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# **The Windrush Compensation Scheme**

## **A Comparative Analysis**



**By Elly Nowell and Shaila Pal**

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The responsibility for any errors in the research remains those of the authors.

## Executive Summary

The Windrush Scheme was set up in 2018 to provide documentary confirmation of British citizenship and residency rights for the Windrush generation and other commonwealth citizens and their children. This came in the wake of the scandal that had seen the Home Office, because of Theresa May's hostile immigration environment policy, repeatedly refuse existing residency rights to many people whose home had been the UK for decades. The impact on victims was profound. Many victims lost jobs, their homes, were deprived of healthcare, and were threatened with removal from the UK. Some were sent to countries they had not visited since early childhood. Then Prime Minister Theresa May, and successive Home Secretaries, apologised for the scandal and committed to right these wrongs.

A second scheme was set up in 2019. The Windrush Compensation Scheme aimed to provide fair, comprehensive, and accessible compensation to the victims of the scandal for any losses suffered because of being denied the right to live in the UK. In the years since, the Windrush Compensation Scheme has been subject to extensive scrutiny and repeated calls for reform from JUSTICE, the Home Affairs Committee on the Windrush Compensation Scheme, campaigners, and victims.

In November 2021, the Home Affairs Committee on the Windrush Compensation Scheme, found:

*'Many people who have applied for compensation have yet to receive a penny and we have heard too many stories of people struggling with impossible demands for evidence, poor communication from the Home Office and a lack of understanding of the issues they faced. For some, the experience of applying for compensation from the Home Office has become a source of further trauma rather than redress. Many of the concerns raised with us about the Windrush Compensation Scheme as part of this inquiry have echoes of the same criticisms made of the Home Office by Wendy Williams in her report into how the Windrush scandal occurred. It is a damning indictment of the Home Office that the design and operation of this scheme contained the same bureaucratic insensitivities that led to the Windrush scandal in the first place and suggests that the culture change promised in the wake of the scandal has not yet occurred. We are deeply concerned that delays and difficulties in the compensation scheme have compounded the injustices faced by members of the Windrush generation.'*<sup>1</sup>

Victims of the scandal have continued to express dismay and distress at the failure of the Windrush Compensation Scheme to deliver justice:

*'This process is traumatic. It should be a simple admin process, and also the way they are treating people – there is still no compassion being shown.'*

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<sup>1</sup> Home Affairs Select Committee, 'The Windrush Compensation Scheme', HC 204 (24 November 2021), 3

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*'Chaos is what I can say. I don't think some of the staff from the helpline knew what the Windrush saga was about. I gave up for two years. I have just put in for a claim. I became ill. Stress was too much.'*<sup>2</sup>

The Windrush Compensation Scheme continues to operate and more than four years since its establishment grave concerns about the scheme remain. In April 2023, Human Rights Watch found the scheme *'is failing and violating the rights of many to an effective remedy of human rights abuses suffered'*.<sup>3</sup>

This report has examined three other contemporary compensation schemes relating to harm caused by the State: namely the **Lambeth Children's Home Redress Scheme** the **Horizon Shortfall Scheme** and the **Infected Blood Compensation Scheme**. The report evaluates the structure and performance of each compensation scheme in order to compare and contrast them to the Windrush Compensation Scheme. The findings indicate a range of structural weaknesses present in the Windrush Compensation Scheme which require urgent reform. Based on these findings several recommendations for change are made.

## Key findings

### 1. Low statistical success rate for Windrush Compensation Scheme

The Windrush Compensation Scheme cohort is a large cohort and the second largest cohort examined in this report. The Home Office estimates indicate that between 6,000 to 15,000 applicants may be eligible, 7,534 applications having been made to date. Statistics indicate the number of those impacted could be higher than 15,000. The Infected Blood Inquiry has estimated that a total of 28,150 may have been impacted by contaminated blood products and therefore is potentially the largest cohort examined in this report. The initial estimates for those eligible under the Horizon Shortfall Scheme were in the hundreds, though 2,992 applications have been made. Initial estimates for those eligible for the Lambeth Children's Home Redress Scheme were approximately 3,000, with 2,240 applications made.

Statistically the WCS has the lowest success rate for applicants, with only 22% (1,641) of those applying receiving compensation and 53% (3,986) of initial applications being refused. In comparison, under the Lambeth Children's Home Redress Scheme 79% of applications were successful, with 8% being refused. Under the Horizon Shortfall Scheme 73% of applications were successful with a 17% refusal rate. The low success rate of the WCS raises concern as 16,744 applicants have had their immigration status confirmed though the Windrush Scheme. This suggests that only 10% of applicants who have secured declaratory immigration status have received a payment under the Windrush Compensation Scheme

### 2. Complex initial eligibility requirements for Windrush Compensation Scheme

The initial eligibility criteria for both the Horizon Shortfall Scheme and the Lambeth Children's Home Redress Scheme are arguably more straightforward and less onerous evidentially. The Horizon Shortfall Scheme requires the claimant to have been a postmaster who experienced shortfalls because of a previous version of the Horizon IT system. Whilst

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<sup>2</sup> Testimony from WCS applicants, Windrush Lessons Learned Review: progress update (31 March 2022), 32

<sup>3</sup> Human Rights Watch, 'UK: "Hostile" Compensation Scheme Fails 'Windrush' Victims' (17 April 2023) <<https://www.hrw.org/news/2023/04/17/uk-hostile-compensation-scheme-fails-windrush-victims>> accessed 29<sup>th</sup> January 2024

the Lambeth Children's Home Redress Scheme requires the applicant to have been resident or a visitor to a Lambeth Children's Home or Shirley Oaks Primary School.

The Windrush Compensation Scheme initial eligibility requirements require a correct determination of immigration status at the time the loss is said to have occurred. Compared to the other schemes examined, this can be a complex process which can be hindered by the quality of decision making and the lack of availability of legal advice and representation. The complexity of Immigration law has been acknowledged by judges. One of the findings of the Windrush Lessons Learned Review (2020) was the difficulty even experts in the Home Office faced understanding aspects of Immigration Law. These factors, coupled with the problems highlighted as to the competency of Home Office caseworkers, the broader culture in the Home Office and lack of funded legal advice create significant barriers for victims to obtain just compensation.

### **3. Elevated standard of proof applied in Windrush Compensation Scheme**

All schemes examined stated standard of proof to assess claims is the civil standard of proof of the balance of probabilities. The approach to the standard of proof and evidence more generally in the Horizon Shortfall Scheme and the Lambeth Children's Home Redress Scheme was found to be significantly fairer and more flexible than the Windrush Compensation Scheme. The original standard of proof for the Windrush Compensation Scheme was the criminal standard of proof of 'beyond reasonable doubt', this was subsequently modified to the balance of probabilities. There is evidence to suggest that a standard of proof above the balance of probabilities threshold is being applied in the Windrush Compensation Scheme. Many victims of the Windrush scandal consider the culture of disbelief and suspicion endemic of the hostile environment is also present in decision making under the Windrush Compensation Scheme. Whereas in both the Horizon Shortfall Scheme and the Lambeth Children's Home Redress Scheme there is evidence to suggest the decision maker attributes appropriate weight to the testimony of the victim particularly in the absence of documents due to the passage of time. In light of the historic nature of the wrongs committed, the accepted institutional failures and inaccuracies in respect of record keeping, the Windrush Compensation Scheme approach stands out as a clear outlier in this regard.

### **4. Wide range of heads of loss with some limitations & inaccessible application process**

The range of heads of loss on all schemes appears expansive and broadly reflects the type of losses suffered. Criticisms were present, including that the Windrush Compensation Scheme did not cover loss of pensions, savings, and property. For the Lambeth Children's Home Redress Scheme, the period of loss excluded foster care placements and certain homes.

The Windrush Compensation Scheme application process appears the most complex and bureaucratic. The application form runs to 44 pages and Windrush victims have reported great difficulty in completing the form. Whereas the Horizon Shortfall Scheme application is 14 pages, and the Lambeth Children's Home Redress Scheme application is 10 pages in length. The Horizon Shortfall Scheme application has received criticisms for the phrasing of questions around consequential loss, particularly as it seems these were largely completed by unrepresented Postmasters, as funded legal representation was not made available at this stage.

## **5. Decision making lacking independence and adversarial approach**

The Windrush Compensation Scheme is the only scheme where the perpetrator of the original harm, the Home Office, is solely responsible for the initial decision making and subsequent first level review. The skill and competency of Home Office caseworkers have been questioned in a number of independent reports.

In the Lambeth Children's Home Redress Scheme, the initial decision is made by a team consisting of Lambeth Council and their solicitors. The Horizon Shortfall Scheme initial decision is made by an independent advisory panel, consisting of a legal specialist, a forensic accounting specialist, and retail specialist. The decision is then subject to approval by the Post Office. The proposal for the Infected Blood Compensation Scheme is that an arm's length body, chaired by a judge, would administer the scheme. The legal expertise and experience present in all the other schemes examined more adequately addresses the legal and factual complexity of the claims. In this regard, the Windrush Compensation Scheme falls below the standard set by these contemporary schemes.

## **6. Absence of legal funding**

The Windrush Compensation Scheme has no provision for government funded legal advice or representation at any stage of the process. The government funds the organisation 'We are Group' to help claimants in completing the application form. This assistance has been found to be inadequate and of limited assistance. Legal aid is presently not available and is the subject of an on-going legal challenge.

The Horizon Shortfall Scheme and the Lambeth Children's Home Redress Scheme both provide for funded legal representation at different stages. The Lambeth Children's Home Redress Scheme provides for funding from the outset of the application, whilst the Horizon Shortfall Scheme provides for advice to review a decision and representation to challenge the initial decision. The Horizon Shortfall Scheme has received criticism for the absence of initial advice to prepare a claim and Sir Wyn Williams, the Chair of the Post Office Horizon IT Inquiry, has recommended that funding for legal advice be made available from the outset. The proposals for the Infected Blood Compensation Scheme are comprehensive and promote a holistic and compassionate model of redress. This includes proposals for the provision of legal advice and representation throughout the claims process and a range of other bespoke services and support.

## **7. Limited independent redress**

The structure and the decision-making inadequacies of the Windrush Compensation Scheme are further compounded by limited independent redress, particularly in contrast with the other schemes examined. The Windrush Compensation Scheme has an initial review process which is carried out by another caseworker within the Home Office. A further Tier 2 right of review exists to the Adjudicator's Office, which is part of His Majesty's Tax Authority. The Horizon Shortfall Scheme includes provisions for an internal review process, mediation, arbitration, and a claim in the small claims track. Whereas both the Lambeth Children's Home Redress Scheme and the proposed Infected Blood Compensation Scheme permit an appeal to an independent appeal panel comprised of a judge and other legal and relevant experts.

## 8. Government failure to address wider systemic issues

All the compensation schemes explored involved historic wrongs perpetrated by the state, profound suffering and harm to its victim, delays and/or failures by the Government to take action thereby compounding the wrongs, the existence of systemic and cultural organisational flaws, and a public outcry resulting in the need for independent scrutiny.

The Windrush Lessons Learned Review and the Independent Inquiry into Child Sexual Abuse were both extensive and thorough investigations into wider systemic failings in the Home Office and the child protection regime respectively. Detailed and robust recommendations were made. The Government has reneged upon several key commitments made pursuant to the Windrush Lessons Learned Review, which is currently the subject of a legal challenge. In respect of the Independent Inquiry into Child Sexual Abuse, Lambeth Council appears to have followed the recommendations. However, at a national level key recommendations critical to child protection have not been fully adopted by the Government. An effective compensation scheme and independent investigation leading to systematic change together can go some way to achieving a form of restorative justice for victims, and more broadly implementing recommendations is linked to restoring public confidence in state institutions. The Government's approach in respect of the Windrush Lessons Learned Review and the Independent Inquiry into Child Sexual Abuse represents a failure to implement meaningful systemic change.

## 9. Lack of central UK framework for redress schemes

A significant number of historic compensation schemes have been set up in the UK to address a range of both state and non-state perpetuated harms on an ad hoc basis. Many of the older schemes were deemed to be broadly unsuccessful. Whilst some lessons were learned and implemented in the compensation schemes explored in this report, there is no established guidance or systematic approach to ensuring compensation schemes are effective. The limitations of the UK framework for compensation and redress schemes have been highlighted by the APPG for Fair Business Banking in their report on 'Building a Framework for Compensation and Redress' in February 2023. Whilst the APPG focused on schemes relating mainly to the financial sector, the Windrush Compensation Scheme and Horizon Shortfall Scheme were considered. In light of this report's findings that all the schemes explored had failings and their development has been delayed, we concur with the recommendations of the APPG that the government should develop compulsory guidelines for setting up compensation schemes and that an arms-length body be set up to oversee and regulate compensation schemes in the UK.

## Recommendations

The review of the structural framework, operation and effectiveness of other contemporary schemes has further highlighted the failings of the Windrush Compensation Scheme. Sir Brian Langstaff, Chair of the Public Inquiry into the Infected Blood scandal commented that '*[t]ime without redress is harmful*' and '*delay often defeats justice*'.<sup>4</sup> Time is of the essence and reform must come swiftly if justice is to be served. There have been previous calls for structural reform of the Windrush Compensation Scheme from JUSTICE and the Home

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<sup>4</sup> Sir Brian Langstaff, Statement from Sir Brian Langstaff (5<sup>th</sup> April 2023)

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Affairs Committee on the Windrush Compensation Scheme, with which this report broadly concurs. Based on this report's findings the following key changes are recommended.

### **1. Decision-making body**

The establishment of a bespoke independent body, separate from the Home Office and the Government, to process applications and make decisions.

### **2. Heads of loss, standard of proof, causation, and quantum**

A general review should be undertaken by a panel of experts (including beneficiaries) of the current approach more generally and specifically to heads of loss, standard of proof, causation, quantum, and the application process. The aim of the review would be to enable the Windrush Compensation Scheme to deliver fair compensation to victims in a compassionate manner utilising a flexible approach where needed in recognition of the historic nature of the wrongs, the vulnerabilities of victims and the impact of the failings of the current WCS.

Specifically, this report would advocate:

- The heads of loss are expanded. Here the proposed Infected Blood Compensation Scheme may be a valuable model.
- A 'soft edge' approach to the balance of probabilities standard of proof.
- The applicant's account is to be accepted unless there is significant evidence to the contrary.
- Removal of the requirement to prove mitigation of loss as currently set out in the Windrush Compensation Scheme Casework Guidance.
- Reassess the fairness of current tariffs.
- Simplify the application process.

### **3. Provision of legal advice and representation**

The establishment of an approved panel of legal firms and professionals vetted by an independent body (e.g. the Law Society), with a funding scheme to provide payment to appropriately qualified legal professionals in assisting claimants through all stages of the application process and any appeal/right of review.

### **4. Right of appeal to an Independent Panel**

Following a decision by an arm's length body, an applicant will have a single stage right of appeal to an Independent Appeal Panel chaired by a judge and other appropriate legal and medical experts.

### **5. Wider systemic change and Windrush victims**

The Government should fulfil the commitments it made following the Windrush Lessons Learned Review and take all steps needed to enable the wider systematic change in the Home Office. The voice of the victims of the Windrush scandal needs to be at the forefront of any changes to the Windrush Compensation Scheme and wider systematic changes.

## List of Abbreviations

|   |  |
|---|--|
| <b>Bates</b>                              | Bates v Post Office Ltd (No 3) [2019] EWHC 606   |
| <b>BEIS</b>                               | Department of Business, Energy and Industrial Strategy   |
| <b>Core Compensation Schemes</b>          | Constitutes HSS, Lambeth Scheme, and Infected Blood Compensation Scheme  |
| <b>DBT</b>                                | Department of Business and Trade   |
| <b>GLOS</b>                               | Group Litigation Order Compensation Scheme   |
| <b>HSS</b>                                | Horizon Shortfall Scheme   |
| <b>IBSS</b>                               | Infected Blood Support Scheme  |
| <b>Interim Blood Scheme</b>               | Infected Blood Interim Payment Scheme  |
| <b>Infected Blood Compensation Scheme</b> | Proposed Infected Blood Compensation Scheme as set out in Infected Blood Inquiry   |
| <b>IICSA</b>                              | Independent Inquiry into Child Sexual Abuse  |
| <b>Lambeth Scheme</b>                     | Lambeth Children’s Home Redress Scheme   |
| <b>NAO</b>                                | National Audit Office  |
| <b>OHCS</b>                               | Overtaken Historic Convictions Scheme (aimed at compensating those with a criminal convictions arising from the Post office scandal) |
| <b>PHSO</b>                               | Parliamentary and Health Service Ombudsman   |
| <b>Post Office Inquiry</b>                | Post Office Horizon IT Inquiry   |
| <b>SOSA</b>                               | Shirley Oaks Survivors Association   |
| <b>SLC</b>                                | Southwark Law Centre   |
| <b>WCS</b>                                | Windrush Compensation Scheme   |
| <b>WLLR</b>                               | Windrush Lessons Learned Review (  |
| <b>WS</b>                                 | Windrush Scheme (declaratory Immigration Status scheme)  |

## Part 1: Aims and Methodology

### 1.1 Aims

King's Legal Clinic, part of the Dickson Poon School of Law, works in partnership with Southwark Law Centre on the Windrush Justice Clinic. The Windrush Justice Clinic<sup>5</sup> aims to support victims of the Windrush scandal receive the compensation they deserve and carry out research on the accessibility and fairness of the compensation scheme.

This report aims to aid understanding of how the Windrush Compensation Scheme (**WCS**) could be improved by assessing it alongside other contemporary compensation schemes and identifying the key substantive and structural reforms needed.

### 1.2 Methodology

Due to the wealth of existing literature, desk research was initially carried out on a wide range of compensation schemes within the UK. The UK has an extensive number of historic and current compensation schemes.<sup>6</sup> It was identified early on that an inherent difficulty in a comparative analysis of different compensation schemes arises due to their unique features and contexts.

Therefore, the report undertakes a detailed analysis of three compensation schemes (**Core Compensation Schemes**), namely the Lambeth Children's Home Redress Scheme (**Lambeth Scheme**), the Horizon Shortfall Scheme (**HSS**), and the proposed Infected Blood Compensation Scheme (**Infected Blood Compensation Scheme**). The analysis of the Infected Blood Compensation Scheme includes consideration of the Interim Infected Blood Payment Scheme (**Interim Blood scheme**). In addition to the detailed analysis, the report presents the available statistics on a range of other compensation schemes to help evaluate the effectiveness of the WCS through a statistical lens.

The Core Compensation Schemes are selected on the basis of their comparability to the WCS and the aims of the research.<sup>7</sup> In particular, the following were relevant factors in selection:

- A contemporary scheme operating in England and Wales which had been subject to review.
- The existence of state harm or state culpability for historical wrongs, excluding acts resulting in a criminal conviction for the victim.
- A scheme involving a broad range and /or complex heads of loss.
- A vulnerable cohort.

As one of the primary aims of the research was to explore how the WCS could be improved, particular weight was attributed to the 'contemporary' element in the selection process. The

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<sup>5</sup> King's Legal Clinic is part of the Windrush Justice Clinic, a wider partnership made up of community organisations, law centres and university legal advice clinics striving to help victims of the Windrush scandal receive the compensation they deserve.

<sup>6</sup> 14 such schemes were identified in initial research.

<sup>7</sup> Other schemes looked at include the Criminal Injuries Compensation Scheme, Historical Institutional Abuse Redress Board, Armed Forces Compensation Scheme, Diffuse Mesothelioma Scheme, Troubles Permanent Disablement Scheme, The compensation scheme for former Icelandic water trawlermen, Coal Industry Pneumoconiosis Compensation Scheme, Vibration white finger compensation scheme for miners, PPI claims against the Financial Services Compensation Scheme (failed firms) and the Equitable life compensation scheme.

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initial literature review showed that the Core Compensation Schemes included some consideration in their design of the shortcomings of previous compensation schemes. This factor was particularly relevant to the decision to include the proposed framework for the Infected Blood Compensation Scheme. This has been undertaken by Sir Robert Francis KC and Sir Brian Langstaff as part of the Infected Blood Inquiry. The proposed framework served as a valuable contemporary resource to assist the analysis due to its wider exploration of the characteristics which should underpin a just and robust compensation scheme, and its design having had regard to the perceived failures of the WCS.

The HSS aims to compensate a class of victim from the Post Office scandal, specifically those who suffered loss but were not convicted of a criminal offence. Other compensation schemes for those convicted of criminal offences arising from the Post Office scandal and those who brought legal proceedings against the post office exist. They are touched upon briefly though are *not* the subject of detailed analysis and comparison to the WCS. The HSS is selected due to its comparability to the WCS and the aims of the research.

The research is primarily based on desk research. Other sources include a WCS case study provided by Southwark Law Centre and a Freedom of Information Act (2000) response provided by the Post Office on the 4 January 2024.<sup>8</sup>

### **1.3 Structure of Report**

The background to the Core Compensation Schemes and the WCS will be introduced in Part 2. In Part 3 each scheme will be compared and evaluated by reference to the following factors: the make-up of the impacted cohort and the initial eligibility criteria; the heads of loss and evidential approach; the decision making and review process; and the availability of legal advice and support for victims. Part 4 will bring together the various elements to determine the effectiveness of the WCS in comparison to the Core Compensation Schemes and draw conclusions for future reform.

