

## **POST OFFICE LTD**

### **POLICY REVIEW – 2018**

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1. In conducting this review of Post Office Ltd (POL) policies we have considered the following documents, all of which require a degree of amendment so as to align the policies into a single coherent and complimentary canon, to correct minor errors and to update the Criminal Investigation and Prosecution policies to comply with current law and process:
  - Prosecution Policy for England & Wales – v.1, 22 January 2016
  - Conduct of Criminal Investigation Policy – no v. number, undated
  - Policy Document - Contract Breach – Final version, 7 April 2014
2. It should be noted that one of the more important considerations in conducting this review was that of the possibility of the forced disclosure of policies to interested third-parties.<sup>1</sup> We are concerned here that a failure to follow a given policy may give rise to claims in Judicial Review and, in the criminal arena, the staying of a prosecution.<sup>2</sup>

#### **Prosecution Policy for England & Wales**

3. We note that we were asked to review the draft Prosecution Policy some time ago and did so, in September 2015. In so doing we made a number of recommendations<sup>3</sup> which we note were adopted and now appear in the present iteration of the Prosecution Policy.

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<sup>1</sup> *E.g.* defendants to criminal prosecutions, civil litigants *etc.*

<sup>2</sup> Such actions are not uncommon: the author has both prosecuted and defended such claims, both in Judicial review and in the criminal courts.

<sup>3</sup> Attached hereto.

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4. Nevertheless, we have again reviewed the Prosecution Policy, considering whether it remains reasonable, transparent, fair and proportionate and is as immune from Judicial Review or other challenge<sup>4</sup> as any policy can be.
  5. We have concluded that the Prosecution Policy requires no meaningful alteration save in one area, on the basis that with the single exception identified, the Policy continues to meet those criteria set out at paragraph 4 above.
  6. We have also sought to update those references to other source-material as have themselves been updated since we last reviewed the policy.
  7. The single area of concern we have with the present iteration of this Policy concerns the list of additional public interest factors set out in Policy paragraph 6.3. Whilst the factors themselves are clear, there is no guidance as to how each factor is to be measured or to what extent a factor may affect a decision to charge. Accordingly, we have provided a degree of guidance which we consider may assist a decision-maker in this crucial policy area.

#### **Civil/Criminal overlap**

8. We have given some consideration to the potential for friction between the Contract Breach policy and the criminal process. The benefits provided by the operation of a civil enforcement-based policy are clear; we do however see some potential for conflict between those aims and with the procedural and evidential demands of a properly formulated criminal investigation process.<sup>5</sup> Whilst the Contract Breach policy will of course include the use of informal discussions and problem-resolution processes, speed of determination and efficient loss-recovery processes, those very advantages may play against the proper and lawful gathering of evidence in a criminal investigation.
9. A useful example of the difficulties which may arise in this context is that of admitted misconduct in Reasons to Urge interviews and Informal Discussions.

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<sup>4</sup> *E.g.* An application to stay criminal proceedings as an Abuse of Process, or as being oppressive or unfair by reason of a failure to follow a policy.

<sup>5</sup> ....and with the law as it applies to evidence-gathering, admissibility *etc.*

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Such interviews and discussions fall outside of the PACE Act requirements and accordingly may well be inadmissible as evidence in criminal proceedings; as prosecutors we have experienced situations where a suspect has provided qualified or complete admissions to wrong-doing in such informal environments, only to see those admissions ruled as inadmissible in criminal proceedings because they were obtained outside of the PACE Act procedures.

10. We therefore consider it important that the Contract Breach policy provides a mechanism for the early identification of potential criminal cases and their consequent withdrawal from, or suspension of, that policy's process. In that context please refer to our comments at paragraph 14 below.

### **Conduct of Criminal Investigation Policy**

11. Although we have not been asked to review this policy previously, we note that it is well-written and comprehensive – we also consider that it meets the aims set out in paragraph 1.1 of the Policy. We would however recommend several small changes,<sup>6</sup> the detail of which is set out in the following paragraphs.

#### **12. General Changes:**

12.1. The word "*fraud*" is used throughout the policy to denote criminal conduct. Whilst the term is there used in the generic and is intended to indicate a number of criminal offences, to the lawyer the term defines offences involving a deception by false representation/omission, committed in order to achieve a gain for the offender or to cause a loss to another. Thus, to the lawyer, the term excludes offences not requiring a false representation but of which POL may nevertheless have been the victim.<sup>7</sup> Accordingly we have replaced the word "*fraud*" with a more complete description of the criminal conduct to which the Policy applies – see paragraph 1.3 of the Policy for an example.

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<sup>6</sup> Again we have corrected a small number of typographic errors and updated references to source material.

<sup>7</sup> E.g. Theft, robbery, burglary etc.

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13. Specific changes. We have adopted the relevant policy paragraph numbering for ease of reference:

**2.2.** Two of the criteria to be considered by the Security Operations Manager, "*The seriousness of the allegation*" and "*The level of criminality*" seem to us to be a little nebulous. We are concerned that these formulations provide too much scope for challenge, on the basis that they permit too great a subjective determination: what is *serious* to one may not be so to another. We would advise the formulations set out in the 'Track Changes' document as providing for a more objective determination of the relevant criterion and thus more easily applied and less open to challenge.

**4.1. Event Log.** It is vitally important that all entries into the Event Log be times and dated – in our experience an identifiably contemporaneous entry into a document or log can provide compelling and often determinative evidence of a sequence of actions or events.

