

In Strictest Confidence

Appendix A

POST OFFICE AUDIT, RISK AND COMPLIANCE COMMITTEE

Prosecutions Policy

1. Purpose

The purpose of this paper is to:

- seek the ARC's views on proposed changes to the prosecutions policy and the way in which POL will prosecute criminal cases in the future; and
- update the ARC with respect to certain aspects of the Branch Support Programme.

2. Background

2.1 At its meeting on 19 November 2013, the Committee considered whether or not there was merit in formally amending the prosecutions policy and if so what the substance of those amendments should be. It was agreed at that meeting that before any firm decision could be taken in this regard:

- (a) further work needed to be done to understand the financial and other consequences of amending the policy, particularly if it were the case that the amendments resulted in fewer cases being referred to the criminal courts;
- (b) the Committee needed a clearer understanding of the work that was being done as part of the Branch Support Programme and the impact this would have on detecting (and preventing) losses at an earlier stage; and
- (c) it would be helpful to understand how banks and other large companies dealt with criminal loss caused by employees.

2.2 In this connection it is probably useful to note that in a report for POL Brian Altman QC observed that, "Post Office Ltd's prosecution role is perhaps anachronistic...", and that we are "the only commercial organisation (albeit Government owned) I have been able to identify (apart from RMG that retains a prosecution function) that has a commercially based, sophisticated private prosecution role, supported by experienced and dedicated teams of investigators and lawyers. To that extent it is exceptional if not unique."

3. Activities/Current Situation

3.1 The way in which prosecutions have historically been brought was set out in some detail in the paper on prosecutions considered by the Committee in November. In that paper it was noted that typically we prosecute subpostmasters for False Accounting combined with Theft, and/or Fraud. The prosecutions are brought in accordance with the Code for Crown Prosecutors and the choice of charge is largely dependent on whether we have obtained an admission of guilt, or other compelling evidence that the Defendant has taken money directly from us, or have only secured evidence that the Defendant covered up losses by falsely recording the branch's financial position (e.g. to avoid paying losses back and/or to keep their branch) on the Horizon system. As will be recalled, typically Defendants plead guilty to a charge of False Accounting, with the charge of Theft then being dropped.

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3.2 In terms of the volume and cost of cases, over the past few years we have averaged about 250 investigations into possible criminal conduct a year, of which about 50 resulted in criminal prosecutions. The financial losses (to POL) in those cases where a prosecution was brought ranged between £1,738 and £175,260 per incident in 2012/2013, and £2,347 and £192,990 in 2013/2014. The average cost of bringing a criminal prosecution the in 2012-2013 financial period was about £7,500 (£3,600 for the costs of our internal security investigators, plus £3,900 for our external solicitors).

3.3 The amount recovered from Defendants in respect of stolen, misappropriated or unaccounted for stock or money in the cases closed so far in the 2013/2014 period was £741,182, or approximately £10,500 per case. Total losses in those cases were £1,603,932, implying a recovery rate of 46%. These figures must, however, be treated with a degree of caution, as any amounts recovered must be seen as coincidental consequence of the current policy on prosecutions. It is well established that the purpose of criminal prosecutions is to punish and deter wrongdoing, **not** to recover financial loss: this must be our guiding principle. Should we bring a prosecution for any other reason, Post Office and its Board run the risk of being accused of abusing the Criminal Justice System, with attendant reputational damage.

3.4 POL does however frequently initiate actions in the civil courts for debts it believes are due and owing to it by subpostmasters. In 2012/13, the civil debt team (a team which is entirely separate to the criminal team) recovered approximately £1.9 million, and instructed external lawyers in 100 cases, at an average cost per case in 2012-2013 of about £1,200 (£400 for the costs of Former Agent Accounting Team, plus £800 for our external solicitors). It is not proposed at this stage to review the civil recovery process, as it outside the scope of the work undertaken by Project Sparrow. That said, the way that POL interacts with subpostmasters generally is in scope for the Branch Support Programme.