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<sup>8</sup> See Appendix 2.

## Part 2: Background to Windrush Compensation Scheme & Core Compensation Schemes

In this section the Core Compensation Schemes will be introduced and placed in context in order to compare to the WCS.

### 2.1 The Windrush Scandal

From 1948 onwards thousands of people from the Caribbean answered the British government's call to rebuild Britain following the Second World War. One of the earliest groups to arrive came on the 22<sup>nd</sup> June 1948 on the ship the Empire Windrush. Consequently, they are referred to as the 'Windrush generation'. They arrived and settled in the UK lawfully, either as British citizens or with settled status.

In 2010, the Home Office destroyed landing cards and other records belonging to members of the Windrush generation, making it difficult to prove their legal status in a time where that proof was essential due to the onset of the hostile environment policy.<sup>9</sup> Introduced in 2012, the aim of the policy was to make the UK uninhabitable for what the government classed as undocumented migrants.<sup>10</sup> Landlords, employers, the NHS, banks and many other organisations and bodies were required to report on and/or collect information in relation to service users' immigration status or nationality. Access to services and employment was conditional on the provision of specific documents and evidence. Thousands of Windrush generation members and their families were unable to satisfy the extensive documentary requirements of the new regime. Many had arrived as children on their parents' passports, and evidence demonstrating their arrival was lost or destroyed. The impact was significant and devastating, unable to prove their lawful immigration status, some were detained in the U.K, removed or deported, and some were incorrectly denied re-entry to the UK following travel overseas. Many lost their right to work and rent, access to bank accounts, healthcare and education, and were unable to claim benefits.

The treatment of the Windrush generation was eventually the subject of widespread media coverage which pressured the government to take corrective action. In April 2018, the then Home Secretary, Amber Rudd apologised for the '*appalling*' treatment of the Windrush generation.<sup>11</sup> Initially the Windrush Scheme (**WS**) was set up in 2018 to restore residency rights.

In May 2018 the government announced the Windrush Lessons Learned Review (**WLLR**) and appointed Wendy Williams as the Independent advisor.<sup>12</sup> The aim of the WLLR was to provide an assessment of what led to the Windrush scandal and to identify key lessons for the Home Office. The WLLR was published in March 2020, some of its key findings included:

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<sup>9</sup> Amelia Gentleman, 'Home Office destroyed Windrush landing cards, says ex-staffer' (The Guardian, 17<sup>th</sup> April 2018) <<https://www.theguardian.com/uk-news/2018/apr/17/home-office-destroyed-windrush-landing-cards-says-ex-staffer>> accessed 28<sup>th</sup> August 2023

<sup>10</sup> Erica Consterdine, 'Hostile environment: the UK government's draconian immigration policy explained' (The Conversation, 26<sup>th</sup> April 2018) <<https://theconversation.com/hostile-environment-the-uk-governments-draconian-immigration-policy-explained-95460>> accessed 28<sup>th</sup> August 2023

<sup>11</sup> Amelia Gentleman, 'Amber Rudd 'sorry' for appalling treatment of Windrush-era citizens' (The Guardian, 16<sup>th</sup> April 2018) <<https://www.theguardian.com/uk-news/2018/apr/16/theresa-may-caribbean-representatives-windrush-immigration>> accessed 27<sup>th</sup> August 2023

<sup>12</sup> Wendy Williams, 'Windrush Lessons Learned Review: Independent Review by Wendy Williams' (HC 93, March 2020)

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- That the root causes of the Windrush scandal were attributable to immigration and nationality policies going back to the 1960s, which sought to restrict eligibility to remain in the UK to certain groups.
- The scandal was foreseeable and avoidable, early warning signs were present but were not acted upon. Both Ministers and officials are deemed responsible for the scandal.
- The structure and culture of the Home Office '*created the operating environment in which these mistakes could be made, including a culture of disbelief and carelessness*'<sup>13</sup>
- Serious concerns were expressed that the Home Office failings demonstrated an '*institutional ignorance and thoughtlessness towards the issue of race*' and were '*consistent with some elements of the definition of institutional racism.*'<sup>14</sup>
- The impact of the scandal was multifaceted it that it '*dealt a serious blow to the public's trust in the Home Office and the immigration system. This is particularly so for Britain's black African-Caribbean communities.*'<sup>15</sup>.

The WLLR made thirty recommendations for change and improvements to the Home Office. These recommendations focused on three main issues; the Home Office acknowledging the wrongs committed; that it should allow greater external scrutiny; and '*migration and wider home policy is about peoples and, whatever its objective, should be rooted in humanity*'.<sup>16</sup> The Home Secretary accepted the findings in the WLLR on 23<sup>rd</sup> June 2020 and outlined the Home Office's Comprehensive Improvement Plan on 30<sup>th</sup> September 2020.

Progress on the improvement plan has been slow and at times ineffective. In her March 2022 progress report, Wendy Williams expressed that she was '*disappointed by the lack of tangible progress or drive to achieve the cultural changes required*'.<sup>17</sup> Whilst acknowledging some positive changes she commented that '*[m]uch more progress is required in policymaking and casework, which will be seen as the major indicators of improvement*'.<sup>18</sup> More recently there was significant disappointment when key promises made pursuant to the WLLR were effectively reneged upon. These included not delivering reconciliation events or setting up a Migrants Commissioner and the premature disbanding of the Home Office task force responsible for reforming the Home Office following the scandal.<sup>19</sup> In December 2023, permission was granted in judicial review proceedings against the Home Office on the grounds that the failure to implement the WLLR recommendations was contrary to the Human Right Act (1998), discriminatory, and in breach of the Public Sector Equality Duty.<sup>20</sup>

### Development of Windrush Compensation Scheme

Separate to the WLLR, a Windrush compensation consultation exercise was undertaken. This led to the setup of the Windrush Compensation Scheme (WCS) in 2019 to compensate

<sup>13</sup> Wendy Williams, 'Windrush Lessons Learned Review: Independent Review by Wendy Williams' (HC 93, March 2020) 7

<sup>14</sup> Ibid

<sup>15</sup> Ibid 123

<sup>16</sup> Wendy Williams, 'Windrush Lessons Learned Review: Independent Review by Wendy Williams' (HC 93, March 2020)

<sup>17</sup> Amelia Gentleman, 'Windrush: Home Office has failed to transform its culture, report says' (Guardian, 31<sup>st</sup> March 2022)

<sup>18</sup> Ibid

<sup>19</sup> Amelia Gentleman, 'Unit tasked with reforming Home Office after Windrush scandal being disbanded' (Guardian, 19<sup>th</sup> June 2023).

<sup>20</sup> Black Equity Organisation, 'Questions of 'institutional racism' need to be answered by Home Office' (30 January 2024) < <https://blackequityorg.com/questions-of-institutional-racism-need-to-be-answered-by-home-office/> <' accessed 5<sup>th</sup> February 2024)

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victims for the harm suffered due to the inability to prove their lawful status in the UK. The scheme design was informed by the public consultation alongside ‘*advice from the independent adviser (Martin Forde KC), the guidance contained in the Parliamentary and Health Service Ombudsman’s (PHSO) ‘Principles for Remedy’, National Audit Office briefing on establishing time-limited compensation schemes and good practice from the Home Office and other government department*’.<sup>21</sup> At the time, and still in existence<sup>22</sup>, the government operated an ex gratia scheme which allowed customers of the UK Visas and Border Force to seek financial redress for maladministration. It was felt the existing scheme was not sufficient to address the complex circumstances of victims many of whom suffered more than maladministration.<sup>23</sup> Therefore, the Home Office considered it appropriate to set up a bespoke scheme which operates on an ex gratia basis.<sup>24</sup> The Home Office’s stated mission for the WCS is to ‘*to deliver a fair, comprehensive and accessible compensation scheme*’<sup>25</sup>, with seven objectives. These included:

- Objective 2: Deliver a simple, fair, value for money and effective policy framework that reflects the views and needs of those affected.
- Objective 4: Provide a timely, high-quality and efficient service that puts the claimant at the heart of the process and achieves high levels of satisfaction.
- Objective 5: Deliver a visible, compassionate, engaging and transparent scheme that is trusted by the public.
- Objective 6: Build trust and confidence in the Home Office.<sup>26</sup>

Initially the WCS was open until 2023. On the 21<sup>st</sup> July 2021, following extensive criticism for its failings and calls to remove the end date, the Home Secretary announced that the formal end date for the Scheme had been removed. This is now reflected in the Windrush Compensation Scheme Full Rules.<sup>27</sup>

The WCS has been subject to extensive scrutiny and calls for reform including by JUSTICE<sup>28</sup>, the Home Affairs Committee on the WCS, and a wide range of campaigners.<sup>29</sup> Three key reports include the National Audit Office, Investigation into the Windrush Compensation Scheme (21<sup>st</sup> May 2021), JUSTICE, Reforming the Windrush Compensation Scheme (15<sup>th</sup> November 2021) and the Home Affairs Committee, The Windrush Compensation Scheme (24<sup>th</sup> November 2021).

<sup>21</sup> Home Office, Windrush Compensation: Response to Consultation (CP 81, April 2019), para 4.3

<sup>22</sup> Home Office, UK Visas and Immigration’s service and values (Updated 22 May 2019) para 2.2.

<sup>23</sup> <https://www.gov.uk/government/publications/uk-visas-and-immigrations-service-and-values/uk-visas-and-immigrations-service-and-values> accessed 21<sup>st</sup> January 2024

<sup>24</sup> Home Office, Windrush Compensation scheme, Equality Impact Assessment (17 March 2022), 3-4

<sup>25</sup> Windrush Compensation Scheme: full rules (Home Office, 11<sup>th</sup> April 2023), 1.4

<sup>26</sup> National Audit Office, Investigation into the Windrush Compensation Scheme (Home Office, 21<sup>st</sup> May 2021), 15

<sup>27</sup> Ibid.

<sup>28</sup> Windrush Compensation Scheme: full rules (Home Office, 11<sup>th</sup> April 2023), 1.3

<sup>29</sup> JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil, and criminal – in the United Kingdom.

<sup>30</sup> BBC News, ‘Windrush scandal: Anger at Home Office over compensation progress’ (BBC, 31<sup>st</sup> March 2022)

<sup>31</sup> <https://www.bbc.co.uk/news/uk-60943533> accessed 3<sup>rd</sup> December 2023

## 2.2. Lambeth Children's Home Redress Scheme

The Lambeth Scheme came into being following revelations around historic child abuse at children's homes and institutions in Lambeth going back as far as the 1960s<sup>30</sup>. Many police and Lambeth Council investigations were carried out over the years dealing with allegations of child abuse which were highly critical of Lambeth Council, with little or no concrete action being taken. Instead, Lambeth Council's approach consisted of a 'culture of cover-up' and 'lack of concern for the day-to-day lives of children in its care'<sup>31</sup>

A number of significant police investigations were carried out into child abuse in Lambeth Children's Homes, including Operation Bell, Operation Middleton<sup>32</sup> and Operation Trinity. Significant criticisms were made of the various police investigations, including failures to identify networks and links between offenders, ineffective investigatory practices, inadequate victim support and low conviction rates.<sup>33</sup>

Lambeth Council was investigated as part of the wider Independent Inquiry into Child Sexual Abuse<sup>34</sup> (IICSA), which found in July 2021 that:

*'Lambeth Council has been aware of individual allegations of sexual (and physical) abuse since at least the 1970s. It is now recognised – including by Lambeth Council – that physical and sexual abuse was pervasive in its children's homes. This remained unchecked for decades.'*<sup>35</sup>

IICSA made 3 specific recommendations requiring Lambeth Council; to draw up an action plan to address the issues raised and report back to IICSA with a specified period; provide training for elected councillors on safeguarding and corporate parenting; and review recruitment and vetting checks for foster carers and staff in Children's Homes. Lambeth agreed to all recommendations and provided an update and action plan by the 15 December 2021.<sup>36</sup> After a seven year national Inquiry, the IICSA reported its main findings and recommendations to the Government in October 2022. The Chair of IICSA, Professor Alexis Jay, stated that there was a 'national epidemic of child sex abuse that has been enabled by institutional failures for decades' and made a range of recommendations.<sup>37</sup> The government, whilst accepting some of the recommendations, rejected a number of them including the creation of a Child Protection Authority and a designated Minister. Despite a 7 year Inquiry, the government further seeks to consult on a number of the recommendations including a national redress scheme and mandatory therapeutic support for victims. Professor Jay was

<sup>30</sup> Children in the care of Lambeth Council investigation report, Independent Inquiry into Child Sex Abuse, (July 2021), 180

<sup>31</sup> Ibid

<sup>32</sup> Operation Middleton Report (Metropolitan Police Service, 12<sup>th</sup> August 2003). The operation took place from December 1998 and closed on the 31<sup>st</sup> July 2003.

<sup>33</sup> Children in the care of Lambeth Council investigation report, Independent Inquiry into Child Sex Abuse, (July 2021), 187

<sup>34</sup> Established in 2015, IICSA was a statutory inquiry aimed at investigating institutions who failed to protect children in their care and put forward recommendations for change.

<sup>35</sup> Children in the care of Lambeth Council investigation report, Independent Inquiry into Child Sex Abuse, (July 2021), vi

<sup>36</sup> Recommendations - Children in the care of Lambeth Council, Independent Inquiry into Child Sex Abuse, < <https://www.iicsa.org.uk/recommendations/recommendations-children-care-lambeth-council.html#991975887> > accessed 30<sup>th</sup> January 2024

<sup>37</sup> The Independent, 'Government must act on 'national epidemic' of child sex abuse, inquiry concludes' (20<sup>th</sup> October 2022)

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‘deeply disappointed’<sup>38</sup> and stated “The package announced by the government will not provide the protection from sexual abuse that our children deserve.”<sup>39</sup>

## Development of Lambeth Scheme

The Lambeth Scheme was set up prior to the findings of the IICSA, following active campaigning from the Shirley Oaks Survivors Association (SOSA) calling for reparations.<sup>40</sup> In 2017, Lambeth Council accepted responsibility for the abuse suffered and acknowledged that they had ‘created and oversaw conditions [...] where appalling and absolutely shocking and horrendous abuse was perpetrated’.<sup>41</sup> The Lambeth Scheme was the first of its kind set up by a local authority in England and Wales and is funded by Lambeth Council<sup>42</sup>. It opened on 2<sup>nd</sup> January 2018 and closed to new applications on 1<sup>st</sup> January 2022.<sup>43</sup> Lambeth Council set a range of aims for the redress scheme including a desire to give survivors ‘swift and compassionate redress without having to go through the courts’<sup>44</sup> It acknowledge that due to the ‘adversarial nature of the court process survivors of abuse can be re-victimised by having to recount their experiences’ and that the ‘aim of the Redress Scheme is to prevent re-victimisation whilst providing a range of reparations that hopefully will enable people to move on with their lives.’<sup>45</sup>

## 2.3. The Post Office and Horizon Scandal

The Horizon scandal is often regarded as one of the greatest miscarriages of justice in modern UK history.<sup>46</sup> The scandal arose from the use of the Horizon IT system by the Post Office. The faulty conclusions of this system were used as primary evidence for accusations of theft and fraud from 1999 - 2015, and ultimately as a basis for 983 criminal prosecutions and many convictions.<sup>47</sup> Additionally, many Postmasters<sup>48</sup> were unfairly made to repay shortfalls from their own pocket, lost their jobs, became bankrupt and suffered significant harm.

In April 2016, a High Court claim was issued against the Post Office by a group of Postmasters. In December 2019 the Horizon IT system was found to be fundamentally unsound and the cause of injustice in *Bates v Post Office Ltd.*<sup>49</sup> (‘Bates’), around 555 Claimant’s had joined the group litigation which resulted in a settlement of £43 million plus legal costs. At the time, those who had not been part of the Bates case received nothing.

<sup>38</sup> The Independent, ‘Child sex abuse inquiry chair slams government’s ‘disappointing’ response to recommendations’ (22<sup>nd</sup> May 2023)

<sup>39</sup> Ibid

<sup>40</sup> Amy Clowrey, ‘The Lambeth Children’s Home Redress Scheme’ (Switalskis Solicitors, December 3<sup>rd</sup> 2021)

<<https://www.switalskis.com/the-lambeth-childrens-home-redress-scheme/>> accessed 27<sup>th</sup> August 2023

<sup>41</sup> Children in the care of Lambeth Council Investigation Report, Independent Inquiry into Child Sex Abuse, (July 2021), vi

<sup>42</sup> The council has the legal authority to establish a redress scheme under s1 Localism Act 2011. See Lambeth Council, Lambeth Children’s Home Redress Scheme (Cabinet Report, 18<sup>th</sup> December 2017), 4.1

<sup>43</sup> In the Cabinet report it was intended that the scheme would be funded through a capitalisation direction, enabling capital expenditure most of which was intended to be borrowing through the Public Works Loan Board, see Lambeth Council, Lambeth Children’s Home Redress Scheme (Cabinet Report, 18<sup>th</sup> December 2017), 3.4

<sup>44</sup> Cabinet Report: Lambeth Children’s Homes Redress Scheme Update, 1<sup>st</sup> April 2019

<sup>45</sup> Ibid

<sup>46</sup> Jack Sheard, ‘Laughably small’ Horizon scandal compensation scheme announced (The Justice Gap, 9<sup>th</sup> December 2022)

<<https://www.thejusticegap.com/new-horizon-scandal-compensation-scheme-announced/>> accessed 27<sup>th</sup> August 2023

<sup>47</sup> BBC News, ‘Post Office scandal explained: What the Horizon saga is all about’

<<https://www.bbc.co.uk/news/business-56718036>> accessed 22<sup>nd</sup> January 2024

<sup>48</sup> The use of the term Postmaster refers to both male and female officials in charge of the Post Office.

<sup>49</sup> (No 3) [2019] EWHC 606

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An independent public Inquiry into the scandal was established in September 2020, chaired by Sir Wyn Williams. This subsequently became a statutory inquiry, Post Office Horizon IT Inquiry (**Post Office Inquiry**), in June 2021 which is still ongoing.<sup>50</sup> The terms of reference for the Post Office Inquiry include:

- Understanding what went wrong and formulating key lessons for the future.
- Evaluating if the Post Office has responded to criticisms made in previous litigation and made progress in organisational and cultural change, including whether the current system in place between the post office and Postmasters is fit for purpose.
- Examining historical and current governance and whistleblowing controls.
- Evaluating the performance of the various compensation schemes in place.<sup>51</sup>

The Post Office Inquiry is currently in Phase 4, during January 2024 and onwards evidence will be heard about the Post Office action against Postmasters and others.<sup>52</sup> There is a currently a focus on the adequacy of the disclosure provided by the Post Office's legal representatives during the Post Office Inquiry. Serious questions have been raised about the conduct of the Post Office and government officials, including allegations of a cover up going back to at least 2014.<sup>53</sup> It is envisaged that there will be seven phases to the Post Office Inquiry, phase 7 will involve an assessment of the three compensation schemes.<sup>54</sup>

Over time three schemes were established to compensate those affected by the scandal, primarily by reference to whether Postmasters were convicted. Those who were convicted would seek to have their conviction overturned and thereafter compensation via the Overturned Historic Convictions Scheme (**OHCS**). There have been considerable criticisms of the delays and bureaucracy in processing the requests to overturn criminal convictions, to date 93 convictions have been overturned.<sup>55</sup> Following the screening of the TV drama 'Mr Bates v the Post Office' in January 2024 a public outcry<sup>56</sup> regarding the scandal led to the announcement of unprecedented legal changes. On 10 January 2024, the government announced it would bring forward legislation which would exonerate all those convicted as a result of the faulty Horizon IT system, introduce measures to expedite compensation claims for those who uncovered the scandal, and introduce a minimum payment of £600,000 where the conviction has been overturned.<sup>57</sup>

The two remaining schemes relate to those without criminal convictions. The Group Litigation Order Compensation Scheme (**GLOS**), announced in June 2022, aimed to fairly compensate Claimants from the Bates litigation who had received low amounts of

<sup>50</sup> DBT, Post Office Horizon IT inquiry 2020: terms of reference (Updated 22<sup>nd</sup> September 2021)

<sup>51</sup> The Post Office Horizon IT Inquiry, Terms of Reference

<<https://www.postofficehorizoninquiry.org.uk/publications/terms-reference>> accessed 29<sup>th</sup> January 2024

<sup>52</sup> The Post Office Horizon IT Inquiry, Public Hearings Timeline <<https://www.postofficehorizoninquiry.org.uk/public-hearings-timeline>> accessed 22<sup>nd</sup> January 2024

<sup>53</sup> BBC News, 'Post Office accused of cover-up over secret Horizon documents' <<https://www.bbc.co.uk/news/business-68079300>> accessed 29<sup>th</sup> January 2024.

