

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

POST OFFICE LTD

ADVICE CRIMINAL APPLICANTS TO THE MEDIATION SCHEME ALTERNATIVE PROCESSES

1. This Advice considers:
 - i. The propriety of mediating claims to the Mediation Scheme (“the Scheme”) made by a person who stands convicted of criminal offences committed against POL assets or has been cautioned¹ in respect of such an offence (“criminal Applicant” or “Applicant”); and
 - ii. An alternative approach to such applications, *e.g.* by conducting a face to face meeting with such an applicant, so as to provide an explanation of POL’s findings with a view to the settlement of any dispute, outside of the Scheme.

Criminal Offenders and Mediation

2. It our considered view that no Applicant guilty of a criminal offence² committed against POL should be allowed into the Scheme, for to mediate such applications will be to leave POL open to a number of alarming consequences. Those consequences include, but are not limited to, the following:
 - i. The fact of entry into the Scheme of itself indicates that POL is at least prepared to concede that they may have erred in prosecuting the Applicant.
 - ii. Similarly, the fact that one such Applicant has been allowed to enter into the Scheme sets an unfortunate precedent: “...if him/her, why not me?”

¹ The absence of any criminal differentiation between a caution, a guilty plea and a full trial verdict of guilty was considered in an Advice dated 9th July 2014.

² This group includes those who have been cautioned in respect of such an offence.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

- iii. Once such an Applicant has been admitted into the Scheme, there emerges a clear potential for the launching of appeal proceedings in circumstances where there should be none. Any alternative interpretation placed, or perceived³ to have been placed, by POL on facts having previously founded a prosecution (and subsequent conviction/caution), or otherwise the saying of anything which may be suggested as being inconsistent with the way in which the case was originally prosecuted, could readily give rise to an application for permission to appeal against a conviction, sentence or the administering of a caution. Here the risk to POL is substantial – a concession for instance that a Horizon shortage was or may have been the result of human error would certainly undermine the original basis for a prosecution and conviction founded upon the reliability and integrity of Horizon, perhaps fatally.
- iv. The very process of mediating such an Application gives rise to the possibility that the mediation may yield results. Where the mediation results in agreement, compromise or concession seemingly favourable to the Applicant, or the payment of compensation,⁴ the risks are manifest:
 - i. Any competent lawyer would advise that such an outcome represented a substantial concession by POL to the effect that the conviction or caution was “unsafe”⁵ Such advice would inevitably lead to an appeal.
 - ii. The setting of a precedent – others criminal applicants would seek to compare their cases with the settled case, thereby generating further work, expectation and, ultimately, disappointment. Whilst we note that there is a confidentiality requirement built into the Scheme, experience teaches that important or surprising concessions, agreements and payments do emerge. In this respect we note that there are a number of non-lawyer advisors representing Applicants⁶; it is also plainly in the interests of support- or pressure-groups to publicise such material.

³ ...by the Applicant, their representative or an interested third-party.

⁴ For want of a better descriptive.

⁵ The test to be applied by the Court of Appeal in determining criminal appeals against conviction.

⁶ Who are not bound by the Legal Professional Privilege or Confidentiality regimes applicable to lawyers.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

- iii. The message sent by the mediation of such Applications will, in our view, never be a positive one. Honest SPM's, staff, agents and employees of POL may feel undermined and devalued.
3. The substantial risks to POL which arise out of the mediating of criminal offender Applications carry with them a number of potential, and in our view likely, side-effects:
 - i. Whilst the issue is strictly outside of our criminal purview, we feel bound to point out that the potential for adverse publicity, generated by the mediating of criminal Applications and particularly where some concession, agreement or payment is made by POL, is inestimable.
 - ii. The "Knock-on" effect. Once a concession is made in a mediation and dependant upon the nature and extent of the concession, there is every likelihood that we would be required to disclose the fact and detail to others in a similar position⁷. This could in certain circumstances prove to be a logistical challenge of some size.
 - iii. Similarly, a successful appeal would also give rise to a considerable assessment and disclosure exercise, all conducted in the full view of the media. That is not to say that an unsuccessful appeal would not generate an assessment and disclosure exercise, only that the publicity surrounding a successful appeal would be the greater for that reason.
 - iv. A successful appeal also carries with it a number of further consequences, including but not limited to compensation for incarceration, loss of reputation, loss of income and assets, and for general loss. In particular, any monies paid over by the successful appellant by way of the making-good of losses directly to POL; any fine, compensation, confiscation or costs would also be recoverable, with appropriate interest.