4. Options Considered

4.1 As noted in the November paper, broadly the options considered comprised:

- (a) **Preserving the status quo** – i.e. retaining prosecutorial capability and continuing with a prosecutions policy which is substantially the same as that which has been used in the past;
- (b) **Pursuing a prosecutions policy more focussed on more egregious misconduct** - e.g. higher value cases/cases involving vulnerable members of society/cases of involving particularly wilful wrongdoing, and engaging with the police in relation to other matters; and
- (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.

4.2 For a variety of reasons, option (a) did not gain a large degree of support from the Committee at its meeting in November and for that reason is not the focus of this paper. Similarly, given that we have been advised by leading Counsel that, due to budgetary constraints, the CPS is unlikely to have an appetite to prosecute all but the most serious cases, and there would be a substantial lead in time as we would need to open negotiations with the Director of Public Prosecutions about implementation which would take time and still leaves us in our current position. Also, if option (c) were commenced, it would not be for Post Office to implement or review the policy but for the CPS. For these reasons option (c) is not discussed in

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any great detail, though should the Committee decide that it is an option worth exploring further much of the analysis in the following paragraphs, particularly with respect to cost and financial implications will still be of relevance. Instead, the balance of this paper focuses on option (b), and the possible “filters” that could be applied to our prosecution policy in order to ensure that only cases displaying an appropriate “fact pattern” are prosecuted.

4.3 One of the “filters” that could be applied is financial: currently there are no formal financial limits set out in our prosecution policy (though in practice de minimis amounts are not pursued), an approach which gives us a run rate of approximately 50 criminal cases a year. If a financial filter were applied then (based on our analysis of historic cases) the number prosecutions would (be likely to) reduce as follows:

- £15,000 - approx. 25 cases a year
- £20,000 - approx. 20 cases a year
- £30,000 - approx. a dozen a year
- £100,000 - one or two cases a year (and these could possibly be of interest to the CPS)

In order to ensure that an appropriate balance is struck between providing a suitable deterrent, and POL not being viewed as being too heavy handed, it is recommended that a financial limit be introduced into the policy as a matter to “take into account” when deciding whether to initiate proceedings. The significance of this “guide” figure would be that cases involving losses of an amount less than it would not typically be prosecuted **save where** there are highly compelling or special circumstances (e.g. the victims of the conduct are elderly or otherwise vulnerable members). It is proposed that this figure be fixed, initially, at £20,000.

4.4 It is also suggested that factors other than financial ones should be expressly introduced into any revised prosecutions policy. After discussion with our prosecutions team and taking into account the fact patterns displayed in those cases that are being considered by the mediation scheme, it is proposed that those factors include:

- whether the losses in question have been repaid;
- 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 skills or “muddle-headedness”;
- the degree of sophistication of the alleged wrongdoing;
- the number of incidents;
- the extent to which any members of the public suffered loss, and if so whether they were from vulnerable groups in society;
- the period of the alleged offending;
- the cost of bringing the prosecution; and
- whether there are any alternative, more suitable, remedies available to POL.

4.5 It should be noted that, although POL is still currently able to bring cases where the evidence concerned is extracted from the Horizon system, there is a strong risk that in such cases a defence will be mounted to the effect that the Horizon system cannot be relied upon. We have been advised that in these cases, there is a strong likelihood that such a defence would be successful, at least until such time as a new independent expert is identified and has familiarised himself with the system. This is likely to take around 12 weeks, and cost up to £200,000. Accordingly, at least until

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such time as the dimensions of this work are fully understood, as a practical (i.e. evidential) matter court proceedings will not be started in such cases. In addition there may be material on-going costs per case for the independent expert as the systems change through the usual business change programmes.

4.6 For completeness, and at the request of the Committee, we have also considered how other retailers, financial institutions and quasi-public organisations respond to criminal conduct within their organisations. Although definitive information is hard to obtain, it appears that:

- Most retailers and financial institutions maintain in-house security/investigative functions, which pass evidence of crime (often CCTV footage) over to the police and then support any actions taken by the external prosecutor (e.g. CPS). Other than Royal Mail Group, we have not identified any commercial organisations that habitually bring private prosecutions.
- Although Virgin Media recently conducted a high profile, high value (c. £144 million) private prosecution of a set-top box fraud, this was conducted with the police and appears to have been an exceptional step rather than a “business as usual” activity.
- Quasi-public organisations (e.g. TfL) and charities (e.g. RSPCA) are also known to bring private prosecutions. However these are typically brought against external persons (e.g. fare dodgers or animal abusers), and not employees or others involved in the organisations’ day-to-day operations.