<sup>54</sup> The Post Office Horizon IT Inquiry, Progress Update from Sir Wyn Williams ( 2 February 2024)

<sup>55</sup> BBC News, 'Post Office scandal explained: What the Horizon saga is all about'

<<https://www.bbc.co.uk/news/business-56718036>> accessed 22<sup>nd</sup> January 2024

<sup>56</sup> BBC Culture, 'Mr Bates vs The Post Office: How a TV drama shook up Britain – in just a week' (12<sup>th</sup> January 2024)

<<https://www.bbc.com/culture/article/20240112-post-office-scandal-how-a-tv-drama-shook-up-britain-in-just-a-week>> accessed 22<sup>nd</sup> January 2024

<sup>57</sup> Ministry of Justice 'Government to quash wrongful Post Office convictions' (10<sup>th</sup> January 2024)

<<https://www.gov.uk/government/news/government-to-quash-wrongful-post-office-convictions>> accessed 22<sup>nd</sup> January 2024

compensation from legal proceedings due to the deduction of legal costs. For everyone else there is the Horizon Shortfall Scheme (HSS), which is the focus of this report.

The HSS is a voluntary remediation scheme arising from the settlement deed in Bates.<sup>58</sup> The administration of the ex-gratia HSS is by the Post Office, a limited company owned solely by the government. The scheme was launched on the 1<sup>st</sup> May 2020, with a provisional (extended) deadline to make an application by November 2020. Notwithstanding this deadline, the Post Office stated it would accept 'late applications'. The legal powers to make payments run out on the 7<sup>th</sup> August 2024. However, on Sir Wyn Williams' recommendation the government has now introduced a Post Office (Horizon System) Compensation Bill on the 29<sup>th</sup> November 2023 to allow compensation to be paid beyond this date.<sup>59</sup>

## 2.4. Infected Blood Scandal

Between the late 1970s and early 1990s, thousands of people received NHS blood products from high-risk sources. This primarily impacted the cohort of people living with haemophilia and other bleeding disorders.<sup>60</sup> These risks were ignored by management and the government.<sup>61</sup> Consequently, many of those treated with high-risk blood products contracted Hepatitis C or, less frequently, HIV.

After many years of pressure from campaigns and MPs, and following a class legal action brought against the government in *Jason Evans & Others*, in July 2017 the government set up a public inquiry to look into the scandal.<sup>62</sup> The Infected Blood Inquiry is Chaired by Sir Brian Langstaff who described the scandal as the '*worst treatment disaster in the history of the NHS*'.<sup>63</sup> The terms of reference for the inquiry seek to:

- Understand what happened and why, including levels of candour by institutions and bodies and whether there was a cover up.
- Assess the impact on all those affected.
- Assess the adequacy of existing treatment, care and support.
- Identify organisational and systemic failings.
- Make recommendations for reform.<sup>64</sup>

A separate independent reviewer, Sir Robert Francis KC, was appointed to look at a framework for compensation and redress. Sir Robert's report ('**Infected Blood Scheme Compensation Study**') was published on the 7<sup>th</sup> June 2022, in which he strongly recommended an interim payment scheme before the end of the inquiry and proposed

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<sup>58</sup> Clauses 9.4, 9.5 and Schedule 5 of the Settlement Deed of Bates.

<sup>59</sup> DBT, 'Government introduces new Post Office compensation bill' (gov.uk, 29<sup>th</sup> November 2023) <<https://www.gov.uk/government/news/government-introduces-new-post-office-compensation-bill>> accessed 3<sup>rd</sup> December 2023

<sup>60</sup> The Haemophilia Society, 'The contaminated blood scandal' <<https://haemophilia.org.uk/public-inquiry/the-infected-blood-inquiry/the-contaminated-blood-scandal/>> accessed 28<sup>th</sup> August 2023

<sup>61</sup> Ibid

<sup>62</sup> BBC News, 'Infected blood inquiry: Son 'will never come to terms' with scandal' (BBC, 3<sup>rd</sup> February 2023) <<https://www.bbc.co.uk/news/uk-england-oxfordshire-64498290>> accessed 3<sup>rd</sup> December 2023

<sup>63</sup> Sir Brian Langstaff, Statement from Sir Brian Langstaff (5<sup>th</sup> April 2023)

<sup>64</sup> Infected Blood Inquiry, Terms of Reference.

<<https://www.infectedbloodinquiry.org.uk/terms-reference>> accessed 29<sup>th</sup> January 2024

compensation framework.<sup>65</sup> In his recommendations, Sir Robert Francis KC explicitly sets out the central failures of the WCS as dangers crucial to avoid in the implementation of the Infected Blood Compensation scheme.<sup>66</sup>

Following Sir Robert Francis's recommendations, the Infected Blood Inquiry recommended that an interim block payment be made to those who qualified to avoid the injustice of delay, and the elderly or very ill missing out on the final compensation scheme. The Interim Blood scheme was set up in 2022. In April 2023, the Inquiry released a second interim report by Sir Brian Langstaff which made recommendations for the final Infected Blood Compensation Scheme. In doing so, Sir Brian Langstaff acknowledged that the government had recognised wrongs had been committed and that compensation should follow. He found that '*wrongs were done at individual, collective and systemic levels*'<sup>67</sup> and that '*the response of successive governments [...] compounded the wrongs.*'<sup>68</sup> In December 2023 MPs voted in favour of Sir Brian Langstaff's recommendation to set up the final Infected Blood Compensation Scheme, within 3 months of the new Bill becoming law<sup>69</sup>.

This report will look at the Interim Blood Scheme as well as the proposals for the final Infected Blood Compensation scheme.

## 2.5 Other Compensation Schemes

As set out in Part 1 of the Report, a range of schemes were considered in the preliminary stages of research to identify appropriate comparators based on the aims of the research, brief details of these schemes are set out in Appendix 1.

## 2.6 Conclusion

Whilst the Core Compensation Schemes and the WCS present a range of different historical backgrounds, the central unifying features of all the schemes include the historic nature of the wrongs perpetrated by the state, delays and/or failures by the government to take action thereby compounding the wrongs, the existence of systemic and cultural organisational flaws in state institutions, and a public outcry resulting in the need for significant independent scrutiny.

The Core Compensation Schemes are all the subject of a statutory public inquiry whereas the Windrush scandal was subject to an independent review, the WLLR, established by the Home Office and undertaken by an Independent Advisor. The various public inquiries and the WLLR aim to broadly identify historic and current systemic failings and the reforms needed. The WLLR was a robust and detailed review which identified the critical failings of the Home Office and provided detailed recommendations. Whilst the government initially committed to honouring these recommendations, several key recommendations were subsequently reneged upon. A number of years after the Windrush scandal, effective cultural and institutional change has not occurred. The impact of IICSA is more mixed, on a local

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<sup>65</sup> Sir Robert Francis QC, Compensation and Redress for the Victims of Infected Blood – Recommendations for a Framework (Cabinet Office, 7<sup>th</sup> June 2022), Recommendation 14

<sup>66</sup> Ibid, 168

<sup>67</sup> Sir Brian Langstaff, Statement from Sir Brian Langstaff (5<sup>th</sup> April 2023)

<sup>68</sup> Infected Blood Inquiry, Second Interim Report (5 April 2023), 3

<sup>69</sup> BBC News 'Ministers lose infected blood vote after Tory MPs revolt' (5<sup>th</sup> December 2023) <https://www.bbc.co.uk/news/uk-politics-67615379> accessed 11th December 2023

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level IICSA's recommendations were accepted and implemented by Lambeth Council which indicates a degree of systemic change. Though nationally, IICSA recommendations were not wholly accepted by the government which the chair of the Inquiry considered inadequate to provide the safeguards needed. The Inquiries for the Infected Blood and Post Office scandals are ongoing and cannot be fully assessed at this point.

Independent scrutiny of the underlying scandals involving meaningful engagement with those impacted, coupled with effective systemic and cultural institutional reform are intrinsic components needed to adhere to the broader principles of restorative justice. An effective compensation scheme is an important part of achieving a form of restorative justice for victims. Though on its own it will be insufficient to restore the broken social contract between the state and victims and, more widely, restore public confidence and trust in state institutions. Therefore the failures to fully implement the reforms proposed by the WLLR and the IICSA arguably undermine the ability of the compensation schemes to achieve their broader purpose.

## Part 3: Comparative analysis

### 3.1. Introduction and Statistics

In this section of the report a comparative assessment will be carried out of the core compensation schemes and WCS on the basis of the make-up of the impacted cohort and initial eligibility criteria; heads of loss and evidential approach; decision making and review process; and legal advice and support provisions. To assist this evaluation, it is valuable to consider broadly what a compensation scheme involving harm perpetuated by the state should aim to achieve and any key characteristics that should be present. Sir Robert Francis KC refers to the importance of the moral rationale for setting up a compensation scheme and includes factors such as, public sympathy, the wide range of people affected, suffering, hardship, and the recognition of unique circumstances and the unfairness of the wrong caused by a state agency.<sup>70</sup> The unique circumstances therefore warrant an appropriate approach. Section 2 of this report explored the historical background of each scheme and how the nature of the respective scandals has resulted in significant public outcry and an independent investigation to identify the causes of the scandal and reform needed. An effective compensation scheme and independent investigation leading to meaningful reform together can go some way to achieving a form of restorative justice for victims, and more broadly, are linked to restoring public confidence in state institutions.

James Gallen describes compensation or reparations as ‘*an opportunity for those responsible for harm to redress victim-survivors in material and symbolic terms. Responsible actors providing reparations can acknowledge their responsibility for wrongdoing, and directly recognise victim-survivors as rights bearers.*’<sup>71</sup> To achieve recognition of victims as rights bearer, a compensation scheme should fully and fairly compensate a victim within a fair and non-adversarial procedural framework. Thus, achieving some redress for victims both materially and symbolically. Sir Robert Francis KC indicates that the following principles or characteristics should underpin a compensation scheme: Remedial, Respect for Dignity, Collaborative, Choice, Individualised, Inclusive, Non-technical, Accessible, Ease of proof, Broad, Improving, Complementary, and Holistic.<sup>72</sup> Where relevant these principles and characteristics will be used to evaluate the effectiveness of each element of the various schemes.

#### Statistical overview

The statistics set out in Table 1 provide a statistical and functional overview of the performance of the WCS. The statistics assist in evaluating the accessibility of each scheme. Table 1 includes figures relating to the Core Compensation schemes and the available statistics from other schemes which were initially explored. Based on the available statistics, the WCS has the lowest success rate, with only 22% of applicants being successful and receiving a payment. The refusal rate for the WCS appears high with 52% of applications being refused. This is the highest refusal rate when compared to the Core compensation schemes and only second to the Criminal Injuries Compensation scheme which has a 57% refusal rate.

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<sup>70</sup> Ibid, Para 2.4

<sup>71</sup> Gallen J. Reparations. ‘Transitional Justice and the Historical Abuses of Church and State’ Cambridge University Press, (2023)196

<sup>72</sup> Sir Robert Francis KC, Compensation and Redress for the victims of infected Blood Recommendations for Framework (March 2022), Paragraph 2.6.

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**Table 1:**

| Scheme   | Total applications | Successful Claim & payment made | Claim refused/ ineligible <sup>73</sup> | Total payments | Legal funding <sup>74</sup> | Year established | Year ended | Route of Challenge   |
|--|--------------------|---------------------------------|---|----------------|-----------------------------|------------------|------------|--|
| <b>Windrush Compensation Scheme<sup>75</sup></b>           | 7534               | 1641 <sup>76</sup><br>(22%)     | 3986<br>(53%)                           | 75,237,071     | No                          | 2019             | -          | Tier 1 internal review.<br>Tier 2 review by Independent Adjudicator (HMRC) |
| <b>Horizon Shortfall Scheme<sup>77</sup></b>               | 2992 <sup>78</sup> | 2171<br>(73%)                   | 497<br>(17%)                            | 91,780,000     | Yes                         | 2020             | 2024       | Meetings, mediation, then small claims track or arbitration                |
| <b>Lambeth Children's Home Redress Scheme<sup>79</sup></b> | 2,240              | 1,778<br>(79%)                  | 169<br>(8%)                             | 99,100,000     | Yes                         | 2018             | 2022       | Independent Appeal Panel   |

<sup>73</sup> Includes claims subject to dispute resolution.

<sup>74</sup> This relates to whether the scheme provides applicants with funding for legal advice.

<sup>75</sup> Home Office, Windrush Compensation Scheme Data November 2023

<<https://www.gov.uk/government/publications/windrush-compensation-scheme-data-november-2023>> accessed 4<sup>th</sup> January 2024

<sup>76</sup> Value offers (includes zero entitlement claims that have had a payment on review) which are fully closed due to no right of review being exercised (WCS01>Colum L, Home Office, Windrush Compensation Scheme Data November 2023)

<sup>77</sup> Post Office, Historical Shortfall Scheme: Latest Data on Compensation Progress & Redress <<https://corporate.postoffice.co.uk/en/horizon-scandal-pages/latest-data-on-compensation-progress-and-redress#:~:text=Offers%20of%20%20C%2%A398.8m,table%20below%20for%20more%20information>> accessed 31<sup>st</sup> January 2024

<sup>78</sup> This data is extracted from the Post Office, HSS, Latest Date on Compensation Progress & Redress statistics and a Freedom of Information Act (2000) response provided by the Post Office on the 4 January 2024 (please see Appendix 2).

<sup>79</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme Update (31<sup>st</sup> December 2023)

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|  |         |                  |                 |               |     |      |      |  |
|--|---------|------------------|-----------------|---------------|-----|------|------|--|
| <b>Infected Blood Interim Compensation Scheme<sup>80</sup></b>   | 4,500   | 4,500<br>(100%)  | -               | 450,000,000   | No  | 2022 | -    | Internal review  |
| <b>Other non-core compensation schemes</b>                       |         |                  |                 |               |     |      |      |  |
| <b>Criminal Injuries Compensation Scheme<sup>81</sup></b>        | 36,686  | 14,837<br>(43%)* | 19,668<br>(57%) | 173,000,000   | No  | 2012 | -    | Review, right of appeal to CIC Tribunal                    |
| <b>Historical Institutional Abuse Redress Board<sup>82</sup></b> | 3,661   | 2,606<br>(71%)   | 609<br>(16%)    | 67,498,250    | Yes | 2020 | 2025 | Single judicial member                                     |
| <b>Armed Forces Compensation Scheme<sup>83</sup></b>             | 118,336 | 65,145<br>(55%)  | 34,156<br>(28%) | 1,266,000,000 | No  | 2005 | -    | Internal review followed by appeal to independent tribunal |
| <b>Diffuse Mesothelioma Scheme<sup>84</sup></b>                  | 3,145   | 2,397<br>(69%)*  | 1,077<br>(31%)* | 280,200,000   | Yes | 2014 | -    | Internal review followed by appeal to First Tier Tribunal  |

\*signifies that the number is an estimate based on available percentages

<sup>80</sup> BBC News, 'Hunt says bill for infected blood scheme may be very large' (28<sup>th</sup> July 2023) <<https://www.bbc.co.uk/news/health-66341658>> accessed 4<sup>th</sup> December 2023

<sup>81</sup> CICA, Annual Reports and Accounts 2022-23 (HC 1586, 18<sup>th</sup> July 2023)

<sup>82</sup> Historical Institutional Abuse Redress Board, Annual Report 2022-23 (17<sup>th</sup> July 2023)

<sup>83</sup> Ministry of Defence, UK Armed Forces Compensation Scheme Annual Statistics 6<sup>th</sup> April 2005 to 31<sup>st</sup> March 2023 (6 July 2023)

UK Armed Forces Compensation Scheme Annual Statistics 6 April 2005 to 31 March 2023 Published: 6 July 2023

<sup>84</sup> Department for Work and Pensions, Diffuse Mesothelioma Payment Scheme annual statistics April 2014 to March 2023 (28<sup>th</sup> November 2023)

## 3.2. Impacted Cohort and Initial Eligibility Criteria

In this section we will explore the initial eligibility criteria required for each scheme and the likely size and makeup of the impacted cohort. These factors will assist in evaluating the extent to which each scheme is sufficiently broad, remedial and accessible.

### 3.2.1 Windrush Compensation Scheme

Whilst the WCS primarily seeks to compensate the Windrush generation and commonwealth citizens, the eligible cohort is broad and extends to people who came to the UK from other countries.<sup>85</sup> The aging nature of the cohort and race have been identified as relevant characteristics which may exacerbate vulnerability.<sup>86</sup>

There are several groups who may be eligible for compensation and are known as **Primary Applicants**, they firstly need to demonstrate they have lawful status.<sup>87</sup> The categories of lawful status include:

- Category 1: Commonwealth citizens who arrived in the UK before 1 January 1973.
- Category 2: The children or grandchildren of Category 1 Primary applicants who arrived in the UK as minors.
- Category 3: Persons of any nationality who arrived before 1989 who are now lawfully in the UK.
- Category 4: Persons who are now British and derived their citizenship from the above categories.
- Category 5: Commonwealth citizens with an existing right of abode who were ordinarily resident in the UK by 1 January 1973.

The close family member of a Primary Applicant, defined as a spouse, partner, parent, sibling, or child may also be eligible for compensation if they have suffered loss. If the applicant does not have the required proof of their lawful status, they should apply to the WS for confirmation of their lawful status. Once this initial eligibility requirement is met, applicants need to demonstrate that they ‘*have suffered loss in connection with being unable to demonstrate their lawful status in the United Kingdom*’.<sup>88</sup>

The provisions regarding initial eligibility can be complex as the Primary Applicant must prove that they have lawful status as set out above. The complexity of immigration law is well documented, it has been described by judges as ‘*an impenetrable jungle*’<sup>89</sup>, and having ‘*a degree of complexity which even the Byzantine Emperors would have envied*’.<sup>90</sup> In the WLLR, Wendy Williams commented that ‘*even the department’s experts struggled to understand the implications of successive changes in the legislation...*’.<sup>91</sup>

Further it is important to correctly determine the eligibility category the applicant falls within; it is possible to fall within more than one category. Identifying the correct category is essential as it determines the period of time for which loss or harm suffered is calculated. Van Ferguson highlights the importance of identifying the correct category of lawful status, in particular for

<sup>85</sup> Home Office, Windrush Compensation Scheme: full rules (24<sup>th</sup> October 2023), 1.1

<sup>86</sup> The Windrush generation are defined as “sharing the protected characteristic of race (national origin, ethnicity, nationality and colour; the majority are black)” Wendy Williams, ‘Windrush Lessons Learned Review: Independent Review by Wendy Williams’ (HC 93, March 2020), p24

<sup>87</sup> Home Office, Windrush Compensation Scheme: full rules (24<sup>th</sup> October 2023), 2.1

<sup>88</sup> *Ibid*, 1.1

<sup>89</sup> *Sapkota & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 1320 [127] (Jackson LJ)

<sup>90</sup> *Pokhriyal v The Secretary of State for the Home Department* [2013] EWCA Civ 1568 [4] (Jackson LJ)

<sup>91</sup> Wendy Williams, ‘Windrush Lessons Learned Review: Independent Review by Wendy Williams’ (HC 93, March 2020) 12

applicants who should benefit from ‘presumptive law status’ which is likely to result in greater compensation:

*‘Primary applicants falling under Categories (1) and (2) benefit from ‘presumptive lawful status’. This means that the Windrush generation who arrived and settled in the UK before 01 January 1973 automatically acquired indefinite leave to remain on that date by operation of law, regardless of whether they had documentation confirming that fact. This presumptive lawful status also extends to the children and grandchildren of Category 1 Primary applicants. When it comes to calculating the relevant period of time which the Home Office is willing to accept liability for compensation, the clock starts from when the potential applicant had “presumptive lawful status”, usually from 01 January 1973, or in the case of their children or grandchildren, the date when they entered the UK. Should the potential applicant be identified as falling solely within Category 3, they do not benefit from this “presumptive lawful status”. The clock starts when they are able to prove their “lawful status at the time” which is usually contingent upon the existence of a historic document confirming that lawful status (e.g. a letter from the Home Office confirming that an individual has Indefinite Leave to Remain.’<sup>92</sup>*

Therefore, an accurate assessment of the lawful status held by the Primary applicant is critical to determining the relevant period of loss for compensation purposes.

### **Size of Cohort**

In terms of quantifying the number of people impacted by the Windrush scandal, there are no precise statistics. According to University of Oxford estimates there were more than 500,000 UK residents who were born in a Commonwealth country and arrived in the UK before 1971.<sup>93</sup> The 2011 Census recorded that 57,000 people arrived in the UK from Commonwealth countries before 1971 did not hold a UK passport.<sup>94</sup> The government acknowledged in 2021, four years after the scandal, that it did not know how many people may be eligible for the WCS.<sup>95</sup>

When the WCS was launched in 2019, the Home Office developed a planning assumption for the likely number of applications and estimated costs associated with the scheme. The various planning assumptions were not deemed to be targets or caps for expenditure under the WCS. However, the Home Office planning assumption has gradually reduced over the years. The Home Office’s original planning assumption was that it would receive 15,000 eligible claims with an estimated scheme cost of £120m-£310m. In February 2020 the estimate was lowered to 11,500 eligible claims with an estimated scheme cost of £60-£260 million. In July 2021, this was lowered again to 4,000–6,000 claims with an estimated scheme cost of £171 million to £215 million.<sup>96</sup> The planning assumption was ‘a scenario-based approach, taking into account qualitative and quantitative information from the Windrush Scheme and the WCS, but also using some judgement where information is limited’.<sup>97</sup> Therefore, the reduction of the planning assumption appears to be primarily founded on the take up and success of the schemes. This approach is problematic in light of the criticism levelled at the WCS generally, including a lack of trust in the scheme.

