

CONFIDENTIAL – NOT POLICY

PROJECT SPARROW: OPTIONS PAPER FOR INTERNAL DISCUSSION

Issue

1. A discussion about the relative merits of a number of options for the future of the mediation Scheme.

Recommendation

2. That participants to the meeting consider and discuss this paper before coming to a view on the best course of action to take, taking all equities into account. The conclusions drawn in the meeting will inform a recommendation to the Sparrow Sub- Committee.

Background Summary

3. Dissatisfaction with the Scheme has been laid bare and a number of unwelcome developments have occurred over the last 6 weeks and even since the last meeting of the Sub Committee of the Board on 12 January 2015:
 - three unfavourable BBC pieces have been broadcast;
 - relevant MPs have withdrawn their support and secured a Westminster Hall Debate to make this plain;
 - JFSA continue to refuse to take any meaningful part in the Working Group (indeed they do not presently think it ought to meet at all);
 - Appeals have been made for BIS to intervene;
 - the BIS Select Committee has launched an Inquiry;
 - the Criminal Cases Review Commission has begun to demand the production of documents
 - the influence of a firm of specialist lawyers, engaged by JFSA, on the correspondence and tactics employed by JFSA has become apparent in recent weeks and litigation now seems inevitable.
4. While there is no evidence that the Post Office brand has yet been fundamentally damaged, the reputational and PR risks are increasing rather than decreasing. In the circumstances, the question arises as to whether the Scheme continues to provide a viable, expedient and fair way to explore and, where possible, resolve a small number of individuals' complaints. The accusations levelled against Post Office are no longer confined to the manner in which our staff and processes may have performed in specific cases, but have been broadened so as to call into question our values and integrity as an organisation.

Options

5. A positive decision on the way forward for the project is now required and following much deliberation over the last few months, 4 options have emerged as candidates for this discussion:

- **Mediate all cases** or all cases apart from criminal cases – possibly bringing an end to the Working Group by agreeing to mediate all cases in the Scheme regardless of evidence or merit. The advantage of this approach is that it will, at least temporarily, meet some of JFSA and MPs’ criticisms. The downside is that a majority of the cases are without merit and will, therefore, be incapable of resolution at mediation. Post Office will have incurred substantial costs in mediating these cases and disappointed Applicants will be aggrieved when they inevitably begin litigation. A variant might involve accepting the recommendations from Second Sight to mediate all cases for the purposes of the Working Group but decide, in fact, not to mediate thereafter – that final decision already resides with us (and indeed the Applicant) in all cases and would reduce an element of cost. Post Office is looking to address any issues surrounding criminal cases with the Criminal Cases Review Commission (CCRC), 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** – 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. Moreover, it could prove difficult to prevent Applicants from pooling their money, aggregating it to provide Edwin Coe LLP with a substantial fighting fund of, 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 (think years, rather than months).
- **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 in which there is an actual 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 obvious disadvantage is that, for what is assessed by Comms to be a relatively short time, the media and PR environment will be very hostile indeed.
- **Seek to maintain the status quo** – rewind the clock and persuade all parties to the Scheme to adhere to its rules and its original scope as a potentially viable option for Post Office. However, no party to the Scheme considers it fit for purpose and JFSA is extremely vocal in saying so. Further, there is very little chance of successfully persuading JFSA who do not, as it

stands, participate in the bulk of the business of the Working Group (nor do they accept its decision-making role). Attempts to broaden the Scheme scope will likely continue, a number of mediations which offer no real prospect of resolution will take place, and litigation is the likely result. Unless some 'reset' can take place, this approach risks providing further space and time for our detractors to build upon and continue to prosecute the campaign we now face, as well as incurring significant financial and reputational cost.

6. An appendix providing a working assessment of each of these options is attached, as is a summary matrix showing their comparative profiles measured against Reputational, Commercial and Legal risks.
7. Colleagues are invited to offer their views on the relative merits of these options or, indeed, whether some form of composite of elements of some or all four could offer a way through.

27/01/15

OPTION A**CONFIDENTIAL – NOT POLICY – FOR DISCUSSION****OPTION A: MEDIATE ALL****Option Description**

- All aspects of current Scheme maintained, including the Working Group to oversee scheduling and case through-put, but Post Office accepts the recommendation of Second Sight to mediate as final, and mediates all cases.
- One variant might include agreeing to do this for all cases other than criminal cases, in relation to which we could offer to submit the review into Post Office's handling of those conducted by Cartright King to an external (for instance, an eminent QC) to verify, independently, that we have acted correctly.

Reputation/Perception

- Current attacks on Post Office will, clearly, subside very quickly but accusations of having made a 'u-turn' will replace one sort of criticism with another
- Any reduction in negative coverage will be of short duration since while we are prepared to mediate all cases, we will not accept responsibility to the levels sought by Applicants without any evidence showing that we should.
- That will lead to huge frustration on the part of Applicants, their professional advisers and MPs since it does not meet the outcomes they seek in terms of compensation/redress.
- Increases in accusations that Post Office is entering into mediation in bad faith and we will find ourselves in the same situation as at present, though the false dawn will have aggravated this
- Not mediating criminal cases will produce further opprobrium.

