subject to the other matters set out in this paragraph, a loss or shortage of less than £5,000 might indicate that we will not prosecute. This does not mean that we will always prosecute where the loss or shortage is greater than that sum, or that we will never prosecute where the loss or shortage is less than that sum, the value of the loss or shortage being but one factor to be considered. In appropriate cases we will prosecute where a loss or shortage is well-below that figure.”
- 51. In principle there is no difficulty about a guide figure. POL is a commercial organisation and has to protect public money. Paragraph 4.12(f) was a fairly recent addition to the CPS Code for Crown Prosecutors. It invites prosecutors considering the public interest stage of the test to consider, among other things, “the cost to the CPS and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty.”<sup>3</sup>
- 52. But it then guards against deciding the public interest on the basis of that factor alone, adding, “It is essential that regard is also given to the public interest factors identified when considering the other questions in paragraphs 4.12 a) to g), but cost is a relevant factor when making an overall assessment of the public interest.”
- 53. Thus the commerciality of a prosecution is a legitimate factor but it should never be the sole factor when considering the public interest stage of the test, and would have somehow to be reflected in any POL policy. This is how I understand paragraph 4.3 of the paper, which regards the financial limit to be

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<sup>3</sup> This is reflected in CK’s draft document at paragraph 4.5.ix

introduced into policy *as a matter to be taken into account* when deciding whether to initiate proceedings, i.e. it is not the only factor to be taken into account, which I think is entirely the correct approach to adopt.

54. CK had alighted upon £5,000, possibly for historic reasons. The draft paper for the Committee suggests £20,000. The important thing is that the figure is not set in stone and that the new POL prosecution policy document provides POL with a sufficient degree of discretion to ensure that deserving cases do not slip through the net on financial grounds alone.

#### Publication of the guide figure

55. I have noted the suggestion that the figure should not be made public at any point. I have grave reservations about that. If a policy is to be published on POL's website it must be transparent<sup>4</sup> Publication would indicate POL intends taking a consistency of approach to its cases. Any later revelation that POL was working to a guide figure that was not published is storing up potentially disastrous if not embarrassing problems. If, for instance, after a time, it were discovered that POL was applying an unpublished guide figure of £20,000 but had decided to prosecute an individual where the loss fell under that figure that may open up the decision to later challenge or criticism, and in my view can and should be avoided. As another example, what if there were an FOIA request about it, and POL was obliged to publish the guide figure it had been applying (on the assumption it was not exempt under the FOIA)?
56. In my judgment, there really is no good reason why the guide figure should not be published with an appropriately worded reserved wide discretion (such as CK have devised), allowing of the possibility also that it may be revised down or up in the future.

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<sup>4</sup> Publication is recommended at paragraph 6.1.b)

Assessing the loss

57. Although beyond the immediate remit of the paper for the Committee and this Advice, I simply add that assessing the loss or shortage below which POL will not as a matter of policy, subject to special circumstances, typically prosecute, may prove quite difficult to apply in practice. This is not a question of policy or definition but goes really to the practicality of applying a guide figure. One example will suffice: if POL's policy were not to prosecute for losses under £20,000, and in a given case POL claimed the loss was £21,000, whereas the putative defendant argues that POL is unable to prove any loss over £20,000 by reference, say, to a privately commissioned accountant's report, what then? How is the quantum of the loss resolved without getting embroiled in argument about whether the person should or should not be prosecuted and the decision subject to challenge on the basis that POL is not following its own policy?
58. This is not an argument to suggest that the guide figure being applied should not be adopted in principle or should not be published. I think the answer will be to have sufficient escape clauses in place in the published policy so that no challenge can be made to the decision-making process based on financial factors alone.

Non-financial factors

59. I make the following observations about the bullet pointed factors, which by the use of the word "include" in the introductory part of paragraph 4.4 are, I take it, clearly not intended to be exhaustive.
- *The nature of the alleged misconduct*
60. I think this is too widely drawn as a factor to form policy. At all events the nature of the misconduct will tend to determine whether or not the evidence provides a realistic prospect of conviction.

- *Whether there is evidence that the defendant took money directly from us/others*

61. Again, I think this factor might be difficult to apply in practice. The offence of false accounting is often charged in the alternative to theft to avoid proving what, if anything, was in fact taken.

62. Indeed, even more significantly, to establish as policy that cases where there is evidence of the taking of money directly from POL or others might tend to favour prosecution could send out a message that the more sophisticated and successful the concealment of the loss the less chance there is of prosecution. I can see that this was regarded as a factor in favour of prosecution in light of the fact that it is ultimately taxpayers' money that is being protected, but I think it should be reconsidered.

