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Department for
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Post Office: Ownership of Criminal Convictions Compensation

Summary

1. We would welcome your views on whether BEIS should take on ownership of delivering compensation for postmasters who have had their convictions overturned, following the recent Court of Appeal judgment.

Timing

2. Routine.

Recommendations

3. That you **consider** the below advice, including the risks that we would face in either scenario.

Advice

4. Following the Court of Appeal judgment on 23 April, Post Office Ltd have been consulting their legal advisors about the best way to ensure fair and swift compensation to those postmasters who have their criminal convictions overturned. So far, 39 postmasters have had their convictions overturned by the Court of Appeal; another 8 have had their convictions overturned by Southwark Crown Court; hundreds more are likely to go to appeal in the coming months.
5. The Government's position is that compensation should be paid to the postmasters as quickly and fairly as possible. Most postmasters are likely to be successful in any legal claims that they bring for 'malicious prosecution' because the Court of Appeal ruled that POL's original prosecutions were 'an affront to public conscience'. They may also have other legal actions with good prospects of success. This means that the scale of compensation for which POL will be liable is greater than they can afford, perhaps amounting to as much as £1bn and our expectation is that Government will need to pay the compensation, because otherwise POL would become insolvent.
6. POL's legal advisors have provided the company with a 'merits opinion' which states that the company faces the options of (a) running a compensation scheme; (b) entering into mediation or (c) relying on further litigation through the courts (which the postmasters are otherwise certain to bring) as a way of quantifying the liability. Their advisors have recommended to the POL Board that their strategy should follow these steps: (i) interim payments; (ii) negotiations with postmasters; (iii) mediation; and then – if other steps have been unsuccessful – adjudication by means of arbitration, litigation or a compensation scheme.

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7. Mediation is likely to offer the better VfM and public relations (over further litigation and associated costs going to lawyers), but it is unclear whether this will be successful. The postmasters will retain the right to take POL to court if any alternative is unsatisfactory to them. One POL mediation scheme collapsed in the past, in relation to civil claims, and the c.£58m mediated Horizon GLO settlement that was reached in December 2019 is now widely regarded as unsatisfactory because of the proportion that went to the postmasters' lawyers and financial backers. POL has already received claims from some of the affected postmasters, but it is not yet clear what the postmasters' preferred approach will be – nor that of their legal advisors, who are likely to be working on a contingency fee basis.
8. BEIS policy and UKGI strongly agree with POL that it would be best to seek HMT agreement for interim compensation payments to (all, or most, of) the 47 postmasters whose convictions have been overturned so far, subject to our assessment of VfM. Securing approval to make interim payments should both demonstrate progress and allow more time for an in-depth analysis of the different compensation options. We will provide advice on this separately (including an AO assessment). We are also working urgently with lawyers to establish whether we will require a statutory power (by way of a short Bill or clause in an existing Bill) in order to provide funding for these and future compensation payments.
9. The pressure on compensation is likely to grow in the coming weeks, especially if it appears to some that payments are taking 'too long'. POL's separate 'Historical Shortfalls Scheme' (compensating postmasters who suffered shortfalls) is progressing, but fairly slowly because of the complexity of looking back at evidence, much of it unquantified and in some cases non-existent, over many years. Given the scale of the injustice highlighted by the Court of Appeal, compensation for those with overturned convictions is likely to be higher-profile, as the Home Office has experienced recently in relation to the Windrush case (where, for example, the initial offer of interim payments had to be upgraded in the face of public pressure).
10. The Horizon affair is largely unprecedented, although the Department has some history of designing and delivering compensation schemes. Of the Icelandic Trawlermen Compensation Scheme, the NAO (in 2007) said that the Department "did not prepare effectively for the scheme and therefore lacked the evidence it needed to verify whether claims were eligible under the scheme rules. It also lacked a robust plan to implement the scheme, with appropriate project and risk management procedures". The NAO also criticised our initial approach to the Coal Health Compensation Schemes (again in 2007), saying that: "The [Department] did not prepare itself properly for introducing the schemes for these two serious mining related injuries. In the early stages the consequences were significant. The taxpayer has paid too much in administration costs and many claimants, some of whom are elderly and infirm, have had to wait a long time for their compensation." However, the NAO also highlighted lessons for future schemes, emphasising the importance of planning and avoiding overly-complex processes, as well as how important it is to access programme management and external expertise. This could be a template for our work here.
11. To achieve resolution on compensation for the wrongly convicted at speed and efficiently, whilst balancing fairness to taxpayer and victim (the main success criteria we would identify) is hugely challenging. There is a significant likelihood that POL will fail to deliver in a way that meets public expectations for speed, that the administrative and legal costs

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for the company become very high and a risk that Government requirements may be overly complex.



