

Annex A

DRAFT – NOT POLICY - IN COMMERCIAL CONFIDENCE

Proposition to Board – Sparrow ‘Reset’

1. Background

- 1.1 Post Office, in its role as Secretariat, has sought to administer the Scheme as efficiently and fairly as it possibly can and, in its role as a Party in each dispute, has at all times acted in good faith, paying particular attention to the obligations of confidentiality which binds all parties involved in the business of the Working Group. Despite incurring direct financial costs to date of £5m, and diverting other scarce resources away from strategic priorities for the business, it has been a highly frustrating exercise which has failed, in large part, to meet the expectations of relevant stakeholders or to draw a line under this issue which might enable Post Office to move forward.
- 1.2 This is not the product of poor execution or lack of positive effort on the part of Post Office, but is instead simply reflective of the erroneous assumption which underpins the approach of Applicants and their supporters – that is, that Post Office is responsible, if not through Horizon then in other ways, for the difficulties they have experienced and/or the losses they have incurred. This has been exacerbated by the completely unjustified raising of expectations by Applicants’ professional advisers, the JFSA and MPs over what the Scheme can, and in their minds should, deliver in terms of significant compensation payments and/or Post Office support in efforts to have criminal convictions overturned.
- 1.3 Post Office has, in the process, sustained significant reputational damage. Even if the net volume of media interest has remained relatively low, negative public perception around this issue is pretty firmly entrenched. Even in circumstances where Post Office might be free of its obligations of confidentiality and be in a position to share more balanced factual information about the Scheme and the cases in it, the lazy but media-friendly David and Goliath characterisation of this story would likely retain much of its appeal.
- 1.4 Against this backdrop, it would be easy to forget that there are some very real positives to have emerged from this exercise.
- 1.5 Now all the cases in the Scheme have been comprehensively re-investigated, Post Office can be satisfied that the Horizon platform, which is critical to its entire operation across the network, operates extremely reliably. There is, quite simply, no evidence whatever of a systemic flaw in the system. This is extremely positive news for the business.

1.6 Moreover, with the exception of a small number of cases in which Post Office might have done more to support individual SPMRs (whether by being more timely in providing additional training, in responding to enquiries or correspondence and the like), the investigations paint a largely favourable picture of Post Office's engagement with the individuals running its network.

2. Challenges

2.1 In accordance with the Board's mandate, Post Office has adopted an approach towards the individual complaints in the Scheme in which it accepts its shortcomings where these have been apparent but defends its interests robustly in cases where it is clear that it is neither the cause of, nor otherwise responsible for, the difficulties and/or losses experienced by Applicants. To do otherwise would, of necessity, have produced yet more negative outcomes in terms of legal risk, substantial further cost and financial exposure, as well as promoting opportunism and eroding confidence across the network.

2.2 This approach has been hugely frustrating for JFSA whom, in the absence of evidence of a flaw in Horizon, have sought to broaden the scope of the Scheme, actively solicited media interest and mounted a political campaign to bring further pressure to bear on Post Office to change tack. In addition, they have also instructed a firm of solicitors, Edwin Coe LLP, to raise the temperature still further while ostensibly maintaining their support for the Scheme. The truth is that this apparent support is conditional on the Scheme producing the results they favour, results which the available evidence simply does not support. The message is clear: find in our favour or face litigation. Taken together with their longstanding lack of meaningful participation in the business of the Working Group, these developments do nothing but undermine the ability of the Scheme to reach an equitable conclusion in individual cases or as a whole.

2.3 A further challenge for Post Office in all of this is the clear lack of impartiality and professionalism being shown by Second Sight in the performance of their work. To date, Second Sight have determined that only 2 cases are unsuitable for mediation where any reasonable and objective assessment of the evidence would lead to very significantly higher number. In many cases, Second Sight offer no suggestion or judgment as to what may have happened in any given case, and ignoring what evidence there is, simply recommend mediation on the less than compelling grounds that mediation might offer the parties 'closure'.

2.4 Evidence has now emerged of Second Sight's deliberate distortion of their own findings to support a recommendation that a case be mediated when their own internal analysis demonstrates, without equivocation or ambiguity, that the relevant Applicant is wholly responsible for the losses they incurred. To compound this further, this came to light in a chain of emails between Second Sight and one of the Applicant's professional advisers in which Second Sight seek to provide reassurance that their findings in the case would meet with the professional adviser's approval. This represents a quite inappropriate degree of co-operation, to say the least, between Second Sight and those with a clear stake in the Scheme.

- 2.5 Lastly, and presumably discouraged by the lack of evidence of a flaw with Horizon, attempts by Second Sight to broaden the remit of the Scheme continue apace, most recently through an inordinately lengthy and irrelevant list of questions for Post Office to answer, an approach which closely reflects the wishes of JFSA and MPs.
- 2.6 However, by far the biggest challenge facing Post Office is the simple fact that the Scheme has, in effect, been hijacked. It seems clear that, should the Scheme not come to the conclusion that Post Office, whether through Horizon or otherwise, is responsible for the difficulties and losses of Applicants and that Post Office is responsible for wrongful convictions, it will continue to be labelled as a sham by JFSA and MPs.
- 2.7 It is clear that the Scheme is being pulled away from anything approaching a resemblance to its initial function – to examine individual complaints about Horizon and associated issues and seek, where possible, to resolve these fairly. In circumstances in which only one outcome is acceptable to one of the parties to the Scheme, irrespective of the evidence or otherwise to support it, the Scheme represents little more than a rather large stick with which to beat Post Office.
- 2.8 As noted in previous advice, there are no circumstances in which Post Office emerges from this process in a positive light, no matter how objectively unfair that reality is. It is for this reason that the Sub Committee is invited to adopt the following recommendation.