The WS and the WCS are closely interrelated yet there is a notable disparity in the engagement with the two schemes. As of September 2023, 21,645 people have applied under

<sup>92</sup> Van Fergusson, Solicitor at Southwark Law Centre. Statement provided on 31<sup>st</sup> January 2024

<sup>93</sup> What is Windrush and who are the Windrush generation? (BBC News, 27<sup>th</sup> July 2023) <<https://www.bbc.co.uk/news/uk-43782241>> accessed 27<sup>th</sup> August 2023

<sup>94</sup> Office for National Statistics, CT0801\_2011 Census - COB (UK, Commonwealth, continent) by YR arrival by passport - Nat to region

<sup>95</sup> Home Office, Windrush Compensation Policy (29 January 2020), 2

<sup>96</sup> Priti Patel MP, Letter from the Home Secretary on the Windrush Compensation Scheme (Home Office, 20 July 2021)

<sup>97</sup> Ibid

the WS<sup>98</sup> and 16,744<sup>99</sup> have been issued with documentation confirming their status or British citizenship. However, as of November 2023, 7,534 applications have been made to the WCS, 3,986 (53%) of applications received have been refused with only 1,641 (22%) receiving a payment.<sup>100</sup> Therefore, only around 10% of applicants who have successfully secured declaratory immigration status under the WS have received a payment under the WCS. The Independent Person's Observations on the Windrush Compensation Environment found that there was confusion between the two schemes and that despite the clear relationship between the schemes there was '*no natural transition pathway from completed successful status application to the compensation scheme.*'<sup>101</sup>

### 3.2.2 Lambeth Children's Home Redress Scheme

The aim of the scheme was to provide redress to children who had suffered non-recent sexual, physical and/or psychological abuse whilst resident at one of Lambeth Children's home or Shirley Oaks Primary School.<sup>102</sup> The eligibility requirements were criticised for not including children placed in foster care.<sup>103</sup> The initial eligibility requirements were relatively straightforward, any residents or visitors (or their estates) to Lambeth Children's Home or Shirley Oaks Primary School were able to apply.<sup>104</sup>

Each eligible applicant was entitled to:

- A written apology.
- A meeting with a senior representative of the council.
- A Harm's Way Payment of up to £10,000 where the criteria is met.
- Appropriate counselling or other therapeutic support.
- Specialist advice, support and advice on obtaining housing, welfare benefits, further education and suitable employment.
- An Individual Redress Payment / Compensation Payment assessed under the scheme.<sup>105</sup>

In terms of the impacted cohort in the 1980's in Shirley Oaks Primary School, 57% of children were black, in 1990/91 85% of children who lived in South Vale Children's Home were black. SOSA suggest that racial stereotyping played a significant role in the abuse being allowed to go on and claims not being taken seriously earlier.<sup>106</sup> The IICSA found organisational problems with racism and sexism.<sup>107</sup> The impacted cohort had multi-faceted vulnerabilities, in part due to the nature of the abuse. During the development of the scheme the council provided SOSA with legal costs to ensure they could adequately participate in discussions over the creation of the scheme.<sup>108</sup> Those creating the scheme emphasised the importance of compassion, speed and that those impacted were an ageing cohort.<sup>109</sup>

<sup>98</sup> Home Office, Transparency data: Windrush Task Force Data: Q3 2023 (23 November 2023)

<<https://www.gov.uk/government/publications/windrush-task-force-data-q3-2023>>

<sup>99</sup> Ibid

<sup>100</sup> Home Office, Windrush Compensation Scheme Data November 2023

<<https://www.gov.uk/government/publications/windrush-compensation-scheme-data-november-2023>> accessed 4<sup>th</sup> January 2024

<sup>101</sup> Home Office, #Independent Person report on the Windrush Compensation Scheme oversight and performance

Updated 19 May 2023, paragraphs 21, 22, 24

<sup>102</sup> Lambeth Council, Lambeth Children's Home Redress Scheme (Cabinet Report, 18<sup>th</sup> December 2017), preamble

<sup>103</sup> Independent Inquiry Child Sexual Abuse, Children in the care of Lambeth Council: Investigation Report (HC 704, July 2021), 71

<sup>104</sup> Ibid, 1.1

<sup>105</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme Update (Cabinet Report, October 2019), 7.2

<sup>106</sup> Shirley Oaks Survivors (SOSA) <<https://www.shirleyoakssurvivorsassociation.co.uk/>> accessed 27<sup>th</sup> August 2023

<sup>107</sup> Independent Inquiry Child Sexual Abuse, Children in the care of Lambeth Council: Investigation Report (HC 704, July 2021), 94

<sup>108</sup> Lambeth Council, Lambeth Children's Home Redress Scheme (Cabinet Report, 18<sup>th</sup> December 2017), 1.6

<sup>109</sup> Ibid, 2.3

In the cabinet report before the implementation of the scheme, it was estimated that the number of claims could be 3,000 with an estimated cost of £100m.<sup>110</sup> The Operation Middleton report noted that a total of 6,008 children were placed in care by Lambeth Council in the applicable period.<sup>111</sup> The report was aware of the potential for the number to rise.<sup>112</sup> Complex cases falling outside of the scheme (5-10% of cases) were estimated to cost a potential further £40m.<sup>113</sup> The estimated cohort number was ultimately revised down to 2,100 following the first year of the scheme it would seem partly on the take up for the scheme.<sup>114</sup>

The Lambeth Redress Scheme is now closed. As of 31 December 2023, the number of applications received was 2,240.<sup>115</sup> 92.3% of applications have been processed to conclusion<sup>116</sup>. A total of £99.1 million has been paid through Harms Way Payments and Individual Redress Payments. In addition, £15.8 million has been paid for the applicant's legal costs, £10.4 million for the applicants' expenses (including expert reports), and £2.4 million on counselling services.<sup>117</sup>

The projected total cost of the scheme by the time of completion was expected to be between £153m – 175 million.<sup>118</sup> 120 payments were made over £125,000, amounting to 5.4% of claims.<sup>119</sup> Only 7.5% of applications were withdrawn or rejected from the scheme.<sup>120</sup> The average time for submission of an application to a final reward of compensation was 19 months.<sup>121</sup>

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<sup>110</sup> Ibid, 3.2

<sup>111</sup> Operation Middleton Report (Metropolitan Police Service, 12<sup>th</sup> August 2003)

<sup>112</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme (Cabinet Report, 18<sup>th</sup> December 2017), 3.3

<sup>113</sup> Ibid, 3.2

<sup>114</sup> Ibid, 3.4

<sup>115</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme Update (31<sup>st</sup> December 2023), 3

<sup>116</sup> Ibid, 5

<sup>117</sup> Ibid, 1

<sup>118</sup> Ibid, 1

<sup>119</sup> Ibid, 5

<sup>120</sup> Ibid, 5

<sup>121</sup> Ibid, 4

### 3.2.3 Horizon Shortfall Scheme

The cohort covered by the scheme are current and former Postmasters who had experienced shortfalls relating to the previous versions of the Horizon system. The initial eligibility requirements are relatively straightforward requiring the applicant:

- i) To have (or previously had) a contract with the Post office.
- ii) To have sustained a shortfall relating to previous versions of the Horizon IT system.
- iii) The claim should not involve or relate to any criminal conviction(s).
- iv) Must not have been a party in the *Bates* litigation.<sup>122</sup>

Only certain categories of persons can make an application on behalf of a Postmaster, including a legally appointed assignee or personal representative. In terms of the profile of the cohort, Sir Wyn Williams provided the following assessment:

*'The vast majority of the persons completing the application form will be relatively mature in age and will have accumulated business experience as a sub-postmaster. Many will have considerable experience of running a small business apart from a Post Office branch. Of those lacking in much business experience, very many will have been employed in responsible occupations prior to running a Post Office branch. All this means that most, if not all, applicants to HSS will be mature people with considerable experience of reading and digesting formal documents.'*<sup>123</sup>

Limited information is available about the racial profile of the cohort. Allegations were made of racist treatment by those working the Horizon helpline towards Asian postmasters.<sup>124</sup> Recent reports have come out revealing the use of racist guidance used by the Post Office in the prosecution of sub-postmasters in the Horizon scandal.<sup>125</sup>

The cohort was initially estimated to be in the hundreds<sup>126</sup> but 2,992 applications have been made.<sup>127</sup> Applicants under the HSS scheme have been paid out £91.78 million, with 2,171 (73%) of applicants receiving a compensation payment. A total of 497 have either been deemed ineligible (177) or are going through the dispute resolution process (320).<sup>128</sup>

The scheme continues to be controversial due to the role of the Post Office and complaints about their handling of compensation payments.<sup>129</sup> The Chair of the Post Office Inquiry has repeatedly criticised the scheme and called for legislation to make improvements.<sup>130</sup> In June 2023, further changes were announced to ensure compensation payments were not 'unduly' reduced by tax, amounting to approximately £26 million in top-up payments.<sup>131</sup>

<sup>122</sup> Post Office, Horizon Shortfall Eligibility Criteria (July 2023)

<sup>123</sup> The Post Office Horizon IT Inquiry, Chair's Progress Update on Issues relating to Compensation (15 August 2022), para 142

<sup>124</sup> Charlotte Fung, Testimony in the Post Office Scandal reveals widespread racist treatment of Postmasters (The Justice Gap, 9<sup>th</sup> March 2023) <<https://www.thejusticegap.com/testimony-in-the-post-office-scandal-reveals-widespread-racist-treatment-of-postmasters/>> accessed 27<sup>th</sup> August 2023

<sup>125</sup> James Gregory, Post Office used racist terms for sub-postmasters in official guidance, (BBC News, 27<sup>th</sup> May 2023) <<https://www.bbc.co.uk/news/uk-65730464>> accessed 27<sup>th</sup> August 2023

<sup>126</sup> The Post Office Horizon IT Inquiry, Chair's Progress Update on Issues relating to Compensation (15 August 2022), 52

<sup>127</sup> This data is extracted from the Post Office, HSS, Latest Date on Compensation Progress & Redress statistics and a Freedom of Information Act (2000) response provided by the Post Office on the 4 January 2024 (please see Appendix 2).

<sup>128</sup> Ibid

<sup>129</sup> Tom Ambrose, Post Office inquiry chair criticises Horizon compensation scheme, (The Guardian, 17<sup>th</sup> July 2023) <<https://www.theguardian.com/business/2023/jul/17/post-office-inquiry-chair-criticises-horizon-compensation-scheme>> accessed 27<sup>th</sup> August 2023

<sup>130</sup> The Post Office Horizon IT Inquiry, First Interim Report: Compensation, 17 July 2023

<sup>131</sup> Department for Business and Trade, Government announces tax top-up payments for postmasters affected by the Horizon IT Scandal (Press release, 19<sup>th</sup> June 2023) <https://www.gov.uk/government/news/government-announces-tax-top-up-payments-for-postmasters-affected-by-the-horizon-it-scandal> accessed 27<sup>th</sup> August 2023

### 3.2.4 Infected Blood Schemes

The scandal primarily impacted people, going back to the 1970s and 1980s<sup>132</sup>, living with haemophilia or other bleeding disorders due to their high exposure to blood products as part of their treatment. It would appear that those with bleeding disorders come from all ethnicities and backgrounds, the cohort is particularly vulnerable on health and potentially age grounds which is highlighted by estimates that one infected person dies in the UK every four days<sup>133</sup>. This cohort lived with heavy stigma for decades as having a bleeding disorder was associated with having HIV.<sup>134</sup> Modelling from the Infected Blood Inquiry estimated that 26,800 people had contracted hepatitis C and 1,350 were infected with HIV through contaminated blood products.<sup>135</sup> Criticisms have been levelled at delays establishing both the Infected Blood Inquiry and implementing the various schemes.

All who qualify for the IBSS qualify for an Interim Blood Scheme payment. To qualify for the IBSS, a person must have been infected with hepatitis C and/or HIV from NHS blood, blood products or tissue on or prior to September 1991. Those indirectly infected, can also qualify. Families and civil/long term partners can also apply following the death of someone who qualifies. Ex-gratia support for those impacted began in 1989 for those infected with HIV and was expanded to those infected with Hepatitis C in 2004. These schemes were replaced by an overall infected blood scheme for each UK region in 2017.<sup>136</sup>

The Interim Blood Scheme grants a lump sum payment of £100,000 to all who qualify for their relevant IBSS scheme, at present this includes victims( those who were infected) and their widows. In October 2022 the government made the first interim payments to approximately 4,000 surviving victims and widows.<sup>137</sup> On the 3<sup>rd</sup> December 2023 it was reported that the Labour party would be bringing an amendment to extend the interim payment scheme to bereaved children, parents and siblings who did not automatically qualify.<sup>138</sup> It would appear the relatively low number of interim applications compared to the potential size of the cohort is attributable in part to the death of many, estimated to be at least 3,000, of those infected.<sup>139</sup>

#### Infected Blood Compensation Scheme

In his 2<sup>nd</sup> Interim report Sir Robert Langstaff has recommended the proposed Infected Blood Compensation Scheme fully adopts similar initial eligibility criteria to the IBSS and Interim Blood Scheme. The proposals include automatic eligibility for those on a current or past support schemes. In addition, the inclusion of Hepatitis B where the infection is chronic, and the ability to exercise discretion where the infection was contracted by a transfusion etc after September 1991. Further in respect of the causative transfusion, blood product or tissue transfer the test is whether *'their infection was not unlikely to have been caused by administration of the relevant treatment.'*<sup>140</sup> The balance of probabilities test is utilised with the addition of a reverse of the burden where appropriate.

<sup>132</sup> Owen Bowcott, 'Contaminated blood scandal victims allowed to sue government' (The Guardian, 26<sup>th</sup> September 2017) <<https://www.theguardian.com/society/2017/sep/26/contaminated-blood-scandal-victims-win-ruling-to-launch-high-court-action>> <accessed 3<sup>rd</sup> December 2023>, Infected Blood Inquiry: Formal Milestones document, p1

<sup>133</sup> The Guardian, 'Infected blood scandal: victims' families call for action amid Post Office injustice' (10<sup>th</sup> January 2024)  
<sup>134</sup> Ibid

<sup>135</sup> Andrew McDonald, UK's infected blood inquiry calls for extension of compensation, (Politico, 5<sup>th</sup> April 2023) <<https://www.politico.eu/article/uk-infected-blood-inquiry-extension-compensation-hiv-hepatitis/>> accessed 27<sup>th</sup> August 2023

<sup>136</sup> The Haemophilia Society, 'The contaminated blood scandal' <<https://haemophilia.org.uk/public-inquiry/the-infected-blood-inquiry/the-contaminated-blood-scandal/>> accessed 3<sup>rd</sup> December 2023

<sup>137</sup> Ibid

<sup>138</sup> Suzanne Leigh, 'Infected blood: Tory rebellion expected on payouts amendment' (BBC, 3<sup>rd</sup> December 2023) <<https://www.bbc.co.uk/news/health-67607031>> accessed 29<sup>th</sup> January 2024

<sup>139</sup> Ibid

<sup>140</sup> Infected Blood Inquiry, Second Interim Report (5 April 2023), p37-38

### 3.2.5 Comparative Analysis

In terms of the size of the impacted cohort the Infected Blood Scheme's is particularly large, with potentially approximately 28,000 victims. As a result it appears likely the cohort emanates from a cross section of society, with particular vulnerabilities relating to the aging nature of the cohort, serious health concerns affecting mortality, and some historic social exclusion arising from the stigmatisation of the infection. Similarly the impacted cohort for WCS appears large. Whilst there have been difficulties accurately quantifying the WCS cohort, based on the government's planning assumption it ranges from 6,000 to 15,000 victims and presents a sizeable cohort. The lower end of the planning assumption appears conservative when taking into account the significant number of those granted declaratory immigration status under the WS and figures from the 2011 UK census in respect of those arriving from commonwealth countries prior to 1971. The WCS cohort is marked by a number of factors including race, nationality, and being an aging cohort.

Initial estimates of the eligible cohort for the HSS were small and the number of applications is 2,500, which is a relatively small cohort in comparison to the WCS and Infected Blood Schemes. Sir Wyn Williams' comments also suggest an aging and potentially more literate cohort. The victims of the Lambeth scandal can be more clearly be delineated as highly vulnerable in light of the experience of abuse as children, many were black children, and were also an aging cohort by the time of the creation of the compensation scheme. In terms of the size of the impacted cohort, the Lambeth Scheme appears relatively small comparatively to the WCS and Infected Blood Scheme cohorts. All cohorts present with a range of vulnerabilities, some unifying features include the aging nature of the cohorts, all suffered a degree of direct or indirect social exclusion and financial harm.

In terms of whether the initial eligibility requirement can be said to be broad, accessible and inclusive, the Lambeth Scheme has been criticised for excluding some potential victims. The Interim Blood Scheme, compared to the proposed criteria for the final Blood Compensation Scheme, takes a restricted approach to those who may be eligible for an interim payment. The proposed Final Blood Compensation Scheme takes an inclusive and holistic approach to the groups or victims who may be eligible for compensation and also expands the initial eligibility requirements beyond the interim scheme to include those infected with Hepatitis B.

Comparatively to the WCS, the initial eligibility criteria for the HSS and the Lambeth schemes appear to be relatively straightforward, which are reflected in the relatively high overall success rate. It would appear the WCS eligibility is potentially broad. Though it's accessibility may be restricted by the potential complexity of the initial eligibility criteria, which requires a correct determination of immigration status which may be hindered due to the lack of provision for legal advice and issues around the competency of Home Office caseworkers which is explored later in section 3.4 and 3.5 of this report.

The Infected Blood schemes appear to have a somewhat more complex eligibility criteria comparatively to HSS and Lambeth and this is partly reflected in the causative transfusion requirement. It is not possible to fully evaluate the accessibility of the eligibility requirement for this scheme as it has yet to be implemented, though the operation of the Interim Blood scheme suggests many of those potentially impacted, estimated in the region of 28,000, have not yet been compensated. This appears attributable in part to the death of a number of victims.

### 3.3. Heads of Loss and Evidential approach

This section will set out and assess the formal and practical approaches to the heads of loss, standard of proof, and evidence required by each compensation scheme. In line with Sir Robert Francis's analysis of the key attributes which underpin a sound compensation scheme the following factors appear relevant: respect for dignity, collaborative, individualised, inclusive, non-technical, accessible, ease of proof, broad and improving.

#### 3.3.1 Windrush Compensation Scheme

When assessing the nature and design of the WCS, the Home Office considered two models. Firstly whether the scheme would '*aim to put people back in the position that they would have been in or whether it would offer appropriate compensation for the whole impact suffered*'.<sup>141</sup> The Home Office opted for the latter approach.<sup>142</sup> This is to some extent reflected in Rule 1.2 of the WCS Rules that states '*[t]here is no single or consistent picture of the loss suffered by those affected. The Scheme has been designed to address potential losses under a range of categories and to take into account the impact of the losses in each case, as far as possible*'.<sup>143</sup> This approach arguably reflects the gravity of the state's interference with the right to private and family life pursuant to Article 8, Human Rights Act (1998) (HRA) and the potential availability of damages claims for false imprisonment, misfeasance, negligence and under the HRA.

#### Heads of Loss and Quantum

The WCS has a wide range of defined heads of loss, different heads of loss are mainly quantified either on tariff basis and to a lesser degree on an assessed basis. The defined heads of loss are:

- Home Office Fees and legal fees relating to mainly unsuccessful immigration applications.
- Detention removal and deportation .
- Loss of access to employment.
- Loss of access to benefits, these are mainly referred to HMRC and DWP for assessment and payment.
- Inability to access services: housing, health, education, driving licences and banking (one off payment).
- Homelessness.
- Impact on life.
- Discretionary payments, this covers other impacts not covered elsewhere and appears to be awarded on an assessed basis.
- Living costs.<sup>144</sup>

Whilst the heads of loss are extensive, complexity frequently arises as there are nine heads of loss under the scheme and most claimants will come under multiple categories. However, they have been subject to criticism for not adequately covering all the types of loss experienced.<sup>145</sup> Several forms of loss are explicitly excluded from the scheme, including the loss of pensions, savings, and property.<sup>146</sup>

<sup>141</sup> National Audit Office, Investigation into the Windrush Compensation Scheme (Home Office, 21<sup>st</sup> May 2021), 13

<sup>142</sup> Ibid.