**6.9. New sub-paragraph inserted.** The Policy is silent on the issue of Schedules of Unused Material. The compilation of these schedules is an essential step in the conduct of any investigation, without which there will be a real risk that any subsequent prosecution will fail, regardless of the quality of any evidence obtained. We have provided an appropriate formulation to deal with this omission. Two schedules should be compiled:

- a Schedule of Non-sensitive Unused Material, upon which is recorded investigation material which would, were the test for disclosure to be met,<sup>8</sup> be disclosed to a defendant; and
- a Schedule of Sensitive Unused Material, upon which is recorded material which is not to be disclosed to the defendant, regardless of whether it meets the test for disclosure, without an order of the Court. This schedule would contain such material as e.g. requests for

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<sup>8</sup> Material which "*might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.*" See s.7A(2)(a) Criminal Procedure and Investigations Act 1996.

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PNC Reports, information relating to investigative methods employed in the investigation, financial enquiry tools used *etc.* being material which would, if disclosed, reveal sensitive investigation techniques and tools the publication of which would be likely to undermine future investigations by reason of their public knowledge.

**6.10.** Previously para.6.9 and unchanged save for paragraph numbering.

**8.1.** Not all investigative documents need to be disclosed to a defendant, but all must be recorded on one of the Schedules of Unused Material.

**9.1.** Evidence bags should always be sealed.

**9.2.** Auditors should always record any significant comment made by during the course of an investigation. Such comments often provide good evidence of wrongdoing, either as later-revealed lies or as admissions to misconduct.

**9.3.** We have redrafted this paragraph so as to provide further guidance as to what may be asked of a subject by an auditor seeking to verify financial assets.

**9.4.** Again we have provided further guidance on how auditors may approach this topic.

## **12. Pace Interview**

We note that there are two paragraphs 12.1 in the Policy. We have renumbered these paragraphs and below refer to the renumbered paragraphs.

**12.1.** We have inserted a sentence to reflect the requirements of PACE Code C paragraphs C11 and C12. We have also appended those paragraphs to this Policy. We have done so because too often, important evidence

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is lost to the prosecution because of a failure to comply with these provisions.

**12.2.**Reference to para.2.9 of Code G corrected to para.2.4 of Code G.

**17.4.**The existence of these notes should also be recorded on the Schedule of Non-sensitive Unused Material.

**Policy Document – Contract Breach**

14. This policy is primarily directed towards what may loosely be described as civil law breaches of contract between Subpostmasters and POL – see para.2 therein. However, in line with the aim set out in paragraph 2 above, we consider it important that any potential for conflict between policies be reduced to a minimum. With that aim in mind we suggest the following amendments, set out in the accompanying ‘Track Changes’ document and explained here:

**14.1. Section 6.4 – Consequences of an Escalation Event**

14.1.1. The document is silent of matters of suspected criminal misconduct save for a few passing and somewhat oblique references. We consider it important that the Contract Breach policy makes specific allowance for the engagement of the Criminal Investigation and Prosecution policies in appropriate cases. Such reference would, it seems to us, protect POL against any allegation that the initiation of a criminal investigation/prosecution was of itself a breach of this Contract Breach policy, presently silent on the point.

14.1.2. A further consideration here is that of the need to formally interview a person suspected of criminal misconduct, in



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accordance with the provisions of the PACE Codes of Practice.<sup>9</sup> It is not uncommon for suspected persons to make partial or full admissions to misconduct when questioned. Such admissions, when made in circumstances where the Code was not complied with, may and often are rejected by the criminal courts as inadmissible because the Code has not been complied with; such admissions, valuable evidence as they are, will be lost to the prosecutor.<sup>10</sup>

#### 14.2. **Section 7 – Suspension**

14.2.1. We have added a third, freestanding, criterion to the two criteria upon which a precautionary suspension may be imposed. We take the view that, regardless of any strictly civil contractual position, any potential breach which gives rise to a criminal investigation should in almost all circumstances (but see para.14.2.2 below) result in a precautionary suspension in order to aid the identification, collection, preservation and recording of evidence. In this context, evidence means any material which has the potential to either support OR undermine a prosecution. The failure to suspend risks the possibility of as yet unidentified evidence being compromised or lost, either through deliberate misconduct on the part of the person(s) under investigation or, indeed, inadvertently. The risk identified here is a significant one in two respects:

- i) POL as investigator/prosecutor has a statutory duty to preserve any material which may meet the test for disclosure in a criminal prosecution; and

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<sup>9</sup> Police and Criminal Evidence Act 1984 and PACE Code C: The Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. The Code applies to all those charged with the conduct of a criminal investigation, including POL Investigators.

<sup>10</sup> It is quite common for a suspect to resile from admissions made in interview, particularly where their lawyer has advised that the admissions were made in circumstances where Code C was not complied with.

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- ii) the contamination or loss of evidence can render what was a strong prosecution case an ineffective one.

14.2.2. Having said all of that, we recognised that even where a criminal investigation is initiated, any precautionary suspension should only apply where the person suspected of criminal conduct is the Operator or Subpostmaster. If the risk lies rather with an Assistant and the suspected misconduct has or is likely to have been committed without the Operator or Subpostmaster's knowledge, then in those circumstances precautionary suspension may not be indicated. The draft criterion at 7(iii) makes allowance for this possibility.

**14.3. Section 7.2 – Discussions**

14.3.1. For the reasons given at 14.1.2 above, we have inserted a further sentence to indicate that, where there is suspected criminal conduct on the part of the Operator or Subpostmaster, there should be no Reasons to Urge interview or Informal Discussion. To engage in such processes would be to negate any evidence of admitted wrong-doing otherwise supportive of a prosecution.