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POST OFFICE LTD

PROJECT SPARROW SUB-COMMITTEE

UPDATE AND OPTIONS

1. Purpose

The purpose of this paper is to:

- 1.1. Update the sub-committee on Project Sparrow following the Parliamentary Select Committee meeting on 3 February 2015.
- 1.2. Seek authority from the committee to implement changes to our approach for handling this issue.

2. Background

- 2.1. The BIS Select Committee took evidence on Horizon and the Mediation Scheme on February 3. It also heard from Second Sight, the JFSA, CWU and NFSP. Sir Anthony Hooper, the independent Chair of the Working Group, was not asked to give evidence. A transcript is available on request. Post Office submitted written evidence for the short inquiry ahead of the hearing.
- 2.2. The evidence session focussed on a wide range of issues in relation to the Horizon system, the Mediation Scheme and beyond. Post Office took a number of actions from the meeting, on which it will report back to the committee. MPs raised concerns about the time the process is taking, while the business also faced hostile questioning from MPs about the range and scope of information being shared with Second Sight. Second Sight themselves criticised Post Office for alleged failures in sharing information and also raised concerns over a range of issues including policy over suspense accounts, the fairness of the subpostmaster contract and Post Office's policy on, and approach to, prosecutions.
- 2.3. We will submit a detailed note for the Committee correcting any inaccuracies, responding to specific questions, and underlining our position.
- 2.4. The Select Committee is expected to report on its findings in early to mid-March. James Arbuthnot MP has been quoted as saying he expects the Committee to call on Government to launch a public inquiry or 'take control' of the Mediation Scheme.
- 2.5. The Committee's recommendations are likely to generate difficult headlines and further parliamentary pressure. MPs and JFSA are engaged in an orchestrated campaign through the media and Parliament that is likely to seek to generate more activity in both.
- 2.6. There was limited media coverage of the Select Committee hearing itself, though we face continued interest from one part of the BBC, which has generated some coverage, largely regional to date. While we are able to withstand this current level of interest, it is resource intensive. We have made representations to the Director of BBC News and Current Affairs.

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- 2.7. A further development has been the increased willingness of Second Sight to speak publicly: one of its directors, for instance, is engaged in public and critical discussion of the Scheme and other Post Office issues via social media. Screen grabs of these discussions are available on request.
- 2.8. We have also been contacted by the Criminal Cases Review Commission with a broad request for information based on Sir Brian Altman QC's review of our procedures in relation to prosecutions.
- 2.9. The Scheme itself continues to make progress despite JFSA's continued refusal to take a meaningful part in its work. JFSA is clear that it does not consider that the Working Group should be meeting at all at present and was only persuaded to take part in the meeting of 13th February by telephone. Sir Anthony Hooper, wrote to the Select Committee to outline this progress. His letter is at Annex A.
- 2.10. The developments described above are set against a background where:
- Certain MPs have withdrawn their support for the Mediation Scheme and criticised Post Office and its directors through a Westminster Hall debate in December and in the media
 - JFSA has lined up a legal firm with a publicly declared intent of preparing potential litigation
 - JFSA is refusing to engage in the Working Group process
 - Pressure is increasing from MPs, JFSA and Second Sight to extend the scope of the Scheme beyond Horizon and into areas such as the subpostmasters' contract, Post Office prosecutions policy and other matters
 - Second Sight continues to press for information to produce what it describes as its "part two" thematic report covering all aspects of Post Office's engagement with postmasters, whether or not relating to Horizon and associated issues. There appears to be an increasing and critical focus on the subpostmasters' contract. This report, while initially pitched as confidential briefing for mediators and applicants, is now being discussed publicly
 - Second Sight have started to openly criticise Post Office's approach to prosecution in their case review reports.
 - We have completed Post Office investigations into all cases in the Scheme and secured confirmation that the Horizon platform works as it should
 - We have written to all MPs who raised cases during the Westminster Hall debate offering to meet to discuss constituents' cases where they agree to such a discussion taking place
- 2.11. The process is meanwhile demanding increasing senior management time, with significant resource being necessarily devoted to this project. It is against this background that we recommend making changes to our approach with the Scheme which serve to meet our obligations to applicants and support calls from MPs on the Select Committee to accelerate the process.