<sup>143</sup> Home Office, Windrush Compensation Scheme: full rules (24<sup>th</sup> October 2023), 1.2

<sup>144</sup> Windrush Compensation Scheme casework guidance, (15 January 2024), 37

<sup>145</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), 4.39 – 4.61

<sup>146</sup> Home Office, Windrush Compensation Scheme: full rules (24<sup>th</sup> October 2023) rule 3.16 (d) and (h)

The primary claimant or their estate can make claims against all heads of loss, bar living costs. The close family members of a primary applicant are eligible to claim compensation for fees, impact on life, discretionary payments, and living costs only.<sup>147</sup>

Following criticism from a range of sources, including from Parliament, the media, and feedback from stakeholders and caseworkers, some changes have been made to the scheme. In December 2020, the amount of compensation available for impact on life increased, a preliminary payment of £10,000 was introduced where harm has been established, and there were changes to awards for loss of access to employment.<sup>148</sup> In August 2022 the total cap for losses due to homelessness was removed. Additionally, there have been changes aimed at simplifying application forms, broadening of the homelessness category awards and the introduction of a 'living costs' category for close family members who incurred losses through supporting those affected.<sup>149</sup>

Whilst these changes are welcome and reflect attempts to improve and a degree of collaboration with relevant stakeholders, significant issues remain. Some heads of loss have low upper limits which restrict the scheme from covering actual losses, including past legal fees (capped at £500), denial of access to education (capped at £500) and homelessness, which allows only £250 per month of proven homelessness.<sup>150</sup> Furthermore, the final discretionary head of loss which was intended to cover unforeseen losses appears so far to have been interpreted inflexibly with awards being made on 'rare occasions'.<sup>151</sup>

The JUSTICE report criticised the application of rules involving employment and pension losses on the basis that they fail to reflect actual losses and are '*at odds with the process that is normally adopted to calculate such losses in personal injury or employment cases*'.<sup>152</sup> In employment law, awards for employment losses are calculated based on a 'basic award' matching the claimant's pay up to £643 a week (this is only applicable if claimant worked over two years for the employer). Additionally, a compensatory award can be claimed which accounts for up to a year's gross pay (up to £105,707) for unemployment and where new employment is found with lesser earnings the difference in pay can be claimed for a period of time determined by the tribunal.<sup>153</sup>

### **Application Form and Standard of Proof**

Despite the attempts to simplify the application form, it is 44 pages long and requires extensive evidence to demonstrate the loss suffered. In particular, understanding what to include in witness statements is an onerous task without legal guidance.<sup>154</sup> This is especially problematic in the context of a scheme which places a high burden of evidence on claimants. Windrush Action, a victim led advocacy group, argued that legal assistance was necessary to understand what needs to be included in a witness statement to get anything higher than the lowest tariff for the impact on life heading.<sup>155</sup>

Originally, the standard of proof for those seeking compensation was the criminal standard of 'beyond reasonable doubt' or 'satisfied as to be sure'. It is notable that this high evidential standard is highly unusual for a compensation scheme. In October 2020 it was reduced to the

<sup>147</sup> Ibid, rule 2.5

<sup>148</sup> Controller and Auditor General, Investigation into the Windrush Compensation Scheme (Home Office, 21<sup>st</sup> May 2021)

<sup>149</sup> Home Office news team, Windrush Schemes Factsheet (Home Office, May 2023)

<<https://homeofficemedia.blog.gov.uk/2023/06/21/windrush-schemes-factsheet-may-2023/>> accessed 27<sup>th</sup> August 2023

<sup>150</sup> Home Office, Windrush Compensation Scheme: full rules (24<sup>th</sup> October 2023),

<sup>151</sup> Home Affairs Select Committee, "The Windrush Compensation Scheme", HC 204 (24 November 2021), 68

<sup>152</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), 1.5

<sup>153</sup> Check what compensation you can get for unfair dismissal (Citizens Advice, 9<sup>th</sup> November 2021)

<<https://www.citizensadvice.org.uk/work/employment-tribunals/employment-tribunals/before-you-go-to-the-tribunal/check-what-compensation-you-can-get-for-unfair-dismissal/>> accessed 28<sup>th</sup> August 2023

<sup>154</sup> L Lewis, H Smith and A Steiner, 'The Windrush Justice Clinic: Preliminary Research Report: The Windrush Compensation Scheme: Unmet Need for Legal Advice' (25 March 2022), 37

<sup>155</sup> Home Affairs Select Committee, Written evidence submitted by Windrush Action (WCS0009), 20

civil standard of ‘the balance of probabilities’<sup>156</sup>. Concerns remain as to how that standard of proof is implemented in practice and whether there is still an unduly high burden placed on claimants to evidence their losses. In 2021 the Home Affairs Committee for the WCS made a damning assessment of the Home Office’s approach:

*‘We are deeply concerned that, despite warnings from Wendy Williams and its then independent adviser, the Home Office has persisted in placing an undue burden on claimants to provide documentary evidence of the losses they suffered.’<sup>157</sup>*

The Independent Person report on the Windrush Compensation Scheme oversight and performance made several recommendations to improve the scheme which suggest that caseworkers for the scheme were going beyond the ‘balance of probabilities’ standard:

*“36. Caseworkers should continue to have enhanced training on the use of the ‘Balance of Probability (BOP)’ including the use of case studies available to caseworkers and the wider public to grow confidence in both quarters.*

*37. It is recommended that greater use and understanding of BOP throughout the casework process should ensure a lighter touch on the burden of documental evidence.”<sup>158</sup>*

The Windrush Compensation Scheme Casework Guidance (the Guidance) states that caseworkers should take a ‘holistic view of the claim and use all the information and evidence available’ and that ‘claimants feel supported to obtain the information’.<sup>159</sup> The Guidance acknowledges that ‘providing detailed documentary evidence to support every aspect of a claim for compensation can be challenging for claimants’.<sup>160</sup> Direct documentary evidence and circumstantial evidence (including the applicant’s and supporting witness statements) are all relevant to the holistic assessment. The caseworker is required to carry out an information and evidence gathering exercise, this includes contacting government and third parties (e.g. the claimant’s GP and former employers) and then contacting the Claimant for further information if necessary.

Though the approach by the Home Office does not appear holistic nor in accordance with the now lowered standard of proof. Wendy Williams in her WLLR identified a continuation of the ‘culture of disbelief and carelessness’ in the running of the WCS.<sup>161</sup> The evidential burden faced by claimants often appears unreasonable and contributes to the perpetuation of harm. This approach does not respect the dignity of applicants. In some instances applicants are asked to produce evidence demonstrating the harm caused which they were unable to access due to the deprivation of lawful status:

*‘Mentally, it’s destroying me... I had no access to the NHS. So, when they ask for evidence to prove that I’m having mental health issues, where am I supposed to get this evidence from, considering I have no access to help?’<sup>162</sup>*

The Guidance states that where ‘medical evidence is unsatisfactory or inconclusive’ the caseworker should consider commissioning the opinion of a suitably qualified medical

<sup>156</sup> National Audit Office, Investigation into the Windrush Compensation Scheme (Home Office, 21<sup>st</sup> May 2021), 10

<sup>157</sup> Home Affairs Select Committee, “The Windrush Compensation Scheme”, HC 204 (24 November 2021), 44

<sup>158</sup> Independent Person report on the Windrush Compensation Scheme oversight and performance

Updated 19 May 2023

<sup>159</sup> Windrush Compensation Scheme: Guidance for decision makers considering cases under the Windrush Compensation Scheme (Home Office, 15 January 2024), 38, 39

<sup>160</sup> Windrush Compensation Scheme: Guidance for decision makers considering cases under the Windrush Compensation Scheme (Home Office, 15 January 2024), 39

<sup>161</sup> Windrush Lessons Learned Review: progress update (31 March 2022), Wendy Williams.

<sup>162</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021)

practitioner or expert.<sup>163</sup> The claimant's consent must be sought, and the costs would be met by the Home Office. However, as with many aspects of the scheme, it is unclear how often caseworkers have exercised this ability to commission and fund medical evidence. In the Case Study below, the medical evidence which ultimately led to the increase in compensation offered had to be self-funded and the offer did not compensate the applicant for the costs of acquiring this necessary further evidence.

In April 2023, Human Rights Watch reported that victims claimed that letters from local councils demonstrating periods of homelessness were not deemed sufficient evidence.<sup>164</sup> In one ongoing case an 82-year-old was offered compensation of only £40,000 for being unable to work or claim benefits for 34 years.<sup>165</sup> As part of the WWLR update, Wendy Williams reported that applicants felt an '*...an almost impossible evidential burden*'<sup>166</sup> was being applied. Applicants reported that the Home Office has asked them to provide '*...receipts from the 1980s, evidence of spending some nights at the Salvation Army in the 1990s during a period of homelessness, and evidence of unsuccessful job applications many years ago*'.

### Mitigation of Loss

An award may be reduced or declined because of double recovery, fraud, mitigation of loss and criminality.<sup>167</sup> In particular in relation to the mitigation of loss, the Claimant is required to provide evidence that they took action to resolve their immigration status and reduce their loss. Criticisms have been levelled at the failure by the WCS guidance to sufficiently recognise the fear of deportation that the individual may have felt in approaching the Home Office. The WCS guidance provides a high factual threshold to be met:

*'You should then consider whether the claimant can demonstrate a compelling reason to fear contacting the department - for instance, if a claimant can show that their actions were strongly influenced by direct knowledge of a family member who had contacted the Home Office and then been detained or removed from the UK this might constitute sufficient justification.'*<sup>168</sup>

This approach has been deemed to make the WCS akin to an adversarial system. In evidence to the Home Affairs Committee on the WCS, Ravi Nayer commented that:

*'by requiring claimants to submit evidence that they have mitigated their loss, the Home Office may have reversed the burden of proof that exists in civil proceedings, in which it is for a defendant to prove a claimant has failed to mitigate their loss.'*<sup>169</sup>

Martin Forde KC, the original independent advisor to the WCS, also advised the Home Office against the included rules on mitigation partly on the basis that '*[mitigation] is not a concept that is known to non-lawyers*'<sup>170</sup> and more generally that it was not a reasonable requirement. Significantly one of the recommendations by the Home Affairs Committee on the WCS was that '*rules on mitigation of loss are not appropriate for a compensation scheme of this nature:*

<sup>163</sup> Windrush Compensation Scheme: Guidance for decision makers considering cases under the Windrush Compensation Scheme (Home Office, 15<sup>th</sup> January 2024), 90

<sup>164</sup> UK: "Hostile" Compensation Scheme Fails 'Windrush' Victims (Human Rights Watch, 17<sup>th</sup> April 2023) <<https://www.hrw.org/news/2023/04/17/uk-hostile-compensation-scheme-fails-windrush-victims>> accessed 27<sup>th</sup> August 2023

<sup>165</sup> Holly Bancroft, The Windrush victim fighting for compensation after not being able to work or claim benefits for 34 years (The Independent, 8<sup>th</sup> February 2023) <<https://www.independent.co.uk/news/uk/home-news/windrush-scandal-compensation-home-office-b2278088.html>> accessed 28<sup>th</sup> August 2023

<sup>166</sup> Windrush Lessons Learned Review: progress update (31 March 2022), Wendy Williams, 61

<sup>167</sup> Home Office, Windrush Compensation Scheme: full rules (24<sup>th</sup> October 2023), Part 4, 1

<sup>168</sup> Windrush Compensation Scheme: Guidance for decision makers considering cases under the Windrush Compensation Scheme (Home Office, 15<sup>th</sup> January 2024), 35

<sup>169</sup> Home Affairs Select Committee, "The Windrush Compensation Scheme", HC 204 (24 November 2021, para 224.

<sup>170</sup> Ibid, para 225.

*the Home Office should lift any remaining mitigation requirements.'*<sup>171</sup> No such changes have yet been made.

### 3.3.2 Lambeth Children Home's Redress Scheme

The Individual Redress Payment amount aimed to compensate for the harm suffered to *'reflect the severity of the abuse suffered as well as any consequential hurt, fear and humiliation the Eligible Applicant has experienced and the lifetime consequences the abuse has caused'*.<sup>172</sup>

#### Heads of Loss

The heads of loss for the individual redress payment consisted of

- (i) the severity of the abuse itself and any aggravating factors;
- (ii) physical injury or any recognised medical or psychiatric condition as a consequence of the abuse;
- (iii) the loss of opportunity arising from the abuse and its effects which the Applicant has suffered.<sup>173</sup>

The awards for abuse suffered and resulting harm and consequences would be calculated on the basis of common law compensation awards for similar harm suffered and by reference to the Compensation Tariff.<sup>174</sup> The total Individual Redress Payment is a payment of up to £125,000, however provision is made for cases where special damages could result in a higher award.<sup>175</sup>

#### Standard of Proof

The standard of proof is the balance of probabilities, and it would appear it is applied in a flexible manner taking a victim centric approach. Malcolm Johnson, a barrister who worked on the scheme noted that:

*'One of the better features of the Scheme, is that it does not require the Applicant to front load their claim in the same way as they would in a civil litigation claim in court proceedings. There are no time limits for exchange of evidence. It is perfectly possible to submit new evidence, for instance an additional statement or new documentary evidence, at a very late stage, even after an offer has been made.'*<sup>176</sup>

The approach of the decision maker to evidence was broadly considered to be fair and recognised historical failings by Lambeth Council:

*'(t)he Applicant's account of abuse is accepted by Lambeth. There's no attempt to say (in my experience) that any Applicant is exaggerating or fabricating their experiences. The Scheme does not give Lambeth the facility to seriously question, which must be right. Indeed, Lambeth's sole counter evidence would be contained in their own social services*

<sup>171</sup> Ibid, para 230.

<sup>172</sup> Lambeth Council, Lambeth Children's Home Redress Scheme (Cabinet Report, 18<sup>th</sup> December 2017), para 2.10

<sup>173</sup> Ibid, para 12.2

<sup>174</sup> Ibid, para 12.5

<sup>175</sup> Appendix A Lambeth Children's Homes Redress Scheme Summary of Redress available under the Scheme (September 2021)

<sup>176</sup> Malcolm Johnson, The Lambeth Children's Home Redress Scheme – Update (LinkedIn, 7<sup>th</sup> April 2020)

<<https://www.linkedin.com/pulse/lambeth-childrens-home-redress-scheme-update-malcolm-johnson/>> accessed 27<sup>th</sup> August 2023

*records, and there is no attempt on their part to say that because the notes contain no reference to abuse, none occurred.’<sup>177</sup>*

An audit of the scheme further suggested that the approach taken was not adversarial and the victims accounts was broadly accepted:

*‘(t)he anecdotal evidence presented by the applicants was taken at face value and there are no examples in the 53 files of file handlers seeking to be judgmental on the grounds of credibility or any other basis. To the extent that issues of credibility may have become relevant, these were raised by the jointly instructed Psychiatrists in the context of their written medical reports and such issues were never flagged at the instigation of the file handlers or Lambeth. In all 53 cases the file handlers adopted a straightforward interpretation of the facts in favour of applicants when seeking to categorise the abuse within the appropriate compensation bands and range.’<sup>178</sup>*

On the application of the balance of probabilities it appears that the Independent Appeal Panel approach was also fair, having proper regard to the testimony of a victim and the poor record keeping of Lambeth Council. Malcom Johnson describes as an example of the approach taken:

*“an Applicant claimed that he had been placed at a Lambeth Children’s Home. His social services notes did not record that placement. This is not that unusual – I have at least three cases where this has happened. The Appeal Panel decided that on the balance of probabilities he had been at this home, because there was no other evidence to suggest otherwise..... It also seems just – because the record of Lambeth and its predecessor, London County Council in keeping proper track of where children were placed and how they were faring, was too often lamentable.”<sup>179</sup>*

There is evidence to suggest that the approach to the amount of compensation awarded has not been overly rigid. Leigh Day solicitors who represented a number of applicants secured payments which reached or exceeded the Scheme’s overall cap of £125,000. They were able to secure aggravated damages linked to racism and loss of earning in excess of the £25,000 caps.<sup>180</sup> In the Lambeth Council’s December 2023 update, 120 payments (amounting to 5.4% of all payments) in excess of £125,000 were made totalling £ 15,955,627.<sup>181</sup>

Leigh Day solicitors generally favourably on the operation of the Lambeth Scheme:

*‘While the redress scheme was not without its faults, it serves as a useful benchmark for more institutions and local authorities looking to acknowledge the wrongs of their past. It ought to encourage others to step up and to begin compensating survivors of abuse in a less litigious manner’<sup>182</sup>*

There were limitations to the Lambeth scheme, significant criticisms included that in some circumstances racial abuse, loss of earnings and education were not adequately covered, and the geographically limited provision of housing assistance.<sup>183</sup>

<sup>177</sup> Ibid

<sup>178</sup> Lambeth Cabinet, Executive summary of Audit report on the Administration of the Lambeth Children’s Homes Redress Scheme (18<sup>th</sup> September 2019)

<sup>179</sup> Ibid

<sup>180</sup> Leigh Day, ‘Lambeth Redress Scheme provides lessons for other local authorities, say abuse claims lawyers’, 6<sup>th</sup> January 2022

<sup>181</sup> Lambeth Children’s Home Redress Scheme Update (December 2023), 5-7

<sup>182</sup> Lambeth Redress Scheme provides lessons for other local authorities, say abuse claims lawyers (6 January 2022), Leigh Day Solicitors

<sup>183</sup> Independent Inquiry Child Sexual Abuse, Children in the care of Lambeth Council: Investigation Report (HC 704, July 2021), 71

### 3.3.3 Horizon Shortfall Scheme

The HSS aims to provide ‘full and fair compensation’ and to place sub-postmasters back in the position they would have been in had it not been for the Post office breach of its contractual obligations and/or they had they not been the victim of unlawful tortious behaviour.<sup>184</sup>

#### Heads of Loss

Claims can be made for Horizon shortfalls and consequential loss. The guidance states that there is “no exhaustive list of the types of loss” it need merely meet the legal test for a consequential loss and claims will be assessed against established legal principles.<sup>185</sup> They do suggest the following heads of loss: loss of earnings, loss of profits, loss of property, loss of opportunity/chance, penalties/general or increased costs of financing, legal and professional fees (unrelated to the Scheme itself), personal injury, distress, inconvenience, harassment, loss of reputation and bankruptcy if directly related to shortfalls.<sup>186</sup>

#### Standard of Proof

The standard of proof is the balance of probabilities but where this is not met the claim may still be accepted if the Scheme considers it fair in all the circumstances.<sup>187</sup> There is evidence to suggest that this approach is not being following universally with mixed outcomes. In their response to the interim compensation report in 2022, the Department of Business, Energy and Industrial Strategy (**BEIS**) reported that 18.6% (11 cases out of 59) of disputed claims had the offer reduced due to lack of claimant information. Although it was also reported on a number of occasions the offer was increased despite a lack of claimant information.<sup>188</sup> BEIS suggests that where a claim is ‘*clearly articulated*’ it should not be disadvantaged if there is a lack of records to support that claim.<sup>189</sup> They set out that as of March 2022, only two applications had been rejected by the Panel in cases with no supporting evidence.<sup>190</sup> BEIS set out the following example case:

*‘Claim: Particularised claim with no/limited evidence: “The evidence of a Horizon shortfall and repayment are contained in the application form and subsequent Request for Information. Despite the absence of documentary evidence, the Panel finds these compelling. The Applicant describes the relevant events with clarity and in real detail. The Post Office has no evidence to the contrary. Non-Disclosure Agreement data appears to evidence the existence of shortfalls. This was a one-off large error, without explanation. Claim to be awarded in full.’<sup>191</sup>*

In response to recommendations from the interim report, the Government made assurances that the burden of proof would not place onerous requirements for evidence on claimants.<sup>192</sup> The guidelines for the HSS state that ‘*where the postmaster is unable to satisfy the burden of proof in relation to their claim, their claim may nonetheless be accepted in whole or in part if the Scheme considers it to be fair in all the circumstances*’.<sup>193</sup>

<sup>184</sup> The Post Office Horizon IT Inquiry, First Interim Report: Compensation, 17 July 2023, para 134

<sup>185</sup> Ibid, para 54.