⁷ We have regularly advised on the criminal disclosure provisions. Here it is sufficient to say that in this scenario, it is likely that those provisions would 'bite'.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

4. In considering the issue of appeals, our concern lies not just with the possibility of success and the consequences that flow from that; our concerns also lie in the pre-appeal process, which may also hold risks to POL not dissimilar to those outlined above.

Conclusion

5. We can identify no proper reason for the inclusion of criminal applicants into the Scheme. We consider that the climate presently surrounding the issue of criminal Applicants and their potential entry into the Scheme will, in the event that such applications are to be mediated, seriously deteriorate both in terms of POL's risk exposure and their liability to readily identifiable repercussions.
6. Accordingly we advise that that no Applicant who is guilty of a criminal offence committed against POL should be allowed into the Mediation Scheme. Such a recommendation applies equally to those cautioned.

An Alternative Approach

7. It is suggested that, rather than mediate Applications from criminal Applicants, an alternative process be adopted. That proposed process consists of the holding of a face-to-face meeting with the criminal applicant so as to permit POL to both frame a different agenda and to "explain POL's findings" rather than to "settle" a dispute, in circumstances where it is made clear that no compromise is being offered.
8. We are of the view that there should be as little dialogue as possible which relates to the foundation, circumstances or factual matrix surrounding any conviction or caution, not least because if the purpose of such dialogue was to go beyond the explanation of POL's findings such that a legitimate expectation of some positive outcome was engendered in the criminal Applicant's mind, POL would be opening themselves up to the allegation that the outcome of the meeting had been predetermined. This could give rise to an allegation that POL had acted in bad faith.
9. In the event that there was to be such discourse however, we would commend the approach outlined in paragraph 7 above. It seems to us that a carefully controlled

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

process of engagement which reduces or eliminates the risks identified in this document but provides a criminal Applicant with a forum within which to express their concerns may be a workable alternative, so long as it is made clear from the outset that there is to be no concession, remedy or payment to the Applicant. .

10. We take the view that such a process should comprise the following:
 - i. Any invitation to such a meeting should be framed in the context outlined in paragraph 7 above. In particular it should be clear to the Applicant that there is to be no compromise on offer.
 - ii. The Applicant should be permitted to bring their representative to the meeting: we suggest however that a limit be placed on numbers and roles. We have in mind no more than three attendees for the Applicant, that is, the Applicant plus two.
 - iii. Similarly, POL should limit themselves to that number: the meeting Chair plus a civil and (where appropriate) a criminal lawyer.
 - iv. The meeting should be recorded in its entirety, so as to protect POL from assertions or allegations made *ex post facto*.

11. We have given much consideration to the issue whether or not any criminal lawyers should be present at the meetings. Our present view is informed by the following factors:
 - i. The cost imperative to POL;
 - ii. The no doubt natural reluctance of any criminal Applicant to engage with a criminal lawyer. In this respect we note that the vast majority of applicants are represented by either civil lawyers or non-lawyers. This reluctance may of course be fuelled by the Applicant's own knowledge of guilt or an inability to face up to their own misconduct.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

- iii. The subject-matter of the meetings will inevitably be centred on the criminal law;
- iv. A number of Applicant's representatives are not lawyers and have shown themselves to be ignorant of basic criminal principle and liable to misrepresent both fact and law⁸;
- v. In the absence of any criminal lawyer, none of those present, we think, would be familiar with the criminal appeal process;
- vi. The need to recognise areas of danger to POL before any 'line' is crossed.