Risk	0-3 months	3-6 months	6+ months
profile:	AMBER	RED	RED

Commercial (including Costs)

- This option entails the maximum possible costs incurred since we will incur the costs of mediation and then face litigation when mediations fail to produce the results sought by Applicants. The £8.3m cost projected under Option C (Status Quo) will rise very significantly indeed
- We can expect this option to take the greatest time, with at least 6 months spent on mediation, followed by prolonged litigation.
- Detrimental effect on business and, crucially, on the businesses of our (non-Scheme) Subpostmasters
- High level resource is distracted away from transforming the business, for an undefined period of time.

Risk	0-3 months	3-6 months	6+ months
profile:	RED	RED	RED

Legal (Judicial Review and Litigation)

- An attempt at legal challenge to the Scheme as a whole (by Judicial Review) is possible at some stage under this option, although the risk of a successful challenge has recently been assessed as being low.
- Litigation by Applicants in relation to at least some of the cases seems inevitable under all options.
- The failure to reach resolution in a large number of mediations potentially incentivises legal action by angering relevant Applicants
- However, in Court, the disputes will proceed in a controlled environment, tested on relevant evidence and legal principles and determined by an impartial Judge.
- Should Applicants mount a group action against Post Office and find solid resources to collectively to fund it, our costs in defending against it could be extremely substantial and litigation at this level always carries a higher risk, although the Court's processes provide for a constant evaluation of risk and opportunity to address it.

Risk	0-3 months	3-6 months	6+ months
profile:	AMBER	RED	RED

OPTION B**CONFIDENTIAL – NOT POLICY – FOR DISCUSSION****OPTION B: PAY TO LITIGATE OR PAYOUT****Option Description**

- Scheme is closed but all Applicants, with the exception of those with criminal convictions, are given a sum (£5K/10K) to bring claims against Post Office together with the documentation created as a result of being accepted into the Scheme. Post Office then defends all and any claims in Court.
- A variant of this option would involve offering a more substantial payment to all Applicants, with the exception of those with criminal convictions, on condition of a waiver of all and any claim they may have against Post Office.
- Post Office is looking to address any issues surrounding criminal cases with the Criminal Cases Review Commission (CCRC), the independent public body established to review possible miscarriages of justice, with which Post Office is now engaged in correspondence.

Reputation/Perception

- We can expect either variant to result in substantial criticism of Post Office for seeking to 'wash its hands' or 'buy its way out' of the issues raised by MPs, JFSA and Applicants
- Option is likely to generate substantial activity, e.g. from those dissatisfied with the level of payment and/or from those who did not apply but now wish to bring issues to our attention
- Media environment is likely to become more hostile in the short term, however we could expect this to subside after a relatively short time, producing more acute pain but over a much shorter period
- However, the problem of potential aggregation of the individual payments to Applicants to fund a sustained group action by Edwin Coe LLP raises the spectre that this early advantage may be short lived, as the case is followed by the media

Risk	0-3 months	3-6 months	6+ months
profile:	RED	AMBER	RED

Commercial (including Costs)

- Currently projected costs are reduced but this is offset by the risk of extremely costly litigation, namely a well-funded group action spearheaded by Edwin Coe LLP
- Uncertainty of the process is removed, though accusations of bad faith will remain.
- High level resource previously diverted is freed up with litigation treated as business as usual
- There is a definitive end, as a court judgment can be robustly defended as the end of any claim/dispute – that said, this would be some considerable way off – and it will remain open to the parties to consider settlement at all times.

Risk	0-3 months	3-6 months	6+ months
profile:	AMBER	RED	RED

Legal (Judicial Review and Litigation)

- An attempt at legal challenge to the Scheme as a whole (by Judicial Review) is possible at some stage under this option, although the risk of a successful challenge has recently been assessed as being low.
- Litigation by Applicants in relation to at least some of the cases seems inevitable under all options.
- The failure to reach resolution in a large number of mediations potentially incentivises legal action by angering relevant Applicants
- However, in Court, the disputes will proceed in a controlled environment, tested on relevant evidence and legal principles and determined by an impartial Judge.
- Should Applicants mount a group action against Post Office and find solid resources collectively to fund it, our costs in defending against it could be extremely substantial and litigation at this level always carries a higher risk, although the Court's processes provide for a constant evaluation of risk and opportunity to address it.
- In this scenario, we would effectively be providing that funding, so the risk is much more pronounced.

