

Initial Complaint Review and Mediation Scheme

Mediating cases - Role of the Working Group

Post Office submission

The Working Group chair has invited Post Office to make a submission on the role of the Working Group in deciding on whether a case should be passed to CEDR for mediation.

Current position

The Working Group is the ultimate decision maker on whether a case is passed to CEDR for mediation.

Second Sight present the Working Group with a recommendation about whether a case is suitable for mediation. If Post Office and JFSA, as the voting members of the Working Group, agree the case could be mediated, it will be passed to CEDR. If there is disagreement, the Chair shall have a casting vote.

JFSA's proposal

JFSA have proposed changing the current position so that where Second Sight recommends a case for mediation, that case should be automatically passed to CEDR with no involvement of the Working Group. Where Second Sight advises that a case should not be mediated, the case should come to the Working Group for discussion and a final decision on whether the case should or should not be passed to CEDR.

This submission

This submission sets out the reasons why Post Office considers that the Working Group should retain its current role in deciding which cases will be passed to CEDR for mediation.

It is noted that this question has already been discussed at length at previous Working Group meetings. At the meeting on **DATE**, the Working Group unanimously agreed that it would be the ultimate decision maker on whether a case is passed to CEDR for mediation.

[INSERT MINUTES FROM MEETING WHERE WG APPROVED FLOWCHARTS]

The flowcharts approved at the Working Group meeting accompany this submission.

Post Office is therefore disappointed that JFSA is now looking to overturn the Working Group's previous decision despite previously supporting it.

This submission does not consider the test that should be applied in deciding whether a case should be passed to CEDR – this related question has already been addressed in a separate submission by Post Office.

Role of the Working Group in the Scheme

The most critical role of the Working Group is to ensure that cases are effectively managed through the Scheme. This inherently involves making decisions on individual cases. It would be odd if the most critical decision on a case, whether it should be passed to CEDR, were to be ignored by the Working Group.

The Working Group's role is clearly stated in the Working Group Terms of Reference¹:

Working Group Terms of Reference

Role of the Working Group

"4.4 To review at each stage Applicants' cases that may not be suitable for the Scheme and to decide whether and/or how those cases may proceed."

"4.9 It is not the role of the Working Group to collectively render any opinion on the merits and/or settlement of any Applicant's complaint. However, the Working Group may consider the merits of any Applicant's complaint in order to administer the progress of that complaint through the Scheme."

The following public documents have made clear statements that the Working Group has a role in deciding which cases are passed to CEDR:

Case Review Mediation Pack² - Page 2, The Scheme - paragraph 5

"The Working Group's role is to ensure the Scheme is run in a fair and efficient manner. It will also be involved in making decisions on how particular cases should be managed through the Scheme."

Case Review Mediation Pack - Page 5 - FAQs

"My case is very old. Can I still mediate it?"

Post Office's records only date back seven years and therefore it may be more difficult to investigate very old cases unless you are able to provide information and documents.

¹ The Working Group Terms of Reference have been approved by all members of the Working Group.

² The Case Review Mediation Pack was and remains publicly available to download from the JFSA website and was the initial documentation sent to potential applicants about the Scheme.

If your case is very old, you may still submit it to Second Sight for consideration. However it may be decided by the Working Group that your case is not suitable for investigation or mediation." [emphasis added]

Case Review Mediation Pack – Page 8 – FAQs

"Will my case definitely be referred to mediation?

[...] the Working Group may consider that some cases are not suitable for mediation. For example, if there is insufficient information about a case or the case is not one requiring resolution."

JFSA have also repeated these commitments to the Minister for Postal Affairs:

JFSA letter to the Minister for Postal Affairs dated 16 April 2014 – 5th bullet

"You will probably be aware that the way the Scheme was meant to work was as follows:-

[...]

The completed 2nd Sight Case Review Report, together with their conclusion and recommendation about the case would then be returned to the WG for either approval of the case being sent to CEDR, the Case Resolution and Dispute Resolution [sic] organisation appointed to run the Mediation process, or for its outcome to be discussed further by the WG"

Unequal protection

JFSA's proposal sees only those cases deemed by Second Sight as unsuitable for mediation being considered by the Working Group.

This approach assumes that Second Sight's recommendations, although given in good faith and with careful thought, may not be correct in all circumstances – hence the need for the safety net of a Working Group review. If this premise is correct, then it is only appropriate for the Working Group to exercise an equal oversight of those cases recommended by Second Sight for mediation. There is no rational basis for applying a greater level of protection to one category of cases over another.