Confidential and Legally Privileged**3. Proposal**

- 3.1. We propose to accelerate the process with a fundamental change where Post Office will adopt a presumption that we mediate in all non-criminal cases, except in the most exceptional circumstances eg where Second Sight have not recommended mediation or there is a significant judgement against the applicant through the Civil Courts.
- 3.2. This would mean we would meet our commitment made to applicants at the outset of the Scheme: providing them with a thorough re-investigation of their case by Post Office, the opportunity of an independent review by Second Sight and, where appropriate, mediation.
- 3.3. Our proposal in detail is that we:
- Adopt a presumption that Post Office will mediate all non-criminal cases currently in the Scheme.
 - Make clear that we do not intend to mediate criminal cases, except in exceptional cases and only to the extent that the subject matter of mediation does not relate to original conviction or circumstances leading to it. Thus far we have seen no cases where the applicant has a criminal conviction where mediation has been considered appropriate. Instead, and to the extent there are areas in a case which do not relate to those which led to the conviction, should we receive advice that it is safe to do so, we will offer structured discussion to applicants with criminal convictions.
 - Release Second Sight from their engagement with Post Office, but make clear that Post Office will meet its commitment to any applicant wishing to avail themselves of a review by Second Sight of their case by providing the necessary funding to do so on an individual case by case basis.
 - Continue to engage with Second Sight pro tem on issues relating to individual cases: including issues such as suspense accounts where they relate directly to individual cases.
 - Publish an "end of term" report - facts and figures - on the operation of the Scheme and the branch support programme.

The impact of this approach would serve to make the role of the Working Group redundant because its primary function is to decide on whether or not cases move to mediation, a point that JFSA has forcefully contested.

- 3.4. Implementing this approach would require a careful handling strategy, on which timing and stakeholder management will be key considerations. A draft narrative is at Annex B.

Other options

- 3.5. For the reasons set out above, we do not believe that continuing with the status quo is preferable given the impact on the business and the growing reputational risk.
- 3.6. We believe that the option we are recommending to the committee is the one which best ensures we meet our obligations to applicants while at the same time accelerating delivering of the Scheme and ring-fencing its impact.

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3.7. There are a number of variants on this approach, which would include:

- Mediating all cases including criminal cases: we have ruled out this option on the basis of very strong legal advice that this would expose Post Office to untenable risks in relation to convictions: we could also be accused of bad faith as mediation cannot by its nature overturn convictions.
- Closing the Scheme in its entirety, with no further mediation: we would be accused of bad faith – fairly – given our public commitments (including at the Select Committee hearing) to applicants as set out above. It would be extremely difficult to justify a decision of this nature and would exacerbate the delicate handling of the select committee inquiry and MPs (a factor which the Minister has been particularly keen that we should address).
- We have considered options around offering a financial settlement to all those with cases in the Scheme: this would be both costly and risky in reputational terms, as it would mean an implicit acceptance that Post Office is in the wrong: against all evidence. It would also have a potentially damaging impact on the wider branch network and those working within it.

3.8. More details on the available options is at annex C.

4. Timing and Next Steps

4.1. We are preparing all the relevant materials and handling plans for the end of February to allow us to move at pace at the optimal moment. The precise timing will be determined by events but there are essentially two trigger points:

- Publication of the Select Committee's report – if the Select Committee does publish a report it is likely to be critical of POL. There is some doubt that they will have time to do so before the end of the Parliament, but assuming they do we will want to make our announcements either on the same day or just before. Although we cannot guarantee to know when (and if) the Select Committee will publish its report we are staying in close contact with the Clerks to get as much information as possible to allow for an informed decision.
- Production by Second Sight of their draft Part Two report – Second Sight are due to circulate their next draft of their Part Two report to the Working Group by the end of February and it is due to be discussed at the Working Group meeting on 24th March. Post Office will want to have implemented its new approach prior to this meeting and potentially even prior to circulation of the draft report.

4.2. The sub-committee is asked to be mindful of the fact that the success of the recommended approach will depend to a significant extent on our ability to move with pace and agility at the optimal moment. We will keep the sub-committee informed of developments during the period ahead, assuming this approach is approved.

Resources

4.3. Adopting a presumption in favour of mediating all non-criminal cases would mean we agree to the incurring costs of approximately £2.3m of mediation in approximately 70 cases in addition to the 11 already mediated.

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- 4.4. If mediation took place at an average rate of 1 per week, this would take approximately 18 months to complete (given holidays etc). Given the required preparation for each mediation, achieving a faster rate of progress is likely to require dedicated, additional resource.

Risks

- 4.5. The key risk in this approach is around reputational challenge. Implementing this option will lead to some adverse media coverage. However, the alternative is no less challenging – indeed it is our assessment that allowing the Scheme to continue without change will lead to greater risk, with prolonged reputational challenge in the media and in Parliament, particularly after the general election.
- 4.6. The option set out above gives the business, in our view, the best chance of closing this issue down as a reputational threat to our transformation and our brand.
- 4.7. Litigation against the Post Office is likely under any option including the status quo. However, the risk of successful Judicial Review should we alter the Scheme is considered to be low.

5. Recommendation

The sub-committee is asked to agree the option set out above.

Jane MacLeod / Mark Davies
11 February 2015

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Annex B

Narrative

In 2013, following the publication of Second Sight's Report, the Post Office sponsored the establishment a complaint review and mediation scheme, overseen by a Working Group chaired by Sir Anthony Hooper, a former judge of the Court of Appeal, to investigate and review cases, and to recommend whether such cases should be referred to mediation.

Following significant complaints about the way the Scheme was operating by the Justice for Subpostmasters Alliance, the Post Office has announced that going forward there will be a presumption in favour of mediation for the remaining complaints in the Scheme relating to its Horizon computer system and issues around training and support.