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12. POL's Chair and CEO would favour Government taking over responsibility for the compensation schemes, given the level of funding involved and the other pressures on the company's management. The question of ownership is partly about whether you would prefer BEIS to have the control that would come from being directly responsible and your risk appetite (in either scenario) if things go wrong. **Whether or not to take on direct responsibility is a delicate decision, so we would welcome your views, in light of the following analysis:**

Pros (of Government taking on direct ownership for compensation from POL)

- **Reputation** – if POL is thought to be failing in delivering compensation fairly and quickly, BEIS is likely to face criticism for failing to intervene upfront by leaving the responsibility with POL.
- **Delivery** – taking on ownership would give us more direct oversight of the design and delivery of compensation, whether that is a scheme or mediation (or even test case litigation). A first step would be to design a potential framework for a scheme, based on legal advice and an assessment of which avenue the postmasters are likely to prefer. There is a significant risk, given the complexity of the issues here, that POL will find it challenging to deliver the compensation in a smooth and effective way.
- **POL's leadership** – reducing the pressure on POL's management team would enable them to focus their efforts on improving the Post Office's core business and culture. The CEO, Nick Read, was brought in because of his retail experience, but he is having to spend significant time engaging with the Horizon IT Inquiry and overseeing the culture change required as a result of the negative court judgment by Justice Fraser as well as this process and the HSS scheme. The POL Board clearly is concerned that the company may not have the capacity and capability.
- **Efficiency** – in either situation, we will need to scrutinise aspects of the compensation closely from an MPM perspective. This has caused POL some frustration in relation to the HSS scheme because of the process and conditions that we have had to mandate. BEIS taking on ownership should lead to a more efficient process in this regard. It should also lead to some savings in legal costs overall, even though BEIS would have to contribute a larger proportion of the costs.

Cons

- **Reputation** - we would be incurring some reputational risk if BEIS took on ownership and the compensation were then perceived to be going slowly. It would probably bring with it greater perceived ownership and responsibility for the historic Horizon issues.
- **Legal** - we would be taking on a risk of challenge to BEIS via a JR if postmasters are unhappy with the compensation offered. The HSS scheme faced a JR in court; that was overturned on the grounds that the scheme was out of scope for a JR due to the fact that it is a voluntary scheme set up and administered by POL under private law, rather than Government, and therefore is not subject to public law. This would not be the case if BEIS took on responsibility for direct delivery of compensation (i.e. it would become a 'public' scheme and therefore challengeable through a JR). If the

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postmasters were unhappy with the approach to compensation, they would be entitled to bring a civil claim in court. We also need to factor in the interests of legal advisers who may well have acted for free on the criminal appeal in the expectation of some pay out on the civil claim.

- **Funding** – although we would need HMT approval and funding in any event for the compensation itself, BEIS does not have spare admin budget or funded staff who could oversee this work. Neither BEIS nor UKGI currently have the capacity nor the capability to take on such a role in administering the process of settlements. We would be likely to need a new Directorate or DD-led team, coupled with significant legal resource and external advisors, to deliver any scheme. It is difficult to estimate the cost and time requirements. The alternative (with POL overseeing the compensation) could also negatively impact BEIS in a similar way if they request more funding for the oversight role. Although POL are currently having to absorb the legal costs in relation to Horizon, we would need reassurance about how to cover any costs that they are unable to fund.
 - **Delivery** – legal redress for the postmasters is against POL and we would need to put in place arrangements enabling BEIS to act for and on behalf of the company – which would be a complicating factor. For example, POL has access to all the records that would be needed for successful delivery so we would be dependent on them sharing complete information in a timely way. All claims will need to be investigated because the settlement amounts are likely to be case-specific. BEIS would need to direct POL employees to deliver this, such as investigating claims, including getting information from Fujitsu (who will be a big crunch point because they do not have capacity to fulfil all of POL's requirements). There may also be issues around the handling and assessment of confidential and legally-privileged information.
 - **Governance**: it would be complex to get effective governance in place and we would require a detailed claims handling agreement between BEIS and POL describing what BEIS can and cannot do on POL's behalf. As part of this, BEIS might need to reimburse POL for its costs (e.g. the investigations). Inevitably there will be conflict between what POL wants to do for BAU and what BEIS needs for the litigation.
 - **Precedent and Moral Hazard**: Government taking a direct role in this situation risks setting a precedent to other partner organisations who may seek to pass responsibility for addressing historic liabilities to the Department.
13. If Ministers did not want to take on ownership at this stage, we would seek to manage the design and delivery of the scheme through UKGI and our shareholder sponsorship relationship with POL. This brings some resource pressures for the existing Post Office Policy Team, for which we would need to seek funding from HMT at Supplementary Estimates. BEIS is already seeking to engage external legal counsel support to strengthen our ability to scrutinise POL's legal advice. In addition, UKGI are overseeing the recruitment of a new Legal Non-Executive Director on the POL Board to enhance their oversight of current and future compensation schemes.
14. It would be possible for Ministers to decide to continue with the current arrangements, whereby POL is responsible for design and delivery, but then choose to step in at a later date if progress is thought to be slow, though it would be harder to do so mid-stream.

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15. There is significant pressure from stakeholders and the media on this issue. For instance, criticism over the level of compensation received by postmasters who took part in the GLO has been sustained. Further criticism would be expected over any perceived delays in compensating those who have convictions overturned, as well as if the level of compensation they are to receive is deemed insufficient.
16. Announcing that BEIS would take ownership of postmaster compensation may be welcomed at first, as it would represent Government taking charge of the issue. However, as noted above, doing so would generate very significant ongoing comms risks as the compensation scheme progressed. In addition, it may weaken the Government's defence that POL is an independent entity and imply the Government is accepting some form of culpability, while also suggesting a lack of confidence in POL's operational ability.
17. We will provide further comms handling based on your steer.

Contributors

18. This advice has Communications considerations, as advised by Euan Holmes.
19. This advice has Legal considerations, as advised by Patrick Kilgariff.
20. This advice has Financial considerations, as advised by Daniel Heath.

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