Views of Post Office

By entering the Scheme, Applicants have expressed a willingness to mediate with Post Office. At no stage however have Post Office's views on mediating particular cases been

sought. This information is not provided in Post Office's Investigation Report. Although Post Office created the Scheme with the intention of mediating with Applicants, this was not a commitment to mediate all cases including those that may be patently inappropriate for mediation.

Mediation, by its very nature, is a consensual process and understanding the views of both parties towards mediation is critical to being able to make a decision on whether a case should be passed to CEDR.

If Second Sight's recommendation to mediate a case is accepted without challenge, they will be making those decisions without any knowledge of Post Office's views. By the Working Group considering each case, Post Office will have an opportunity to put forward its position.

Second Sight's role is to only make a recommendation

Second Sight's role has always been, as has always publicly been stated to be, to make a "recommendation" on whether a case is suitable for mediation.

Case Review Mediation Pack - Page 2, The Scheme - paragraph 5

"As a result of this investigation, Second Sight will produce a Case Review summarising its findings and a recommendation on whether the case is suitable for mediation."

It is perhaps an obvious point that a recommendation is not a decision but rather advice upon which another makes a decision. JFSA's proposal is seeking to expand Second Sight's role beyond its original terms of reference.

Expertise to make the decision

A recommendation by Second Sight on whether a case should proceed to mediation is a valuable tool in making a final decision given their close understanding of the circumstances of each case. However, Second Sight are not experienced in mediation. Under JFSA's proposal, the decision on whether to mediate a case would fall on Second Sight who are not sufficiently expert in this area.

By contrast, the members of the Working Group are much more familiar with mediation. Post Office has been involved in many mediations and JFSA have the benefit of being advised by Kay Linnell, an experienced mediator. The expertise to make sound decisions on mediation therefore rests in the Working Group and not with Second Sight.

This issue is particularly important in light of:

1. Post Office's view that the current test for mediation should be maintained. This test requires an assessment of the prospects of successful resolving a case. To do this, one needs to understand what can be achieved through mediation.
2. The Scheme allows for cases to be resolved through routes other than mediation (such as direct discussions between the parties). It is not understood how Second Sight will go about considering these other options in an informed manner.

Efficient use of resources

The Working Group is charged with managing scarce Scheme resources given that the Scheme is funded from the public purse.

Working Group Terms of Reference

Objectives of the Scheme

"3.7 The Scheme will be funded predominantly by Post Office and must therefore ensure value for money for taxpayers."

Role of the Working Group

"4.6 To manage the administration of the Scheme so as to ensure that the Scheme's processes and procedures are offering value for money for taxpayers..."

A significant part of the Scheme's costs relate to engaging CEDR to mediate cases. If the power to pass cases to CEDR lies primarily with Second Sight and beyond the control of the Working Group, then the Working Group will not be able to exercise this function of managing the Scheme's value for money. Any departure from this principle would need to be escalated through the appropriate governance channels at Post Office.

Criminal cases

A number of Applicants to the Scheme have been convicted or have raised complaints about Post Office's prosecution processes. This was envisaged in the original Scheme documentation:

Case Review Mediation Pack - Page 2, The Scheme

"What if my case involves a completed criminal prosecution or conviction?"

You may put your case through the Scheme even if you have already received a Police caution or have been subject to a criminal prosecution or conviction.

However, Post Office does not have the power to reverse or overturn any criminal conviction – only the Criminal Courts have this power.

If at any stage during the Scheme, new information comes to light that might reasonably be considered capable of undermining the case for a prosecution or of assisting the case for the defence, Post Office has a duty to notify you and your defence lawyers. You may then choose whether to use that new information to appeal your conviction or sentence."

Consideration of these matters is beyond Second Sight's terms of reference as they are not experts in this field. It may be that some cases give rise to technical legal issues when considering mediation alongside related criminal processes. Given the Chair's expertise in criminal law, it would seem most appropriate for him, as part of the Working Group, to have oversight of those cases

Independence of the Working Group

In JFSA's submission, they make repeated reference to the need for the Scheme to be independent. The inference being that should the Working Group decide on whether cases are passed to CEDR, this would somehow not be an independent decision because Post Office sit on the Working Group.

[INSERT WG TERM OF REFERENCE ON VOTING MECHANICS]

The Working Group decision making procedure is such that Second Sight provide independent advice to the Working, after which JFSA and Post Office has equal voting rights and, ultimately, matter that are not resolved unanimously, as decided by the independent Chair who has a casting vote. This means that a decision can be passed by the Working Group against Post Office's wishes. A decision by the Working Group is therefore independent.

[DATE]