<sup>186</sup> Ibid

<sup>187</sup> Horizon Shortfall Scheme Application Form (Post Office, October 2022), 3.1

<sup>188</sup> Appendix: Government response to Post Office and Horizon – Compensation: interim report (Tenth Special Report of Session 2021-22, 27<sup>th</sup> April 2022), 20

<sup>189</sup> Ibid, 20

<sup>190</sup> Ibid, 20

<sup>191</sup> Ibid, 20

<sup>192</sup> Ibid, 21

<sup>193</sup> Ibid, 21

BEIS used the following case example to show the approach taken:

*‘Claim: Despite evidential uncertainty, the Independent Panel awarded the claimant all of the claimed £50,000 related to shortfall losses, based on the claimant’s account and the fact that this was not contradicted by Post Office records for part of the eligible period. The Independent Panel highlighted that evidential uncertainty was to be expected given the lapse of time since the shortfalls occurred.’*<sup>194</sup>

A range of criticisms of the scheme have been made, Howe and Co, who represents 150 postmasters, consider the compensation scheme ‘...provides unfair and low offers to unrepresented postmasters... and refuses to entertain applications from persons who are plainly entitled to apply’.<sup>195</sup> It has also been suggested that there have been ‘significant variations between amounts awarded to very similar cases’.<sup>196</sup>

### Application Form

The initial application forms is 14 pages long and was designed by Hebert Smith Freehills (‘HSF’), lawyers at the time for the post office. The form, which is predominantly completed by unrepresented postmasters, has been criticized for not having sufficiently clear prompts to enable applicants to fully set out the consequential loss suffered.<sup>197</sup> It has been suggested that had the form been designed by a Claimant firm it is likely to have framed the questions more effectively to obtain the information needed to fully compensate for the losses suffered.<sup>198</sup> The HSS (and the GLO and OHCS) has received extensive criticism for delays in processing claims, this included agreeing a costs matrix for expert evidence.<sup>199</sup>

### 3.3.4 Infected Blood Schemes

Qualification for the Interim Blood Scheme is automatic if the applicant is receiving support from IBSS scheme. Therefore eligible claimants did not need to take additional steps to prove their eligibility for the Interim Blood Scheme. As such there are also no heads of loss.

#### Heads of Loss

The Infected Blood Compensation Scheme proposal by Sir Brian Langstaff provides for extensive heads of loss to reflect the impact on life of those affected. It takes an expansive approach to compensating all those impacted and identifies infected persons and affected persons as having claims in their own right across all award categories.<sup>200</sup> The award categories will compensate past and future losses, mainly using a tariff approach, and includes:

- The injury impact award to compensate for future and past physical and mental injury, emotional distress, and injury to feeling.
- Social impact award for past and future social consequences of the infection, including stigma, social isolation, loss of educational opportunities and congenial employment.
- 

<sup>194</sup> Ibid, 21

<sup>195</sup> Building a Framework for Compensation and Redress, APPG for Fair Business Banking (February 2023) p14

<sup>196</sup> The Post Office Horizon IT Inquiry, Chair’s Progress Update on Issues relating to Compensation (15 August 2022)

<sup>197</sup> 90% of postmasters are believed to be unrepresented at the initial stages,

John Hyde ‘Post Office lawyers accused of gagging Horizon victims’ (30 May 2023), The Law Society Gazette.

<sup>198</sup> Building a Framework for Compensation and Redress, APPG for Fair Business Banking (February 2023), 24

<sup>199</sup> The Post Office Horizon IT Inquiry, First Interim Report: Compensation (17 July 2023), paras 105 and 108

<sup>200</sup> spouses, civil partners, long term cohabitants, children, parents, siblings, providers of care, and members of the family or friends whose relationship was so close that it was reasonable to expect they would be seriously impacted and who have suffered emotionally, mentally and/or physically as a result- Infected Blood Inquiry, Second Interim Report (5 April 2023), Recommendation 4, p82

- Autonomy award, which includes compensating for interference to the right to family and private life e.g. loss of opportunity to marry, partnerships prospects and to have children.
- Care Award for past and future care needs.
- Financial loss award for past and future loss on an assessed basis as opposed to a tariff approach like the other award categories.<sup>201</sup>

Sir Brian Langstaff's recommendation is for a mainly tariff based scheme determined by an independent advisory panel of clinical and legal experts, taking into account but not limited to current practices in courts and Tribunals in the UK and other UK compensation schemes.<sup>202</sup> Exemplary damages are not included, the rationale being that it may introduce a more adversarial approach to the scheme. The proposed framework does not preclude the applicant bringing a claim for exemplary damages through the courts.

### Standard of Proof

The proposed burden of proof for the future scheme makes a concerted effort to go further than the other schemes explored in this report by placing a reduced burden on claimants. Sir Brian Langstaff suggested that a legalistic or adversarial burden of proof should be avoided, in favour of either automatic qualification based on the previous support schemes alongside a sympathetic collaborative approach to claims outside of the automatic qualification utilising a generous balance of probabilities formulation.<sup>203</sup> The test for eligibility is that it '*will be accepted if the information available points toward eligibility and the opposite cannot be shown to be more likely*',<sup>204</sup> an effective reverse of the burden.<sup>205</sup> For the future scheme, Sir Brian Langstaff agrees with Sir Robert Francis KC emphasis of the importance of taking a '*sympathetic and sensitive attitude*' to evidencing claims.<sup>206</sup> Including proactive and sympathetic work by the scheme to find evidence, and a general presumption made in favour of statement of facts made by the applicant.<sup>207</sup>

### 3.3.5 Comparative Analysis

Each scheme deals with harm that was caused by either the state or state-related bodies, the nature of the harm covered many spheres of the victim's life and those close to them. This is largely reflected in that all compensation schemes have, or will in the future have, complex and extensive heads of loss which reflect the harm suffered. To that extent all schemes seek to be remedial and incorporate a degree of individualisation to their assessment of loss. Complex heads of loss often bring up difficulties in evidential requirements, particularly in speculative heads of loss such as loss of earnings or opportunity. Evidence of the psychological harm and impact on life can be difficult, without sufficient legal and medical expert assistance, beyond the personal testimony of the claimant. Frequently, elderly and vulnerable claimants may not have access to direct evidence of the costs or harms suffered. This to some extent this is reflected in the guidance of the schemes or policy statements in respect of the intended approach, which purports to be victim centred.

The HSS scheme applies the test of consequential loss and actual loss arising from the Shortfall to their assessment. This approach is arguably attributable to the contractual and tortious liability of the Post Office. Whereas the WCS, the Lambeth Scheme both use tariffs

<sup>201</sup> Infected Blood Inquiry, Second Interim Report (5 April 2023), 40-47

<sup>202</sup> Ibid, 83-84.

<sup>203</sup> Ibid, 93-94

<sup>204</sup> Ibid, 94

<sup>205</sup> Ibid, 93

<sup>206</sup> Sir Robert Francis QC, Compensation and Redress for the Victims of Infected Blood – Recommendations for a Framework (Cabinet Office, 7<sup>th</sup> June 2022), 18

<sup>207</sup> Infected Blood Inquiry, Second Interim Report (5 April 2023), 93-94

extensively with the WCS having limited heads of loss calculated on an assessed basis though. Criticisms of both approaches have been made, with the consequential loss model leading to inconsistent outcomes on similar cases and the banded tariff payments considered overly complex and applied restrictively in the case of the WCS.

A more positive feature of the WCS is its attempts to improve following demands for change from relevant stakeholders, this included an increase to set tariffs and the removal of some overall limits. However, these improvements are undermined by the highly adversarial approach to mitigation of loss and the application of a rigid and high evidential burden.

The most liberal and victim centred approach can be found in the proposed final Infected Blood Scheme, which compensates both the infected and the affected on all available heads of loss. The groups included under the affected category are more extensive than all of the other schemes. Comparatively, the approach to the assessment of initial eligibility, in particular the generous approach to the balance of probabilities threshold and the extent of heads of loss, is highly expansive.

The HSS, WCS and Lambeth schemes use the balance of probabilities standard for proving losses under the various heads of loss. The guidance and policy statements for all schemes largely promotes a flexible and victim centred approach to the evaluation of. However, the application of the balance of probabilities appears to vary significantly between the schemes. Whilst there was criticism levelled at the HSS scheme for the amounts awarded, delay and processing issues, in comparison to the WCS overall both the HSS scheme and the Lambeth Scheme reported positively on the approach to evidence and the standard of proof.

The WCS has received extensive criticism for applying an elevated standard of proof, its inflexible and rigorous requirement for evidence beyond the testimony of the claimant, and in not giving preference to the claims of the claimant where conflicting evidence is ambiguous or could be questioned due to the failings surrounding the original scandal. Included below is a Case Study which illustrates high evidential standards, inflexibility and a deeply adversarial approach taken by the Home Office.

Case Study<sup>208</sup>

**Background**

MC moved to the UK with his family in [GRO] his mother was a commonwealth citizen. MC was granted Indefinite Leave to Remain (ILR) upon entry to the UK. MC had a promising career as a graphic designer ahead of him. However, from 2014 to 2020, MC experienced ongoing problems [GRO] as his ILR stamp was not [GRO] MC had his contracts terminated

GRO

GRO

**WCS application and decisions**

MC prepared an initial application for the WCS without legal assistance, he submitted an unusually large portfolio of evidence, including approximately 21 wage slips, 312 emails and texts from employers and 25 documents (including contracts, termination letters and his national insurance records). In total approximately **368 items of evidence** were submitted in the original application.<sup>209</sup> [GRO]

GRO

MC instructed Southwark Law Centre (SLC) to assist in a Tier 1 review, an application was submitted on 18 August 2022 [GRO]

GRO

GRO

A Tier 2 review was submitted on the 23 July 2023 by SLC, with submissions highlighting the [GRO] No new evidence was submitted. At the same time SLC<sup>210</sup>, contacted Nigel Hills, the Head of the WCS, to highlight concerns they had about the decision making in this case and the approach [GRO].

GRO

MC is seeking a further review of the nil award for discretionary payments.

<sup>208</sup> This case study has been provided by Southwark Law Centre.

<sup>209</sup> Despite having extensive evidence to support his claim, on the 4<sup>th</sup> February Marcel was rejected for a Preliminary Award. Marcel wrote an email to a number of prominent MPs drawing attention to this rejection. Shortly afterwards, on the 12<sup>th</sup> February 2021, Marcel received an email apologising and overturning the prior rejection, and informing him that he was in fact eligible for the preliminary payment of £10,000.

<sup>210</sup> SLC emailed Nigel Hills on the 1 August 2023, Nigel Hills replied on the 9 August 2023 agreeing to look into the matter.

**Analysis**

This case study highlights the problematic approach taken to evidential standards by those administering the WCS. It is worth noting that MC claim from the outset, unlike many, involves an unusually high volume of supporting evidence. MC also benefited from representation from SLC from the Tier 1 review stage onwards.

In both the initial decision and the Tier 1 review, the WCS decision-maker incorrectly applied the standard of proof (essentially elevating it to beyond the balance of probabilities) and took an erroneous approach to the weight attributable to evidence. For e.g. evidence including written communications from employers stating issues around MC immigration status were the reason for not offering work were simply ignored by the decision maker. In the original Tier 1 review the decision maker sought to justify the erroneous approach by introducing new reasons and new evidence they had procured, this approach was arguably procedurally improper. In any event the approach was also substantively flawed as it placed undue weight on preliminary check entries obtained from the Employer Checking Service to disqualify certain periods claimed for loss of employment, despite extensive evidence which supported MC's claim for these periods.

**GRO**

**GRO**

The case study also highlights the continued restrictive approach to some [ **GRO** ] at odds with the aim of the scheme to fully compensate victims for the loss suffered. The discretionary head of loss was intended to compensate for losses not otherwise covered by the scheme. The WCS accepted that MC's earning capacity may have been impacted, but was given a nil award for the claim for loss of opportunity on the basis of it being speculative. This is despite evidence of projected loss being provided.

**GRO**

### 3.4. Decision making and Review Process

#### 3.4.1 Windrush Compensation Scheme

Initial applications are determined by a caseworker in the Home Office. A number of issues arise to this approach, firstly there is significant mistrust of the Home Office due to its role in causing the harm suffered. The Home Office commissioned research into the barriers that might discourage people from applying to the WCS. The main barrier identified was mistrust in the Home Office, in addition there were concerns that it may lead to immigration enforcement action and that the benefits of applying do not outweigh the effort and likelihood of success.<sup>211</sup>

In the WLLR, victims of the Windrush scandal reported broadly negative experience of the WCS:

- 76% of respondents said they hadn't been treated respectfully by Home Office staff.
- 97% who applied to either scheme said they didn't trust the Home Office to deliver on its commitments.
- 55% of respondents said they thought there had been 'no progress at all' or 'not much progress' towards the department's ambition to be a fairer, more compassionate Home Office.<sup>212</sup>

Victims negative experience and perception of the WCS is well documented in numerous reports.<sup>213</sup> The above experience was confirmed by a more recent small survey by Praxis looking at the experience of vulnerable clients in the Windrush cohort.<sup>214</sup> Out of 20 people surveyed, 8 had applied and only three had received compensation. Those who had not applied suggested they did not know they were eligible or were worried that they would not be able to evidence their losses. Additionally, Praxis stated that they were still receiving referrals for 'people who are struggling to prove their rights to basic services let alone compensation'.<sup>215</sup>

The competency and qualification of Home Office caseworkers to assess claims has also been questioned with the JUSTICE WCS Working Group finding that '*that caseworkers were equipped with neither the skillset, nor a sufficiently deep understanding of the issues, for the task of effectively eliciting further relevant information from Claimants in writing or in telephone conversations, or explaining what further evidence or information might assist in formulating or evidencing a successful claim.*'<sup>216</sup> The Home Office has sought to justify its model of decision making and stated '*to ensure no one is disadvantaged, all claims are allocated to a caseworker who works closely with the individual to gather evidence and to understand their experience*'<sup>217</sup>. This statement was undermined by the National Audit Office (NAO) that found an average of 4.4 caseworkers work on a WCS claim before a decision is made.<sup>218</sup> In contrast, the Second Independent Person's Report on the WCS found that '*inconsistencies in case workers' decisions is being reduced due to improved quality assurance and quality checking*' and that overall the WCS '*remains compliant and is meeting its objectives.*'<sup>219</sup>

<sup>211</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), Para 1.2, p9

<sup>212</sup> Windrush Lessons Learned Review: progress update (31 March 2022), Wendy Williams.

<sup>213</sup> See JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021)

<sup>214</sup> Praxis, New data shows compensation scheme is failing Windrush generation on eve of 75<sup>th</sup> anniversary (21<sup>st</sup> June 2023)

<sup>215</sup> Ibid, 1

<sup>216</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021) Para 4.19

<sup>217</sup> Home Affairs Select Committee, "The Windrush Compensation Scheme", HC 204 (24 November 2021), para 134

<sup>218</sup> Ibid

<sup>219</sup> Home Office, Second Independent Person report on the Windrush Compensation Scheme: oversight and performance one year on (Updated 1 November 2023)

Applicants are able to seek a 'Tier 1 Review', which is undertaken by a Home Office case worker who did not issue the initial decision. A further Tier 2 Review is available and is carried out by the Adjudicator's Office which is part of another government department, His Majesty's Revenue and Customs (HMRC). The Adjudicator's Office can review the amount of compensation awarded and refer a case back to the Home Office and make a recommendation, it cannot substitute the Home Office's judgement like a Tribunal is able to. The Adjudicator's Office is also unable to consider issues relating to eligibility to the WCS<sup>220</sup>. Finally a complaint can be made via the applicant's MP to the Parliamentary and Health Service Ombudsman who is able to make a recommendation based on a procedural error.

Claimants receive no support following submission of a claim.<sup>221</sup> Crucially, this means they receive no assistance assessing whether any compensation offers are fair under the scheme and there is no assistance in pursuing a review.<sup>222</sup> There is clear dissatisfaction with initial decisions, with around 39% (1549) of rejected applicants seeking a Tier 1 review<sup>223</sup>. The NAO criticised the quality of casework and decision making and found that more than half of cases were inadequate.<sup>224</sup> The Home Office publicly available statistics do not provide information on the number of successful Tier 1 and Tier 2 reviews. Various requests for information have been submitted over the years which show that very few cases are successful following a Tier 1 and 2 Review. In 2023 Human Rights Watch reported that almost 57 % of original decisions were maintained following a Tier 1 review with 72% of Tier 2 decisions being maintained.<sup>225</sup> These figures reflect an ongoing pattern, in 2021 a Freedom of Information request from a sitting MP revealed that of 3,020 Tier 1 reviews, only 38 (1%) were successful.<sup>226</sup> Of 459 Tier 2 review outcomes in 2021, only 4 (0.08%) were successful.<sup>227</sup>

### 3.4.2 Lambeth Children's Home Redress Scheme

The initial decision is made by the Lambeth Redress Team who consist of employees of Lambeth Council who work in conjunction with Lambeth Council Solicitors (Kennedy's LLP). An applicant can appeal a decision to an Independent Appeal Panel, chaired by a retired judge and made up of three people with relevant expertise (including social workers, psychologists or barristers). The appeal decision will be final<sup>228</sup>.

Lambeth argued that while the scheme was administered by the Council, they believed there were sufficient safeguards to ensure fairness, these safeguards including transparency, funded legal representation and an independent appeal panel.<sup>229</sup>

As of December 2023, there had been 131 appeals to the Independent Appeal Panel. Of a total of 2,240 applications, this indicates only a 6% appeal rate. Only 17 of which were successful

<sup>220</sup> Kaur, R (On the Application Of) v (Adjudicator's Office & Anor [2023] EWHC 1052 (Admin) (05 May 2023), 19, 20

<sup>221</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), 4.68

<sup>222</sup> Ibid, 4.68

<sup>223</sup> Windrush Compensation Scheme Data: December 2023

<<https://www.gov.uk/government/publications/windrush-compensation-scheme-data-december-2023>> accessed 5 February 2024.

<sup>224</sup> National Audit Office, Investigation into the Windrush Compensation Scheme (Home Office, 21<sup>st</sup> May 2021)

<sup>225</sup> UK: "Hostile" Compensation Scheme Fails 'Windrush' Victims (Human Rights Watch, 17<sup>th</sup> April 2023)

<<https://www.hrw.org/news/2023/04/17/uk-hostile-compensation-scheme-fails-windrush-victims>> accessed 27<sup>th</sup> August 2023

<sup>226</sup> Thomas Kingsley, Windrush compensation scheme 'not fit for purpose' as only 1% of appeals successful (The Independent, 17<sup>th</sup> September 2022) < <https://www.independent.co.uk/news/uk/home-news/windrush-compensation-government-home-office-b2162496.html>> accessed 27<sup>th</sup> August 2023

<sup>227</sup> Thomas Kingsley, Windrush compensation scheme 'not fit for purpose' as only 1% of appeals successful (The Independent, 17<sup>th</sup> September 2022) < <https://www.independent.co.uk/news/uk/home-news/windrush-compensation-government-home-office-b2162496.html>> accessed 27<sup>th</sup> August 2023

<sup>228</sup> Lambeth Children's Home Redress Scheme, Appealing a decision.

<sup>229</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme Appendix E – Summary of Consultation – Redress Scheme, 1

(13%), 85 (65%) were dismissed, 28 were withdrawn, and 1 is still pending.<sup>230</sup> Applications were also subject to regular audit from a barrister.<sup>231</sup> It is notable that the low appeal rate may have been partially due to the approach taken by the scheme and the risk in pursuing an appeal. Namely the possibility of the appeal panel award reducing the original award. Malcom Johnson comments that, *'I suspect that many Applicants are deciding not to take the appeal process, because of that risk and the understandable wish to put the whole ghastly experience of compensation behind them.'*<sup>232</sup>

### 3.4.3 Horizon Shortfall Scheme

Applications for the HSS are assessed by an independent advisory panel consisting of legal specialists, forensic accounting specialists and retail specialists.<sup>233</sup> The independence of the advisory panel from the Post Office was seen as crucial in parliamentary debates and by the steering group due to claimants not wanting to deal with the organisation which originally caused the harm.<sup>234</sup>

Herbert Smith Freehills (**HSF**) were the solicitors appointed by the Post Office to assist in the scheme. HSF act as case assessors to determine initial eligibility. If eligible, the matter is referred to the Specialist Case Review team at the Post Office. The Post Office undertake an investigation of the application and provide a report to the case assessor. The HSF case assessor considers the report and provides an assessment and recommendation, based on applicable legal principles, to the Independent Advisory Panel. The panel members then undertake their own assessment of the application and submit a recommended outcome (i.e. level of compensation) to the Approvals Committee at the Post Office. A decision is made by the Post office and an outcome letter is prepared by HSF. In higher value cases the outcome letter is reviewed by the panel to ensure that they agree with its terms.<sup>235</sup> Prior to acceptance or rejection of an offer the applicant can seek disclosure of all or any of the documents.

If the applicant wishes to reject the offer, the review process begins with a 'good faith meeting', followed by an escalation meeting, then mediation. If these are not successful, then the applicant can progress to small claims track if the claim value is £10,000 or under. If the clam value is higher than that it will go to arbitration.