4.7 In the November paper, a number of other factors were identified as possibly relevant to our approach to prosecutions (e.g. brand inconsistency, engagement with subpostmasters). In addition to these, which remain relevant, the following should be noted:

- Cost of Compliance with Duty of Disclosure: The continuing duty to act properly as a prosecutor required us (through our external solicitors) to review the prosecutions of 325 individuals to ensure that the Second Sight report did not affect the safety of any convictions. The cost of this review was approx. £180,000. We will need to do similar reviews every time new information comes to light which may call into question the safety of a conviction. To seek to minimise the need for this, we have instituted a weekly, cross-business conference call at which branch accounting issues can be raised. The estimated external cost of these calls is approx. £27,000 a year.
- Wasted management time and money: To date, we have spent approximately £5million seeking to address the concerns raised over our Horizon system and the criminal prosecutions. It has also taken up a considerable number of man hours of senior management at a time of significant, strategic and fast change in the company.

5. Commercial Impact/Costs

5.1 The immediate financial impact of the above policy approach, assuming that no other changes are made, would be that the sums of money that are currently recovered via the criminal law system (£741,182 in the 2013/2014 period), would no longer be as readily recoverable. As explained in the November paper, however, it would be open to us to use the civil courts to recover losses, though this is a more time consuming process, and there is greater scope for assets to be hidden from view. The recovery rate per case pursued through the Civil Courts will be difficult to

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ascertain given that a number of Subpostmasters subject to criminal proceedings are in financial difficulties, the impact of this on the recovery process is unknown.

5.2 However, if POL can deal with problems that arise in subpostmasters' offices before they turn in to significant financial losses, the financial impact of any change in the prosecutions policy should be greatly reduced. This in part is the aim of the BIP, the key elements of which include:

- gathering better MI from the network systems;
- providing better training and support to subpostmasters and branch staff;
- identifying problem losses earlier;
- liaising with the relevant persons sooner; and
- reviewing how we respond when a subpostmaster has materially breached his obligations to us.

5.3 Appendix A provides an overview of the Branch Support Programme and the actions that have and will be taken.

5.4 It should also be noted that any decision made now with respect to the future conduct of criminal prosecutions will have an immediate impact on so-called "in motion" cases. These cases, which are the subject of the separate paper due to be considered at the next meeting of the ARC/Board, are ones where no decision to prosecute has been made, but where the subpostmaster concerned has been interviewed under caution, and is waiting to hear whether or not a charge will be brought. Given that a number of cases now date back to late summer last year, when a decision was made to suspend all prosecutorial activity, POL should communicate its decision in this regard as soon as possible. The working assumption is that there could be some adverse publicity as and when the decision is communicated to subpostmasters and if delayed too long could lead to our management of the cases being called into question. It is anticipated that the number of "in motion" cases will materially reduce if we were to apply the filters referred to in this paper.

6. Proposal

6.1 It is proposed that:

- a) A revised prosecution policy be implemented and applied against more stringent financial and conduct criteria set out in paragraphs 4.3 and 4.4.
- b) Consideration be given to whether the policy be published on our website and if so what elements of it, to comply with best practice and transparency while not undermining our ability to implement the policy.
- c) The new policy, its interpretation and application be reviewed by a committee of ExCo every twelve months.
- d) An individual within Post Office Limited be appointed to take responsibility for deciding whether or not an individual case should be prosecuted against that policy (currently this accountability is shared across a number of individuals).
- e) Any prosecutions be conducted through an external law firm.
- f) The Communications team maintain a living strategy for dealing with all PR issues arising from any and all prosecutions.
- g) In conjunction with the Branch Support Programme, we work to improve our civil recovery operation to maximise the losses it can recover.

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7. Key Risks/Mitigation

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 they have seen this paper.

10. Recommendations

The ExCo/ARC is asked to approve the proposals set out in paragraph 6 above.

Chris Aujard
7 February 2014

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Appendix A

This appendix referred to the Branch Support Programme, on which a full Board paper is included as part of this Item.