Risk	0-3 months	3-6 months	6+ months
profile:	RED	RED	RED

OPTION C

CONFIDENTIAL – NOT POLICY – FOR DISCUSSION

OPTION C: END SCHEME, MEDIATE CASES WITH MERIT, DEFEND REMAINING IN COURT

Option Description

- Post Office closes the Scheme but invites Second Sight to enter into a new arrangement to complete their independent review of all investigations
- New contract could specifically preclude the production of a Part II Report
- Post Office is the sole decision maker in terms of which cases are mediated
- If Second Sight decline, terminate engagement and consider whether to implement some form of alternative means of independent oversight
- Any litigation is defended against as business as usual

Reputation/Perception

- We can expect this option to result in substantial criticism of Post Office for abandoning the Scheme (despite the complaints to which it is subject)
- Accusations of bad faith will be very pronounced
- Media environment will become very hostile in the short term, however we could expect this to subside after a relatively short time, producing more acute pain but over a much shorter period
- We also have a clear plan for media and Parliamentary engagement to run alongside any announcement to assist with limiting negative coverage and offer an alternative view.

Risk	0-3 months	3-6 months	6+ months
profile:	RED	AMBER	AMBER

Commercial (including Costs)

- This option leads to a substantial reduction in projected costs in large because Post Office becomes in control of its duration
- After an initial period of heightened involvement, Sparrow will cease to eat up high level staff time, allowing key individuals to concentrate on the more strategic challenges facing the business
- The current detrimental effect felt on the business and, crucially, on the businesses of our (non-Scheme) Subpostmasters ends

Risk	0-3 months	3-6 months	6+ months
profile:	RED	AMBER	AMBER

Legal (Judicial Review and Litigation)

- An attempt at legal challenge to the Scheme as a whole (by Judicial Review) is possible at some stage under this option, although the risk of a successful challenge has recently been assessed as being low.
- Litigation by Applicants in relation to at least some of the cases seems inevitable under all options.
- The failure to reach resolution in a large number of mediations potentially incentivises legal action by angering relevant Applicants
- However, in Court, the disputes will proceed in a controlled environment, tested on relevant evidence and legal principles and determined by an impartial Judge.
- Should Applicants mount a group action against Post Office and find solid resources collectively to fund it, our costs in defending against it could be extremely substantial and litigation at this level always carries a higher risk, although the Court's processes provide for a constant evaluation of risk and opportunity to address it.

Risk	0-3 months	3-6 months	6+ months
profile:	RED	AMBER	AMBER

OPTION D

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OPTION D: STATUS QUO

Option Description

- Post Office treats Scheme as fit for purpose and attempts to take part in, and administer, it in the same way as now, encouraging others to do the same.

Reputation/Perception

- We know that MPs, JFSA and Applicants consider the current arrangements to be a sham and command no confidence and this is reflected in media reports, particularly those broadcast through BBC TV and Radio outlets
- Seeking to make the unworkable work will fuel that anger
- New and unpredictable lines of attack will be explored and continued damage to the brand is the likely result
- A new Minister post-election and a new critical Second Sight report will also make containing negative media coverage more difficult
- Mediation will take place but often not result in resolution, creating significant frustration and leaving the impression that the Scheme is a 'cover up' and/or failure

Risk	0-3 months	3-6 months	6+ months
profile:	RED	RED	RED

Commercial (including Costs)

- Sparrow will continue to eat up high level staff time, diverting it away from more strategic challenges facing the business
- Currently projected costs (assuming a more benign media environment) will comfortably reach £8.3m, this figure does not include any payments we may or may not make to Applicants
- Detrimental effect on business and, crucially, on the businesses of our (non-Scheme) Subpostmasters
- Highly uncertain outcomes over a long period of time

Risk	0-3 months	3-6 months	6+ months
profile:	RED	RED	RED

Legal (Judicial Review and Litigation)

- An attempt at legal challenge to the Scheme as a whole (by Judicial Review) is possible at some stage under this option, although the risk of a successful challenge has recently been assessed as being low.
- Litigation by Applicants in relation to at least some of the cases seems inevitable under all options.

- The failure to reach resolution in a large number of mediations potentially incentivises legal action by angering relevant Applicants
- However, in Court, the disputes will proceed in a controlled environment, tested on relevant evidence and legal principles and determined by an impartial Judge.
- Should Applicants mount a group action against Post Office and find solid resources collectively to fund it, our costs in defending against it could be extremely substantial and litigation at this level always carries a higher risk, although the Court's processes provide for a constant evaluation of risk and opportunity to address it.

Risk	0-3 months	3-6 months	6+ months
profile:	AMBER	RED	RED

MATRIX

High level Impact and Risk over time Matrix by Scenario

Options to bring the Scheme to a conclusion, taking reputational, commercial (including cost) and legal considerations into account. This diagramme does this, over time, for the four options detailed within the paper.

- Option A: Mediate
- Option B: Payout or pay-to-litigate
- Option C: End scheme
- Option D: Status quo