The process is somewhat complex and does involve the Post Office through its various stages. Though attempts have been made to incorporate checks and balances and a degree of rigour. Criticisms have been made in respect of the transparency and independence of the system. In particular HSF involvement in the design and delivery of the scheme has attracted criticism in light of their firm having been instructed by the Post Office during the Bates litigation. The conduct of the Bates litigation was described by Paul Marshall of Cornerstone Chambers as *'bitterly contested.'*<sup>236</sup> Mr Marshall queried whether HSF *'should have a continuing role in*

<sup>230</sup> Lambeth Children's Homes Redress Scheme Update December 2023, 8

<sup>231</sup> Cabinet Member Delegated Decision, Lambeth Children's Home Redress Scheme Update 30<sup>th</sup> June 2020, 2.51

<sup>232</sup> Malcolm Johnson, The Lambeth Children's Home Redress Scheme – Update (LinkedIn, 7<sup>th</sup> April 2020) <<https://www.linkedin.com/pulse/lambeth-childrens-home-redress-scheme-update-malcolm-johnson/>> accessed 27<sup>th</sup> August 2023

<sup>233</sup> The Post Office Horizon IT Inquiry: Chair's Progress Update on Issues relating to Compensation (15 August 2022), para 33

<sup>234</sup> Government response to the Business, Energy and Industrial Strategy Committee Post Office and Horizon – Compensation: interim report (April 2022), 20

<sup>235</sup> The Post Office Horizon IT Inquiry: Chair's Progress Update on Issues relating to Compensation (15<sup>th</sup> August 2022), para 40-45

<sup>236</sup> Legal Futures, 'About time' – Post Office replaces HSF as Horizon inquiry lawyers, 6<sup>th</sup> June 2023 <<https://www.legalfutures.co.uk/latest-news/about-time-post-office-replaces-hsf-as-horizon-inquiry-lawyers>> accessed 3<sup>rd</sup> December 2023

*either the Williams inquiry or in the arrangement for any compensation scheme – where an overriding requirement is for independence and objectivity.’*<sup>237</sup> In June 2023, HSF were replaced as the Post Office’s lawyers for the public inquiry though remain as assessors on the scheme. Lawyer representing sub postmasters have raised concerns about ‘undue delays’ in decision making<sup>238</sup>. The Solicitors Regulation Authority is also investigating the appropriateness of without prejudice correspondence with unrepresented applicants and the use of non-disclosure agreements by the Post Office lawyers<sup>239</sup>. The operation of the HSS, and GLOS and OHCS, is due to be formally assessed in Phase 7 of the Post Office Inquiry.

### 3.4.4 Infected Blood Schemes

In relation to the Interim Blood Scheme, there is one internal review that can be made regarding qualification to the relevant IBSS scheme. Applicants may also apply for their application to be re-assessed if they are able to provide further or new medical evidence.

Sir Brian Langstaff proposed that for the Infected Blood Compensation Scheme an ‘Arm’s Length Body’ should be established to independently administer the scheme, chaired by a judge. The judge would be assisted in decision making by an advisory board, which would include beneficiaries and a range of experts with relevant knowledge and experience.<sup>240</sup> He further proposes that there should be a right of appeal to a ‘bespoke independent appeal body’ and that the approach of both bodies should run in accordance with the overall principles of the scheme.<sup>241</sup>

### 3.4.5 Comparative Analysis

All schemes, other than the proposed final Infected Blood Compensation Scheme, involve the body originally responsible for the harm in the processing of applications and decision making. This was recently identified as a wider systemic flaw in compensation schemes more generally by the APPG for Fair Banking and Business in its report titled ‘Building a Framework for Compensation and Redress’.<sup>242</sup> This report found that most compensation schemes are administered by institutions which are responsible for the harm caused and this causes a range of problems including an inherent conflict of interests.<sup>243</sup> This approach arguably, and in particularly in the case of the WCS, reduces trust and confidence in a compensation scheme and diminishes respect for dignity and the accessibility of the schemes.

Every scheme with the exception of the WCS recognised the importance of having some independence built into the initial decision making process which would seek to enhance the integrity of the scheme. The HSS and the Lambeth Scheme involve independent lawyers in the initial decision-making process. The Lambeth Scheme recognised the importance of having an independent review panel led by a judge to assure claimants of sufficient independence from Lambeth Council. The HSS has an independent advisory panel which makes the initial decisions and has provision for multiple internal meetings and mediation before going on to the external small claims or arbitration appeals. While the proposals for the Infected Blood Compensation Scheme recommends an arm’s length body to make initial decisions and a right of appeal to an independent body. The WCS stands alone in having no initial provision for independent reviews by a body outside of the Home Office. A further

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<sup>237</sup> Ibid

<sup>238</sup> The Post Office Horizon IT Inquiry: First Interim Report: Compensation (17 July 2023), para 105

<sup>239</sup> Law Society Gazette, ‘SRA probes Post Office lawyers over ‘intimidating’ offer letters’ (5<sup>th</sup> February 2024)

<sup>240</sup> Infected Blood Inquiry, Second Interim Report (5 April 2023), p18-21

<sup>241</sup> Ibid

<sup>242</sup> APPG for Fair Banking and Business, Building a Framework for Compensation and Redress (February 2023)

<sup>243</sup> Ibid, p5

right of review to the Adjudicator's Office which is based in the HMRC cannot be said to be truly independent and has restricted powers comparatively to a Tribunal.

### 3.5. Legal advice and support provision

#### 3.5.1 Windrush Compensation Scheme

The UK Government provides no direct legal support to victims in applying to the WCS. The application form explicitly states that '[y]ou do not need a legal representative to make a claim'.<sup>244</sup> The government provides access to a Windrush Help Team helpline, and provides funding to the organisation 'We Are Group' (formerly known as 'We Are Digital') to provide further assistance in completing the application form.<sup>245</sup> The standard maximum time allocated to support provided by 'We Are Group' is only 3 hours.<sup>246</sup> By contrast, in their evidence to the Home Affairs Committee the specialist public law firm Leigh Day stated that the average number of hours they spent on claims that were prepared and submitted was 52 hours.<sup>247</sup> Additionally, the support does not include advice on the merits or on the substance of an application.<sup>248</sup> The JUSTICE report notes, this level of support is '*fundamentally different from, and falls short of, obtaining legal advice*'.<sup>249</sup>

'We Are Group' is also not sufficiently independent from the Home Office and this undermines the credibility of the scheme with the cohort it is supposed to support. 'We Are Group' is guided and trained by the Home Office, and rather than refer to legal support the service will refer back to the Home Office if they cannot answer a question.<sup>250</sup> Claimants are made to relive the experience of having evidence repeatedly requested by the Home Office.<sup>251</sup> The current lack of adequate legal support means that claimants are mostly left alone to deal with obligations to provide evidence.<sup>252</sup>

WCS claims are not within the automatic scope of civil legal aid, therefore, to obtain public funding an exceptional case determination must be made. Pursuant to s.10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 an exceptional case determination must be made where a failure to do so would breach, or risk breaching, an applicant's human rights.<sup>253</sup> The Legal Aid Agency made decisions on the 31<sup>st</sup> October 2022 to refuse two requests for exceptional case funding, made by Southwark Law Centre on behalf of two applicants seeking compensation pursuant to the WCS. The Legal Aid Agency decision is an effective blanket refusal to make an exceptional case determination in respect of a WCS claim. The Legal Aid Agency position is that WCS claims do not engage Article 6 ECHR and Article 1 of Protocol No 1, that Article 8 ECHR is not fully engaged and is not interfered with, and the applicants do not need legal advice to be involved in the relevant process. The Legal Aid Agency decision is subject to an on-going judicial review by Southwark Law Centre. Permission was granted by the court and a full hearing is scheduled on the 20<sup>th</sup> and 21<sup>st</sup> February 2024.<sup>254</sup>

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<sup>244</sup> Windrush Compensation Scheme Primary Claimant Claim Form, Home Office (24<sup>th</sup> October 2023) ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1099215/primary-claim-form-reader-extended-08-22.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099215/primary-claim-form-reader-extended-08-22.pdf)), page 2

<sup>245</sup> L Lewis, H Smith and A Steiner, 'The Windrush Justice Clinic: Preliminary Research Report: The Windrush Compensation Scheme: Unmet Need for Legal Advice' (25 March 2022), 19

<sup>246</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), 4.65

<sup>247</sup> Home Affairs Select Committee, 'Written evidence submitted by Leigh Day (WCS0013)', 24

<sup>248</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), 4.70

<sup>249</sup> Ibid

<sup>250</sup> JUSTICE, Reforming the Windrush Compensation Scheme (15 November 2021), 4.69

<sup>251</sup> Wendy Williams, 'Windrush Lessons Learned Review: Independent Review by Wendy Williams' (HC 93, March 2020), 252

<sup>252</sup> Ibid

<sup>253</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), Schedule 1

<sup>254</sup> *Oji v SSHD CO/292/2023*

### 3.5.2 Lambeth Children's Home Redress Scheme

For the Lambeth scheme the Council agreed to pay '*any reasonable legal costs and other expenses*'.<sup>255</sup> They paid £450 plus VAT directly to the legal representative for a successful Harm's Way Payments.<sup>256</sup> Lambeth Council pay for reasonable travel expenses for the applicant in attending legal representatives and medical experts.<sup>257</sup> Any dispute over costs can be appealed to the Independent Appeal Panel.<sup>258</sup> Importantly, this arrangement for legal costs was agreed after consultations with victims.<sup>259</sup>

### 3.5.3 Horizon Shortfall Scheme

In respect of the HSS, no legal support is currently provided for advice and assistance to prepare the application. The rationale being that the HSS is designed to be '*simple and user friendly*'.<sup>260</sup> However, if the initial offer is acceptable the HSS provides for reasonable fees to enable claimants to be supported by legal or accountancy experts. Legal fees will also be reimbursed if the claimant wishes to dispute the offer.<sup>261</sup>

In his Progress update report from August 2022, Sir Wyn Williams argues that '*Appropriate legal assistance and advice in respect of most of the higher value claims yet to be determined is likely to be essential*'.<sup>262</sup> He further noted the low take up of legal funding even when it is available.<sup>263</sup> Of those who had accepted offers at the time, two had obtained legal advice under this provision.<sup>264</sup> Of those who rejected their offers, 13 had obtained legal advice under the provision.<sup>265</sup>

Sir Wyn Williams believes the applicant's reasonable legal fees should be payable by the Post Office from the outset of a claim<sup>266</sup>. His rationale being that:

*'preparation of a detailed and structured claim at the outset is, for the most part at least, the best means of ensuring that costs are not wasted further down the line by claims being amended or even re-vamped. [...] My view is that it is usually a false economy to unduly restrict the amount of costs.'*<sup>267</sup>

In contrast, the more recent GLOS scheme allows for a broader provision of legal costs as legal advice is available from the outset of a claim throughout the various stages, though caps and tariffs apply.<sup>268</sup> It appears that there is now a commitment to legal funding for all three schemes arising from the Post Office scandal. However Sir Wyn Williams interim report was unable to assess if what will be provided is reasonable and will enable full and fair compensation. This is a matter which would be explored in Phase 7 of the Inquiry.<sup>269</sup>

<sup>255</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme (28<sup>th</sup> October 2019), 23.2

<sup>256</sup> Ibid, 23.1

<sup>257</sup> Ibid, 23.3

<sup>258</sup> Lambeth Council, Lambeth Children's Homes Redress Scheme (28<sup>th</sup> October 2019), 23.4

<sup>259</sup> Malcolm Johnson, The Lambeth Children's Home Redress Scheme – Update (LinkedIn, 7<sup>th</sup> April 2020) <<https://www.linkedin.com/pulse/lambeth-childrens-home-redress-scheme-update-malcolm-johnson/>> accessed 27<sup>th</sup> August 2023

<sup>260</sup> The Horizon Shortfall Scheme (Post Office, 20<sup>th</sup> July 2023) <<https://www.onepostoffice.co.uk/scheme>> accessed 28<sup>th</sup> August 2023

<sup>261</sup> Historical Shortfall Scheme: Questions and answers for new applications from October 2022 (Post Office, March 2023) <[https://www.onepostoffice.co.uk/media/111958/hss\\_questionsandanswers\\_newapplications\\_march2023.pdf](https://www.onepostoffice.co.uk/media/111958/hss_questionsandanswers_newapplications_march2023.pdf)> accessed 28<sup>th</sup> August 2023

<sup>262</sup> The Post Office Horizon IT Inquiry, Chair's Progress Update on Issues relating to Compensation (15 August 2022), executive summary 7.9

<sup>263</sup> Ibid, 50

<sup>264</sup> Ibid, 50

<sup>265</sup> Ibid, 50

<sup>266</sup> Ibid, 68

<sup>267</sup> The Post Office Horizon IT Inquiry – Chair's statement on Issues relating to Compensation (9<sup>th</sup> January 2023), 41

<sup>268</sup> Post Office, Horizon Shortfall Scheme: Questions and Answers for new applications from October 2022 (July 2023)

<sup>269</sup> Ibid, 49

### 3.5.4 Infected Blood Schemes

The Interim Blood Scheme has no provision for legal support.<sup>270</sup> However, due to the nature of the scandal usually medical records which individuals can request from their GP or hospital are sufficient evidence. Additionally, a significant part of the form is filled in by a relevant medical practitioner rather than the applicant themselves. The medical practitioner is also given permission to contact the Department of Health and relevant bodies such as NHS Blood and Transplant to get information about the blood products received.<sup>271</sup>

The proposals for the Infected Blood Compensation Scheme argue strongly for funded legal advice provision. Sir Robert Francis KC argues that the eventual scheme will be complex, and makes the following comparison to the Windrush Compensation Scheme:

*'the Home Affairs Committee considered the Windrush scandal victims required legal support, it is difficult to see how the same conclusion cannot be reached for the victims of the infected blood scandal. [...] Potential claimants will have to understand into which, if any, of the categories of eligibility their case falls, and except in the simplest of cases they will have to articulate and explain the impact of the infection on them. To consider and describe the losses they have incurred within the categories of loss recognised by the scheme, and to prepare their best case.'*<sup>272</sup>

Sir Robert Francis KC recommended either a support unit of independent lawyers and paralegals or independent lawyers with a standard fixed fee for particular categories of work.<sup>273</sup> Or a combination of the two. He concluded that legal funding was 'vital' and that without it will 'lead to a swift breakdown of trust' and a failure to obtain the 'information to make fair and appropriate assessments of compensation in accordance with the scheme rules.'<sup>274</sup>

Sir Brian Langstaff largely agreed with Sir Robert's proposal, and proposed that a range of services should be provided at no cost to claimants. This included an 'advice and advocacy' service, 'supplemented where necessary by discretionary access to independent legal advice and representation'.<sup>275</sup> He further proposes a financial, insurance, and benefits advice, support services and referral to appropriate specialist services. Additionally, that a bespoke psychological service should be established.

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<sup>270</sup> The Hepatitis C Trust Helpline and Information Service can help with guidance in filling out the application form to the relevant scheme.

<sup>271</sup> EIBSS Application Form for those infected with HIV (NHSBSA, 2019)

<<https://www.nhsbsa.nhs.uk/sites/default/files/2019-11/EIBSS%20-%20HIV%20Primary%20Eligibility%20Form%20%28V5%29%2011%202019.pdf>> accessed 27<sup>th</sup> August 2023

<sup>272</sup> Sir Robert Francis QC, Compensation and Redress for the Victims of Infected Blood – Recommendations for a Framework (Cabinet Office, 7<sup>th</sup> June 2022), 12.1

<sup>273</sup> Ibid, 12.2

<sup>274</sup> Ibid, 12.3

<sup>275</sup> Infected Blood Inquiry, Second Interim Report (5 April 2023), 99

### 3.5.5 Comparative Analysis

The JUSTICE report on the WCS noted that most comparable compensation schemes have a system for recovering legal costs, including where the application process appears less complex than the WCS.<sup>276</sup> When compared to the Core Compensation Schemes the WCS currently stands alone in refusing any provision for legal costs. HSS has faced criticism for not implementing coverage for full legal costs at an earlier stage, though reasonable legal costs are available following a decision by the Post Office to consider the offer and to challenge it. The Lambeth Scheme provided for funded representation from the outset of a claim. The proposals for the Infected Blood Compensation Scheme are comprehensive and promote a holistic and compassionate model of compensating victims for the multiple harms suffered. The proposals are for the provision of legal advice and representation throughout the claims process and a range of other bespoke services and support. The Infected Blood Compensation Scheme can be described as a model scheme which accords with the wider principles of reparative justice identified in the report as essential for compensation schemes involving state harm of this kind.

Johnson strongly contrasted the Lambeth scheme with WCS:

*I represent clients who are making applications to the Windrush Compensation Scheme, and that particular Scheme has proved a grave disappointment. This, I believe is because there is no provision for the payment of solicitors' costs (a key feature of the Lambeth Redress Scheme) and the unit set up by the government to handle the claim is proving as slow as the immigration system that consigned so many British citizens to years of suffering.*<sup>277</sup>

There is a strong emerging consensus amongst those involved with designing and engaging with contemporary compensation schemes involving state harm that the provision for legal support is a necessary component for the scheme to function effectively, promote trust, and respect the dignity of victims. Legal advice and representation not only supports fair compensation for the claimant but it appears likely that providing no funding for legal support is a false economy. The NAO reported WCS caseworkers spend an average of 154 hours per claim. The consensus amongst legal experts, the Home Affairs Committee and the JUSTICE working group is that legal assistance would reduce the burden on the Home Office as claims could be processed quicker.<sup>278</sup> No legal support lengthens claim times and complicates the administration of the scheme. This would be of significant help to the WCS which has experienced substantial delays. Speed of processing claims is of crucial importance due to the impact of delays on claimants and the age of most of the affected cohort.<sup>279</sup>

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<sup>276</sup> JUSTICE, *Reforming the Windrush Compensation Scheme* (15 November 2021), 4.71

<sup>277</sup> Malcolm Johnson, *The Lambeth Children's Home Redress Scheme – Update* (LinkedIn, 7<sup>th</sup> April 2020) <<https://www.linkedin.com/pulse/lambeth-childrens-home-redress-scheme-update-malcolm-johnson/>> accessed 27<sup>th</sup> August 2023

<sup>278</sup> L Lewis, H Smith and A Steiner, 'The Windrush Justice Clinic: Preliminary Research Report: The Windrush Compensation Scheme: Unmet Need for Legal Advice' (25 March 2022), 22, 25.

<sup>279</sup> Home Affairs Select Committee, "The Windrush Compensation Scheme", HC 204 (24 November 2021), 89

## 4. Conclusions and Recommendations

### 4.1 Conclusions

The compensation schemes assessed have unique contexts and have developed distinctive structures, yet all schemes share key elements of commonality with the WCS. In particular the elements of commonality and structural variations provide valuable insights to assess the effectiveness of the WCS and the reforms needed.

#### **Large cohorts for Windrush Compensation Scheme and Infected Blood Compensation Scheme**

An important measure of whether a compensation scheme is effective is its ability to fairly compensate those impacted. The initial estimates for those eligible under the HSS were in the hundreds, though 2,992 applications have been made. Initial estimates for those eligible for the Lambeth scheme were approximately 3,000, with 2,240 applications made. The Infected Blood inquiry has estimated that a total of 28,150 may have been impacted by contaminated blood products and therefore is likely the largest cohort examined in this report. The WCS cohort is a sizeable cohort and the second largest cohort examined, with estimated numbers of 6,000 to 15,000 with 7,534 applications having been made to date. Though statistics indicate the number of those impacted could be higher than 15,000 and the Home Office have acknowledged that they do not know how many people may be eligible for the WCS.

#### **High refusal rate for Windrush Compensation Scheme**

Statistically the WCS has the lowest success rate for applicants, with only 22% (1,641) of those applying receiving compensation and 53% (3,986) of initial applications being refused. In comparison under the Lambeth Scheme 79% of applications were successful, with 8% being refused, under the HSS 73% of applications were successful with a 17% refusal rate. The low success rate raises concerns as 16,744 applicants have had their immigration status confirmed though the Windrush Scheme. This means that only 10% of applicants who have secured declaratory immigration status have received a payment under the WCS.

The proposed Infected Blood Compensation Scheme is yet to be fully implemented, the Interim Blood Scheme is in operation and has received 4,500 applications with all receiving payments. Whilst the Interim Blood Scheme has been highly effective for those who have applied with a 100% success rate, there is a significant disparity between the estimated cohort and those applying under the Interim Blood Scheme. This is attributable to a range of factors, including that some victims have died and eligibility for a payment is limited to victims and widows. The proposals for the Infected Blood Compensation Scheme would extensively widen the pool of those eligible for compensation to include infected persons and affected persons. Affected persons include family members, carers, and close friends.

#### **Potentially complex initial eligibility requirements for WCS**

The initial eligibility criteria for both the HSS and the Lambeth scheme are arguably more straightforward and less onerous evidentially. The HSS requires the claimant to have been a postmaster who experienced shortfalls because of a previous version of the Horizon IT system. Whilst the Lambeth Scheme requires the applicant to have been resident or a visitor to a Lambeth Children's Home or Shirley Oaks Primary School.

The WCS initial eligibility requirements require a correct determination of immigration status at the time the loss is said to have occurred. This can be a complex process which can be hindered by the quality of decision making and the lack of availability of legal advice and representation. A range of eligible categories exists, and an applicant may fall into multiple categories. An incorrect determination of immigration status can either lead to being deemed ineligible, a nil award or an award that does not fairly compensate for the correct period of loss. The complexity of Immigration law has been acknowledged by judges and by Wendy Williams in the WWLR. One of the findings of the WWLR was the difficulty experts in the Home Office faced understanding aspects of Immigration Law. These factors, coupled with the criticism made about the competency of Home Office caseworkers, broader culture in the Home Office and lack of legal advice create significant barriers for victims to obtain just compensation.