3. Decision point

- 3.1 In circumstances where the atmosphere is so febrile, confidentiality so regularly disregarded, the participation of JFSA so conditional, Applicants' expectations so misguided and the lack of impartiality on the part of SS pretty conclusively established, it is hard to see how the Scheme, in its current guise, can continue to function. [DN: not wedded to this at all]
- 3.2 Post Office has little option but to force the issue with members of the Working Group. The Sub Committee is invited to endorse an approach whereby Post Office uses the next meeting of the Working Group on 14 January 2012 as a final attempt to get the Scheme 'back on track' by seeking to gain acceptance of and adherence to:
 - the Scheme and its processes as originally designed (by all);
 - the Scheme's proper scope (Horizon and associated issues only);
 - the need to remove the threat of litigation made plain by JFSA's instruction of Edwin Coe LLP;
 - the need to respect obligations of confidentiality and actively to promote this to individual applicants; and
 - (crucially) the principle that evidence must drive its recommendations and conclusions.

- 3.3 There is no escaping the fact that this is an exceptionally tall order. There would appear to be very little to be gained from a JFSA/MP perspective in participating in the Scheme on these balanced terms since it will not produce the pre-determined outcomes they seek.
- 3.4 That said, providing this final opportunity to address these issue sensibly is important since it is a further demonstration of our genuine attempts to resolve Applicants' complaints and may offer us some further protection against possible attempt to challenge, perhaps by way of Judicial Review, any subsequent decision we may need make about the future of the Scheme. The risk of a successful challenge of this nature has already been assessed as being low – recent legal advice suggests that this step will likely reduce it still further.
- 3.5 While it is highly unlikely that JFSA and its supporters will agree to a 'reset', continuing on the same trajectory as presently, in other words seeking to muddle along as we currently are, is not a realistic option. Post Office has, to date, been extremely accommodating in relation to Scheme. Regrettably this approach has not produced the sort of dividend one might normally have expected it to in terms of any sort of recognition for our efforts: instead, it could be argued that our goodwill has to a certain extent been exploited. [DN: too emotive?]
- 3.6 An attempt to maintain the status quo will entail, *inter alia*:
 - the continuation of a process conducted in the public eye, with every unpopular decision of Post Office being questioned and/or challenged in the media and in Parliament, with obligations of confidentiality preventing Post Office from making any sort of effective rebuttal;
 - the publication by Second Sight, likely to coincide with the run-up to the General Election, of their further report which, judging from their performance to date and the questions they have put to Post Office to inform its content, is near certain to place further unsubstantiated 'charges' at Post Office's door and broaden, quite unjustifiably, the lines of enquiry it will be expected to address;
 - a substantial risk of increased scrutiny in Parliament, perhaps through the Business, Innovation and Skills Select Committee, bringing with it an inevitable and unwelcome increase in the involvement and concern of Ministers in respect of this issue, when we need them to be focused on other matters of commercial importance to Post Office;
 - an extremely lengthy process given that there remain 100 cases in the Scheme; the process of moving cases through the Working Group, attempting to challenge recommendations of mediation by Second Sight no matter how absurd, and scheduling and conducting mediations is certain to take much of 2015;
 - pressure to allow new cases in the Scheme, some of which are likely to be entirely opportunistic (there is already evidence of this happening);

- poor results in terms of public perception since mediation can only resolve those complaints in which the Applicant has both a legitimate claim and is prepared to settle on reasonable terms. This is a tiny fraction of the cases in the Scheme since virtually all complaints include thoroughly exaggerated claims for consequential loss, effectively negating the likelihood of a resolution being achieved. Post Office will be accused of bad faith in respect of each 'failure' to reach a conclusion which is satisfactory from an Applicant's point of view and/or that of JFSA and the MPs; and
- no meaningful reduction in the risk that Applicants, individually or as a group, will resort to litigation in order to pursue their claims against Post Office.

4. What if ?

4.1 In summary, Post Office now has the opportunity it has been seeking since the Summer to bring matters to a head. Post Office should express itself as being prepared to stand by the Scheme if, and only if, it operates as it was intended to, with other Parties displaying the same degree of fairness and responsibility as it has shown. If those terms (which had previously been agreed to on all sides) are no longer acceptable to JFSA, Post Office should indicate, explicitly, that it will need to reconsider the future of the Scheme.

4.2 Contingency plans are being developed which:

- would move the governance and management of the Scheme in-house (ending SS' current role and dissolving the Working Group);
- might include the retention of an independent oversight function in the interests of transparency and public confidence (though not by Second Sight); and
- provide for negotiations with individual applicants, where it is fair and reasonable to do so, in order to try to resolve their complaints.

4.3 Detailed proposals will be brought to the Board if, and when, it becomes necessary.