- *Whether the facts disclose a pattern of deliberate conduct designed to materially benefit him/her or whether the fact pattern discloses inadvertence/poor book-keeping skill or "muddle-headedness"*

63. These are not really public interest factors but would be facets of the alleged offending, which would determine whether or not the evidence provides a realistic prospect of conviction.

- *The cost of bringing the prosecution*

64. This is considered above.

- *Whether there are any alternative, more suitable, remedies available to POL*

65. I take it this must mean civil remedies as out of court disposals such as cautions can only be administered by the police and therefore would not normally be available to POL without police cooperation.

*Paragraph 4.6*

66. I can add here a little more to the debate on other commercial organisations that prosecute.

67. Private prosecutions have recently reached the Court of Appeal again in the Virgin Media case.<sup>5</sup> The appeal itself focused on the lawfulness of compensation and confiscation applications by a private prosecutor under the Proceeds of Crime Act 2002.

68. At paragraph 10 of the judgment, the court commented on the “increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions.”

69. At paragraph 15-16, he added:

It is evident that private prosecutions by charitable or public interest bodies such as the RSPCA are common. Furthermore public bodies such as the Financial Services Authority also rely for their authority to prosecute on the general power of a private individual to prosecute: see *R v Rollins* [2010] UKSC 39 at paragraphs 7-14 [ ... ].

It is now also evident that commercial organisations regularly undertake private prosecutions. This type of private prosecution is undertaken not only by trade organisations such the Federation Against Copyright Theft (principally the visual media) and the British Music Industry (‘BPI’) (the music industry) but also ordinary commercial companies [ ... ].

70. Interestingly, it has been recently reported that the RSPCA is to be stripped of its ability to prosecute following concerns about its approach to prosecution.<sup>6</sup>

71. I was asked to consider which other commercial organisations do prosecute privately. The court in the Virgin Media case did not actually name any. It must be the case that many commercial organisations will prosecute

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<sup>5</sup> *Regina (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52

<sup>6</sup> <http://www.telegraph.co.uk/earth/wildlife/10612063/RSPCA-risks-losing-power-to-prosecute.html>

periodically such as Virgin Media on this occasion, or at least consider it. Banks and credit card companies tend to have in-house investigations capability, but prosecutions arising from fraud are conducted by public prosecuting authorities such as the CPS, or in extreme cases, the SFO, but with evidential support from the in-house investigations teams.

72. The research I have done has revealed that Transport for London (“**TfL**”) has a prosecuting function whereby it will prosecute disparate offences, not just fare evasion, as set out in section 3.0 of its prosecution policy.<sup>7</sup>
73. Northern Rail prosecutes privately. Its Protection, Enforcement and Prosecutions Policy document seems to share common features with that of TfL,<sup>8</sup> although which one, if either, was derivative of the other is impossible to discern. I daresay other rail and transport companies occasionally prosecute fare evasion and other offences falling within their business compass.
74. By way of important contrast, as I have said before, albeit it may be anachronistic, for historical reasons POL has developed a highly sophisticated investigations and prosecution function.

#### *Paragraph 6*

75. This paragraph sets out the proposals. The only three points I feel I should address are a), d) and e).
76. As to a), I am unclear how or why the proposals in paragraph 4.5 should be written in policy as an “over-rider” if that is what is intended. I have commented about the stacked cases above.
77. As to d), while I do not advise that a person within POL ought not to be appointed to take overall responsibility for prosecution policy and consistency

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<sup>7</sup> <http://www.tfl.gov.uk/assets/downloads/tickets/tfl-revenue-enforcement-and-prosecutions-policy.pdf>

<sup>8</sup> [http://www.northernrail.org/pdfs/Protection\\_Enforcement\\_&\\_Prosecutions\\_Policy.pdf](http://www.northernrail.org/pdfs/Protection_Enforcement_&_Prosecutions_Policy.pdf)

of approach, that is a different thing to taking responsibility for decisions that the full Code test is met in individual cases.

78. Therefore, a hierarchy of the casework decision-making function within POL, and POL's interrelationship with its external lawyers, and the advice they give, should be transparent and form part of POL's policy by the formulation of a decision-tree, which might be incorporated by reference into the final policy document if not also published with the publishable policy document.
79. The Security Team's investigations policy document<sup>9</sup> might also be considered in the light of a new prosecution policy, as security and compliance and legal are interrelated aspects of POL's prosecution function, and this document might be considered for publication too.
80. Finally, as to e), while this may be a very sensitive area (and there is absolutely no criticism of CK), there may be an argument for considering regular reviews of the employment of the external law firm prosecuting for POL, unless of course this is done informally or under some arrangement already existing between POL and its external advisors.

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6 February 2014

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<sup>9</sup> 2013 Conduct of Criminal Investigations Policy