Despite extensive investigations by Post Office and independent review from forensic accountants Second Sight, no evidence of system wide problems have been found.

To fulfil its commitment to those who applied to the Scheme, the Post Office plans to hold mediation sessions to give applicants a chance to air their views and try to resolve the complaints.

To date, 136 cases have been investigated by the Post Office, with 11 already having gone to mediation.

Certain of these cases, however, involve applicants with criminal convictions. Mediation cannot lead to the overturn of a conviction and to date, Post Office has no evidence of unsafe convictions. If such evidence was to emerge, Post Office would comply with its duty to disclose such evidence. Post Office therefore does not believe that the mediation process will prove a satisfactory forum for the concerns of those applicants to be resolved. [It will instead consider offering a structured discussion with those applicants who have been convicted of a criminal offence]

The Post Office is taking these steps to speed up the Scheme in order to ensure that it meets its obligations to those who have applied.

The move will bring to an end the Working Group, chaired by Sir Anthony Hooper, whose role was to assess whether cases should go to mediation.

The Horizon system has been used by almost 500,000 people without problems since it was introduced more than a decade ago. It deals with six million transactions every day.

Confidential and Legally Privileged**Annex C****Discussion of Options**

Below is a suite of potential options to move forward. These are not mutually exclusive.

- **Offering to mediate all cases**

- The advantage of this approach is that it would, at least temporarily, meet some of JFSA and MPs' criticisms. We would be meeting our obligations to applicants.
- The downside is that some cases – particularly criminal cases - will be incapable of resolution at mediation.
- We have very strong legal advice that we should not mediate criminal cases.
- Post Office would incur substantial costs in mediating these cases and disappointed applicants are likely to seek legal avenues afterwards.
- Media and stakeholder comment likely to persist as applicants emerge unhappy from Mediation process
- Second Sight role would continue – 'part two' report likely

- **Presumption to mediate all cases apart from criminal cases**

- This is our preferred option. It makes a significant concession to JFSA and MPs, and reduces the number of applicants for whom mediation is unlikely to be available.
- The risks are as above: some cases will be incapable of resolution at mediation, while the criminal cases are those around which most publicity is taking place
- Post Office has already declined to mediate 1 non-criminal case where there was a 13 page High Court judgement against the applicant – we would advocate maintaining that flexibility at the margin.
- This option does however have the potential to ease stakeholder and media handling [though there is an associated risk around a perceived 'u-turn' which could be portrayed as a weakness in our position]
- Second Sight role continues in relation to individual cases through a renewed engagement letter – which could restrict production of 'part two' report
- Our position on criminal cases is strengthened by our dialogue with the Criminal Cases Review Commission, the independent public body established to review possible miscarriages of justice, with which Post Office is now engaged in correspondence.

- **Payout or pay-to-litigate**

- This option would call an end to the Scheme either by trying to offer a sufficiently attractive (likely to be in multiples of £10k) amount for applicants to waive all and any claims they may have against Post Office or undertake to pay a sum to each applicant for professional fees in bringing a claim against us (at least £5k), trusting the outcome to the Courts.
- This option has a certain appeal in terms that it, in a sense, draws a clear line under the Scheme and has the potential to reduce the number of litigants against Post Office. However, the signal it sends to the rest of the Network (that shouting loud enough 'pays') is damaging.
- It could also prove difficult to prevent applicants from pooling their money, aggregating it to provide Edwin Coe LLP with a substantial fighting fund of,

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say, £500,000 to bring litigation against the Post Office. Even in circumstances where Post Office was ultimately successful in any such litigation, external legal advice is that it could cost the business in excess of £2million to defend and be extremely protracted.

- **End the Scheme, mediate cases with merit, defend remaining claims as business-as-usual**
 - Bring an end to the Working Group while inviting Second Sight to enter into a new contract (ending all others) to complete their review of all cases (anticipated in May 2015). This could, dependent on views, seek to preclude the production of a Part II report.
 - If Second Sight decline, end their engagement and consider whether to implement an alternative means of providing neutral oversight.
 - The advantages of this option include the ability to mediate only those cases with a point of contention and where resolution is a likely prospect.
 - Should litigation be brought by other applicants, they can be defended as BAU in the controlled environment of the Courts and Post Office would not have provided funds which could be aggregated in the way described above.
 - The disadvantage is a hostile media and PR environment [albeit in the short term]
- **Seek to maintain the status quo**
 - Adhere to Scheme as it stands
 - However, no party to the Scheme considers it fit for purpose and JFSA is extremely vocal in saying so, with limited chance of them engaging in the Working Group (they do not accept its decision-making role).
 - Second Sight are increasingly bold and hostile in their public statements including the operation of the Working Group.
 - Attempts to broaden the Scheme scope likely, a number of mediations and litigation is the likely result.
 - Risk of providing further space and time for claims to be built against Post Office, as well as incurring significant financial and reputational cost.