12. In balancing these factors we feel that there should be a criminal lawyer present at those meetings involving the more serious offenders, or those involving Applicants who have raised issues of evidence and criminal law in their Applications. For the more simple or straightforward cases we would either provide a Briefing Note relevant to the particular Applicant or attend, such decision being determined by whichever course commended itself to POL.

13. We were minded to suggest that a confidentiality agreement be imposed, however in the light of the fact that the meetings are intended solely to provide a *listening* arena and forum for the explanation of findings/conclusions, such a requirement would be hard to justify and could serve as a deterrent to Applicants.

Conclusion

14. We commend the alternative approach and suggest that the process to be engaged is that described in the preceding paragraphs. Such an approach would certainly go to reducing the risks evident in any entry into the Mediation Scheme by a criminal Applicant by a considerable degree. Properly managed, such a process would eliminate many of the risks outlined in the earlier part of this Advice, including those

⁸ Some no doubt deliberately, some not. It would be not be appropriate to provide examples in this document however.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

of legitimate expectation, the setting of precedent, the launching and outcome of appeals and the repayment of monies *etc.*

Speaking Notes

15. Please refer to Annex 1.

**Simon Clarke
Senior Counsel
Cartwright King**

15th July 2014

ANNEX 1

Speaking Notes

1. Criminal Offenders and Mediation:

- i. A **Criminal Applicant** is a someone who
 - Has pleaded guilty to a criminal offence; in a court;
 - Has been found guilty of a criminal offence following trial by jury;
 - Has accepted a Caution.
- ii. No **Criminal Applicant** should have their Application mediated in the Mediation Scheme.
- iii. The risks to POL of permitting a **Criminal Applicant** into the Scheme are manifest, and include:
 - A so-called '**legitimate expectation**' on the part of the criminal Applicant that POL is or may be prepared to make concessions.
 - A '**legitimate expectation**' on the part of the criminal Applicant that the process of mediation may yield results.
 - A **Precedent**, by which another criminal Applicant might seek to be allowed in.
 - The launching of **appeal proceedings** based upon a concession made within the Scheme.
 - The resurrection of substantial **disclosure** issues.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

- **Breach of confidentially agreements**, particularly relevant in the criminal arena and particularly by non-lawyer representatives, pressure groups *etc.*
- **Damaging publicity** affecting public profile, SPM, employee and agent relations.
- Where concessions, compromise or compensation is made, a '**Knock-on**' effect in relation to other criminal Applicants.

2. An Alternative Approach

- i. The proposed process of holding a **face-to-face meeting** with the criminal applicant so as to permit POL to "explain POL's findings" rather than to "settle" a dispute, in circumstances where no compromise is being offered, is **commended**;
- ii. Such a process should involve:
 - The **making clear** to the Applicant the **purpose** of the meeting.
 - **No compromise** by POL.
 - **Three persons** (including the Applicant) on each side.
 - For **POL** there should be a **meeting Chair** plus a **civil** lawyer and (where appropriate) a **criminal lawyer**.
 - There need not be a **criminal lawyer** present at all such meetings. This is to be determined according to the nature and seriousness of the offence committed.

THIS DOCUMENT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND MUST NOT BE DISCLOSED TO ANY PERSON WITHOUT THE EXPRESS AUTHORITY OF POST OFFICE LTD GENERAL COUNSEL OR CARTWRIGHT KING SOLICITORS

- The meeting should be **recorded** in its entirety, so as to protect POL from assertions or allegations made *ex post facto*.
 - The meeting should not be subject to a **confidentiality agreement** between the parties, so as not to dissuade Applicants from attending.
-