### **Elevated standard of proof applied in Windrush Compensation Scheme**

The standard of proof used in all schemes is the balance of probabilities and the guidance and policy for all in parts promote a flexible and victim centred approach to the evaluation of evidence.

The approach to the standard of proof and evidence more generally in the HSS and Lambeth Schemes was found to be significantly fairer and more flexible than the WCS. The original standard of proof for the WCS was the criminal standard of proof of 'beyond reasonable doubt', this was subsequently modified to the balance of probabilities. There is evidence to suggest that a standard of proof above the balance of probabilities threshold is being applied in the WCS. Many victims of the Windrush scandal consider the culture of disbelief and suspicion endemic of the hostile environment is also present in decision making under the WCS. Whereas in both the HSS and the Lambeth Scheme, comparatively to the WCS, there is evidence to suggest the decision maker attributes appropriate weight to the testimony of the victim particularly in the absence of documents due to the passage of time. In light of the historic nature of the wrongs committed, the accepted institutional failures and inaccuracies in respect of record keeping, the WCS approach stands out as a clear outlier in this regard.

### **Inaccessible application process for WCS**

The WCS application process appears the most complex and bureaucratic. The WCS application form runs to 44 pages and Windrush victims have reported great difficulty in completing the forms. Whereas the HSS application is 14 pages, and the Lambeth Scheme application is 10 pages in length. The HSS scheme has received criticisms for the phrasing of questions around consequential loss, particularly as it seems these were largely completed by unrepresented Postmasters, as funded legal representation was not made available at this stage. Under the Lambeth Scheme legal assistance was available from the outset which may have contributed to the relative success of the Lambeth scheme with 79% of applications being successful.

### **Wide range of heads of loss with some limitations**

The range of heads of loss of all schemes appears expansive and broadly reflects the type of losses suffered. Criticisms were present, including that the WCS did not cover loss of pensions, savings, and property. For the Lambeth Scheme, the period of loss excluded foster care placements and certain homes.

### **Decision making lacking independence and adversarial approach**

The reported approach to decision making and aspects of the WCS caseworker guidance, in particular the approach to mitigation of loss, can be described as adversarial. This is very much at odds with the purpose of compensation schemes of this nature. The nature and the

structure of the decision making process would appear to contribute to this adversarial approach. The WCS is the only scheme where the perpetrator of the original harm, the Home Office, is solely responsible for the initial decision making and subsequent first level review. The skill and competency of the Home Office to make this decision and general quality of decision making has been questioned in a number of independent reports, including by the National Audit Office.

In the Lambeth Scheme, the initial decision is made by a team consisting of Lambeth Council and their solicitors (Kennedy's LLP). The HSS initial decision is made by an independent advisory panel, consisting of a legal specialist, a forensic accounting specialist, and retail specialist. The decision is then subject to approval by the post office. The Post Office lawyers are also heavily involved in the processing of the application. The proposal for the Final Infected Blood Scheme is that an arm's length body, chaired by a judge, would administer the scheme. The legal expertise and experience present in the HSS, Lambeth Scheme and the proposed Infected Blood Scheme more adequately addresses the legal and factual complexity of the claims. In this regard, the WCS again falls below the standard set by these contemporary schemes.

### **Absence of legal funding for the Windrush Compensation Scheme**

The HSS and Lambeth Schemes both provide for funded legal representations at different stages. The Lambeth Scheme provides for funding from the outset, whilst HSS provides for advice to review a decision and representation to challenge the initial decision. The HSS has received criticism for the absence of support for initial advice to prepare a claim and Sir Wyn Williams, the Chair of the public Inquiry, has recommended that advice be made available from the outset. The proposals for the Infected Blood Compensation Scheme are comprehensive and promote a holistic and compassionate model of redress. This includes proposals for the provision of legal advice and representation throughout the claims process and a range of other bespoke services and support.

The WCS has no provision for government funded independent legal advice or representation at any stage of the process. The government funds the organisation 'We are Group' to provide assistance to claimants in completing the application form which has been found to be inadequate and of limited assistance. Legal aid is presently not available for WCS applications and is the subject of an on-going legal challenge.

This significant impact of the application of an enhanced standard of proof, complex eligibility requirements, onerous application process, decisions makers lacking competence, coupled with the absence of government funding for legal advice and representation appear likely to be key factors in the high refusal rate for the WCS. Due to the existence of strong adversarial elements to the WCS application process, the absence of government funded legal representation is highly detrimental to the likelihood of victims being fairly compensated.

### **Limited independent redress**

The structure and the decisions making inadequacies of the WCS are further compounded by limited independent redress, which is in stark contrast to the other schemes. The WCS has an initial review process which is carried out by another caseworker within the Home Office. A further Tier 2 right of review exists to the Adjudicator's Office, which is part of His Majesty's Tax Authority. The HSS includes provisions for an internal review process, mediation, arbitration and a claim in the small claims track. Whereas both the Lambeth Scheme and the proposed Infected Blood Compensation scheme permit an appeal to an independent appeal panel comprised of a judge and other legal and relevant experts.

## **Historic and on-going Government failings**

All schemes present a range of different historical backgrounds. The central unifying features of all the schemes include the historic nature of the wrongs perpetrated by the state, profound suffering and harm to its victim, delays and/or failures by the government to take action thereby compounding the wrongs, the existence of systemic and cultural organisational flaws, and a public outcry resulting in the need for independent scrutiny. In addition to the harm caused to the victims, the nature of all the scandals means that confidence in the ability of the state to operate key functions has been diminished. In terms of the independent scrutiny undertaken, for all the Core Compensation Schemes this has taken the form of a statutory public Inquiry. Whilst for the Windrush scandal the Home Office undertook an independent review, the WLLR, carried out by an Independent Advisor.

In the case of the Windrush scandal and Lambeth Children Home scandal whilst the findings of those carrying out the independent scrutiny can be said to be robust, the response of the government has been mixed and has not led to the meaningful systematic changes needed. The Government has reneged upon a number of commitments made pursuant to the WLLR which is currently the subject of a legal challenge. At a local level, Lambeth Council agreed to the proposed reforms by the IICSA and some changes appear to have been made. At a national level, key recommendations relevant to child protection have not been fully adopted by the Government. The public Inquiries into the Post Office scandal and Infected Blood scandal are ongoing.

An effective compensation scheme and independent investigation leading to systematic change together can go some way to achieving a form of restorative justice for victims, and more broadly are also linked to restoring public confidence in state institutions. The failure to fully implement the recommendations of the WLLR and the IICSA in turn undermines the broader effectiveness of the compensation schemes.

## **Lack of central UK framework for redress schemes**

A significant number of historic compensation schemes have been set up in the UK to address a range of both state and non-state perpetuated harms on an ad hoc basis. Many of the older schemes were deemed to be broadly unsuccessful. Whilst some lessons were learned and implemented in the Core Compensation Schemes which are the focus of this report, this responsibility lay with those creating each individual scheme outside of appropriate guidance or oversight from the government. The limitations of the UK framework for compensation and redress schemes was highlighted by the APPG for Fair Business Banking in their report on 'Building a Framework for Compensation and Redress' in February 2023. Whilst the APPG focused on schemes relating mainly to the financial sector, the WCS and HSS were considered. In light of this report's findings on the schemes explored, which all had failings, we concur with the recommendations of the APPG that the government should develop and compulsory guidelines for setting up compensation schemes in general and that an arms-length body be set up to oversee and regulate redress schemes in the UK.

## 4.2 Recommendations

The review of the structural framework, operation and effectiveness of other contemporary compensation schemes has highlighted the failings of the WCS. There have been previous calls for structural reform of the WCS by JUSTICE and the Home Affairs Committee on the WCS, which the findings of this report broadly concur with. Based on this report's findings the following reforms are recommended

### 1. Decision making body

The recommendation is:

**The establishment of a bespoke independent body, separate from the Home Office and the Government, to process applications and make decisions.**

An arm's length body to process and determine applications as per the proposal for the Infected Blood Compensation Scheme is the most appropriate solution for the WCS. The Home Office have run the WCS for over four years and in light of its numerous failings it is appropriate for an independent body to take over the decision making. The hybrid model of decision making utilised primarily in the HSS and to a lesser extent the Lambeth Schemes where the institution who perpetuated the harm are involved in the decision making, is no longer a viable option due to the failings of the WCS and the need to increase confidence in the scheme. The arm's length body should include an initial assessment by a legal qualified assessor who thereafter would work collaboratively with the applicant to understand the loss suffered and gather evidence. The assessor's decision would be reviewed by panel of appropriate legal and other experts. The legal experts would include those with knowledge and experience of practicing immigration law, personal injury, and compensation claims. Other experts could include accounting and medical experts. An advisory board with general oversight functions would be part of the ALB, and include beneficiaries of the WCS including representatives from community groups, claimant lawyers and members of the civil service (members of the civil service should not constitute a majority of the advisory board).

### 2. Heads of loss, standard of proof, causation and quantum

The recommendation is:

**A general review should be undertaken by a panel of experts (including beneficiaries) of the current approach more generally and specifically to heads of loss, standard of proof, causation, quantum and the application process. The aim of the review would be to enable the WCS to deliver fair compensation to victims in a compassionate manner utilising a flexible approach where needed in recognition of the historic nature of the wrongs, the vulnerabilities of victims and the impact of the failings of the current WCS.**

A victim-centred and compassionate approach to the assessment of loss is critical to delivering fair compensation and repairing the damage caused by both the original Windrush scandal and failings of the WCS. The WCS appears to utilise a particularly complex and onerous approach in comparison to the other schemes, which is at times inflexible, evidentially burdensome and does not accord with established principles of assessing loss.

Specifically, this report would advocate:

- The heads of loss are expanded. Here the proposed Infected Blood Compensation Scheme would be a valuable model to consider.
- A 'soft edge' approach to the balance of probabilities.

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- The applicant's account is to be accepted unless there is significant evidence to the contrary.
- Removal of the requirement to prove mitigation of loss as currently set out in the WCS Guidance
- Reassess the fairness of current tariffs.
- Simplify the application process.

The inadequacy of the Home Office as a decision maker, as addressed above, also contributes significantly to the WCS's limitations and it is hoped an arm's length body with the appropriate expertise and culture would contribute to improvements in this area.

### **3. Provision of legal advice and representation**

The recommendation is:

**The establishment of an approved panel of legal firms and professionals vetted by an independent body (e.g. the Law Society), with a funding scheme to provide payment to appropriately qualified legal professionals in assisting claimants through all stages of the WCS process and any appeal/right of review.**

Due to the nature of the legal and evidential issues, the trauma and distrust of the impacted cohort arising from the original Windrush scandal and the WCS, independent funded legal advice and assistance is necessary from the outset of the application. Whilst it is hoped the establishment of an Arm's Length Body would enable a more collaborative process between applicants and the decision maker in the early stages, it is likely to take time for the Arm's Length Body to re-build trust with the impacted cohort. Therefore initial legal advice is still needed. To avoid further delays and procedural barriers to justice, a scheme akin to the Lambeth Scheme is the most appropriate.

### **4. Right of appeal to an independent panel**

The recommendation is:

**Following a decision by an arm's length body, an applicant will have a single stage right of appeal to an Independent Appeal Panel chaired by a judge and other appropriate legal and medical experts.**

Due to the delays in processing WCS claims, the aging nature of the cohort and the need to restore trust, the review process needs simplification and independent judicial oversight. Due to the nature of the legal issues that may arise, including the need to correctly determine immigration status for purpose of eligibility and the period of loss, and determination of loss, the WCS will benefit from the existence of judicial precedent. This is likely to make the scheme fairer, more transparent and improve decision making. Due to the historical failings of the WCS, the size of the cohort and the legal issues involved, Sir Brian Langstaff's proposal for the Final Infected Blood scheme provides a valuable model.

## 5. Wider systemic change and Windrush victims

The recommendation is:

**The Government should fulfil the commitments it made following the Windrush Lessons Learned Review and take all steps to enable wider systematic change in the Home Office. The voice of the victims of the Windrush scandal needs to be at the forefront of changes to the WCS and wider systematic change.**

Wendy Williams' recommendations in her WLLR to meaningfully address the wider harm caused to communities through reconciliation events and the wider Home Office culture of hostility and racial insensitivity have been largely abandoned by the present government. Robustly honouring and actioning Wendy Williams' recommendations to enable systematic change is critical to achieving genuine reparation for the victims of the Windrush scandal. Whilst time is of the essence, the failings of the WCS now require a further review of the compensation scheme and the broader systems which have perpetuated the Windrush Scandal. It is vital that the voices of the victims of the ongoing Windrush scandal are heard and are central to any review process and reform proposals.

## Appendix 1

For this research we initially looked at a broad range of compensation schemes. Some schemes that were considered initially but not pursued included the Vaccine Compensation Schemes, as the Vaccine Damage Payments in the UK are not considered a compensation scheme due to no admission of wrongdoing. The NHS Resolution Scheme was not explored in detail as the structure was not easily comparable. The Manchester City Football Club Survivors' Scheme was run by Manchester City Football Club so did not have sufficient state involvement. In this appendix some of the schemes that were researched in more detail at earlier stages are briefly described and reasons given for why these schemes were not deemed suitable as final comparators.

### **Criminal Injuries Compensation Scheme**

The Criminal Injuries Compensation Scheme is open to victims of violent crime in Great Britain. The original scheme was established around a decade after the Legal Aid and Advice Act 1949 after victim support organisations argued that legal aid did not help an injured claimant if the person responsible was imprisoned or had no money to make a payment. This created injustice as other injured victims of wealthier perpetrators could receive payment.<sup>280</sup> The first scheme came into being under the Criminal Injuries Compensation Authority 1964.

The heads of loss are reasonably complex. They include physical injuries, disabling mental injuries, sexual or physical abuse, the death of a close relative, paying for someone's funeral and loss of earnings/expenses. There is no government funded legal advice, though in limited circumstances it has been possible to secure exceptional case funding under the legal aid regime for victims of modern slavery<sup>281</sup>. CICA was not used in the final report as there is insufficient admission of wrongdoing on the part of the state as it was originally described as a '*taxpayer funded expression of public sympathy*'.<sup>282</sup>

### **Historical Institutional Abuse Redress Board**

Following public outcry and campaigns for justice for the victims of institutional abuse, in particular Catholic-run children's institutions, the Ryan Report was undertaken in the Republic of Ireland over nine years and published in 2009. The compensation scheme came into being according to the recommendation from the consequent Historical Institutional Abuse Inquiry established in 2012 which investigated decades of abuse allegations across Northern Ireland institutions.<sup>283</sup> The resultant stature and compensation scheme came into operation on 31st March 2020. In total 22 institutions were investigated.<sup>284</sup>

While the Historical Institutional Abuse Redress Board fulfils the necessary criteria, there are many similar compensation schemes including the Lambeth Children's Home Redress scheme. Out of these schemes, the Lambeth Children's Home Redress scheme was preferred as a comparator as there was more available information on the scheme and the focus is on compensation schemes in England.

### **Armed Forces Compensation Scheme**

This scheme applies to serving and former UK personnel injured as a consequence of their service in the armed forces, as long as the injury was on or after 6 April 2006. Claim must be made within 7 years of injury. In the event of death, eligible partners and children can claim benefits. The cohort is mostly men.

<sup>280</sup> CICA, 'The CICA Criminal Injuries Compensation Scheme 1964 – 2022' <<https://criminal-injuries-compensation.co.uk/cica-scheme#:~:text=It%20was%20set%20up%20due,when%20other%20injured%20victims%20did>> accessed 3<sup>rd</sup> December 2023

<sup>281</sup> Jamila Duncan-Bosu, ATLEU: Survivors of trafficking and the Criminal Injuries Compensation Scheme (November 2020)

<sup>282</sup> Ibid

<sup>283</sup> BBC News, 'Historical institutional abuse: £54m compensation paid to survivors Published' (BBC, 7<sup>th</sup> November 2022) <<https://www.bbc.co.uk/news/uk-northern-ireland-63547421>> accessed 3<sup>rd</sup> December 2023

<sup>284</sup> HIA Inquiry, Frequently Asked Questions (Updated 28<sup>th</sup> April 2016) <<https://www.hiainquiry.org/frequently-asked-questions>> accessed 3<sup>rd</sup> December 2023

There is no provision for legal fees to be reimbursed. Applicants are directed to the Veterans Welfare Service or other relevant charitable organisations. Perhaps notable that following application the caseworker will actively seek evidence to support the application, e.g. from medical records, commanding officer, post discharge medical case notes and GP Report. The Armed Forces Compensation Scheme appeared similar to CICA, in that the foundation of the scheme is not an admission of wrongdoing. For this reason, this scheme was also not included in the final report.

### **Diffuse Mesothelioma Scheme**

In the 1960s exposure to asbestos was widely acknowledged to carry severe health risks, particularly of developing asbestosis or mesothelioma. Mesothelioma can be dormant for long periods, meaning establishing causation by employers was difficult. A long campaign was waged to recover compensation for victims, one of the results was the Diffuse Mesothelioma Scheme which was launched in April 2014. The scheme is funded by a levy on the employers' liability insurance industry. The insurance industry admitted failure to keep adequate records and agreed to fund the scheme.

The Scheme applies to those diagnosed with diffuse mesothelioma who were exposed to asbestos either through negligence or breach of statutory duty by their employers, and they are unable to bring a claim against their employer or employer's liability insurer. It is notable that successful applications receive a fixed fee of 7,000 for legal costs.<sup>285</sup> However, this scheme was not included in the report as the wrongdoing was not by the government.

### **Troubles permanent disablement payment scheme**

Lengthy campaigns by victims' groups called for payments and recognition for those injured through no fault of their own in Troubles-related incidents. Those permanently physically or psychologically disabled (needs to be minimum of 14% disablement) as a result of an injury related to the Troubles in Northern Ireland. Ulster Human Rights Watch estimated the eligible cohort as between 26,000-30,000.<sup>286</sup> Scheme began August 2021 and will end August 2026. The heads of loss are permanent physical or psychological disablement above 14%, caused by an incident relating to the Troubles in Northern Ireland. This scheme was not included as the focus was on schemes in England.

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<sup>285</sup> Diffuse Mesothelioma Payment Scheme, FAQs, <<https://www.mesoscheme.org.uk/questions-and-answers/>> accessed 3<sup>rd</sup> December 2023

<sup>286</sup> The Newsroom, 'Less than a tenth of victims apply for troubles pensions' (The Newsletter, 6<sup>th</sup> August 2022) <<https://www.newsletter.co.uk/health/less-than-a-tenth-of-victims-apply-for-troubles-pensions-3796029>> accessed 3<sup>rd</sup> December 2023

## Appendix 2



Shaila Pal

Date  
04 January 2024

Post Office  
100 Wood Street London EC2V 9ER

shaila.pal: GRO

Your Ref:

Classification:  
Public

Dear Shaila Pal,

### Freedom of Information Request – FOI2023/00694

We are writing in response to your email received by Post Office Limited (“**Post Office**”) on 11 December, which has been dealt with under the terms of the Freedom of Information Act 2000 (“**FOIA**”).

In your email you have requested the information shown verbatim in bold below:

**“Please can you provide me with the following data pursuant to the Freedom of Information Act 2000 (FOIA), in relation to the Horizon Shortfall Scheme (formerly known as the Historical Shortfall scheme):**

- 1. The total number of applications deemed ineligible up until the October 2022.**
- 2. The total number of applications deemed ineligible from October 2022 to date.**
- 3. OR the total number of ineligible applications as of the 30 November 2023.**

**We are aware that data is available for eligible applications on the post website : corporate.postoffice.co.uk/en/horizon-scandal-pages/latest-data-on-compensation-progress-and-redress/<<https://corporate.postoffice.co.uk/en/horizon-scandal-pages/latest-data-on-compensation-progress-and-redress/>> . To clarify we require information on the total number of applications deemed ineligible in respect of the Horizon Shortfall scheme only (not the GLO or OHCCS) from it’s launch on the 1 May 2020 to date or until the 30 November 2023.”**

We can confirm that Post Office does hold the information you have requested. We have interpreted your request to mean you would like a response to either questions 1 and 2 or question 3. We have therefore answered question 3 as we believe that covers the periods mentioned in questions 1 and 2. As of 30 November 2023, there have been a total of 177 applications to the Horizon Shortfall Scheme (“HSS”), which have been deemed ineligible (this includes all applications received since the HSS opened in May 2020).

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If you would like further information about the HSS, please go to the Post Office website at the following link:

<https://www.onepostoffice.co.uk/scheme>

If you are dissatisfied with the handling of this response, you do have a right to request an internal review. You can do this by writing to the address above within 40 working days of receipt of this response stating your reasons for your internal review request or alternatively, by emailing [information.rights@postoffice.co.uk](mailto:information.rights@postoffice.co.uk).

If, having requested an internal review by Post Office, you are still not satisfied with our response you also have a right of appeal to the Information Commissioner at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF

Telephone: 0303 123 1113 [www.ico.org.uk/foicomplaints](http://www.ico.org.uk/foicomplaints)

Yours sincerely,

Information Rights Team

[information.rights@postoffice.co.uk](mailto:information.rights@postoffice.co.uk)

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