

IN THE MATTER OF THE INQUIRIES ACT 2005
AND IN THE MATTER OF THE INQUIRY RULES 2006

THE POST OFFICE HORIZON IT INQUIRY

**WRITTEN SUBMISSIONS ON THE PROVISIONAL LIST OF ISSUES
ON BEHALF OF BEIS**

1. The Inquiry has invited written submissions on four themes relevant to its provisional list of issues: (A) Second Sight Investigations Limited; (B) reliance upon legal advice; (C) conduct of the group litigation; and (D) divergences across the United Kingdom. The Department for Business, Energy and Industrial Strategy (“the Department”) sets out herein its written submissions on themes (A)-(C) and the specific questions posed by the Inquiry in relation to each of those themes. The Department is neutral on theme (D).

(A) Second Sight Investigations Limited

- (i) To what extent should the Inquiry examine the events surrounding Second Sight?*
2. The Department submits that the Inquiry should examine the events surrounding POL’s engagement of Second Sight, and in particular (i) whether the scope of its engagement over time was appropriate, (ii) whether it was provided with adequately complete and accurate information in order to perform its role, (iii) why its role changed and was ultimately terminated by POL, and (iv) how POL responded to Second Sight’s reports, why it responded in the way that it did, and whether that was appropriate.
 3. The Department submits that these issues fall squarely within the Inquiry’s Terms of Reference and are important issues in seeking to identify and understand the failings in relation to POL’s use of and reliance on the Horizon system.
 4. The Department notes that, although Ian Henderson of Second Sight gave evidence in the course of the group litigation, his evidence was significantly restricted by the terms of the contract of engagement; and, furthermore, POL’s attitude to Second Sight’s reports was not in issue in the group litigation (see the ‘Horizon Issues’ judgment at §§67 and 78-83). As a result, Mr Justice Fraser’s judgments do not provide a detailed analysis of Second

Sight's role, its findings and the appropriateness of POL's response to its findings, nor of any failings in relation thereto.

(ii) Is it sufficient for the Inquiry to investigate the reasons for the decision to terminate the Post Office Complaint Review and Mediation Scheme?

5. The Department submits that, whilst the Inquiry should investigate the reasons for the decision to terminate the Post Office Complaint Review and Mediation Scheme, it should go further than this.
6. In particular, Second Sight was originally engaged not in relation to the Mediation Scheme but to carry out an investigation into the Horizon system. The Department submits that it is important that the Inquiry should consider the reasons for this investigation, its scope, the material provided to Second Sight, and POL's response to Second Sight's questions and reports. These issues fall squarely within the Inquiry's Terms of Reference.

(iii) Should the Inquiry examine whether and to what extent the scope and findings of, and the disclosure made in relation to, the independent investigation(s) undertaken by Second Sight were appropriate?

7. The Department encourages the Inquiry to follow this line of enquiry, for the reasons set out above.

(B) Reliance upon legal advice

(i) Is it necessary for the Inquiry to investigate whether and to what extent Royal Mail Group and Post Office Limited acted upon legal advice when they:

a. formulated policies and guidelines on the civil and criminal liability of SPMs, managers and assistants for shortfalls shown by Horizon; and

b. brought civil and / or criminal proceedings against SPMs, managers and assistants alleged to be responsible for shortfalls shown by Horizon?

(ii) If so, should the nature of the legal advice received be investigated?

8. In relation to (a), the Department submits that, as part of its assessment of the appropriateness of the policies and guidelines relating to civil and criminal proceedings, and the factors which influenced their formulation, the Inquiry should investigate whether and to what extent legal advice played a role, what that legal advice was, what it was based

on and whether it was appropriate. The Department accordingly submits that the nature of the legal advice received should be investigated.

9. In relation to (b), the Department submits that it is not necessary to, and the Inquiry should not proactively, investigate legal advice received in relation to individual civil and criminal cases. This is likely to be immensely time-consuming, and is tangential to and unlikely materially to assist in resolving the issues with which the Inquiry is concerned as per its Terms of Reference. The Department also observes that other fora are better suited to identifying and resolving specific failings – including negligent or improper legal advice – in individual cases.
10. As explained below in relation to theme (C), the Department submits that the Inquiry should investigate the legal advice received in relation to the group litigation and bearing upon POL's litigation strategy therein.

(C) Conduct of the group litigation

(i) Do the Inquiry's Terms of Reference permit an investigation of the conduct of the Group Litigation?

11. The preambular paragraph under the title “Scope of the Inquiry” in the Inquiry’s Terms of Reference indicates that “*Government wants to be fully assured that through the Inquiry there is a public summary of the failings associated with Post Office Limited’s Horizon IT system*” which will require the Inquiry to “*consider all other relevant evidence, … understand what went wrong, and assess whether lessons have been learned …*”. Paragraphs A and C fall to be read consistently with that preambular paragraph. They require the Inquiry to “*identify what key lessons must be learned for the future*” and to “*Assess whether Post Office Ltd has learned the lessons from the criticisms made by Mr Justice Fraser … and those identified by affected postmasters and has delivered or made good progress on the … cultural changes necessary to ensure a similar case does not happen in future*”.
12. The manner in which POL conducted the litigation was the subject of serious judicial criticism. By way of example only, see §§11-17, 517-523, 544-547 and 559-567 of the Common Issues judgment and §§58, 68-72, 81-82, 124 and 572-653 of the Horizon Issues judgment. Of particular (but not exclusive) relevance to the Inquiry is POL’s vigorous denial that Legacy Horizon and Horizon Online were unreliable and its associated assertion that the IT was most unlikely to be the cause of the unexplained shortfalls and discrepancies in branch accounts, a position it maintained as recently as 2019: see, for example, §§1 & 16 of the Horizon Issues judgment.

13. The Department submits that the approach that POL decided to take to the group litigation is undoubtedly a potentially relevant – indeed highly relevant – factor in the analysis of whether POL’s failings in relation to Horizon were attributable to its culture, whether POL now accepts the criticisms made of its approach to the litigation, what lessons are to be learnt (and whether POL has already learnt them) and whether any necessary cultural change within POL has been delivered or is in progress.

14. The Department therefore submits that POL’s conduct of the group litigation falls squarely within the Terms of Reference.

(ii) If so, should the conduct of the Group Litigation by Post Office Limited (and others) be investigated?

15. The Department submits that, for the reasons explained above, POL’s approach to the group litigation is potentially highly relevant to the issues described in the Terms of Reference. The Department notes in particular that it reflects POL’s position in relation to Horizon, and as to the SPMs’ complaints, as recently as late 2019, and so represents a reasonable starting point from which to assess organisational and cultural change within POL, a matter which is at heart of the Inquiry’s Terms of Reference. The Department also notes that POL’s conduct of the litigation has been a central feature of the concerns expressed by SPMs and MPs.

16. The Department accordingly submits that the Inquiry should examine the circumstances surrounding the formulation of POL’s litigation strategy, including by reference to the information and advice which contributed to the decision to adopt such a strategy.

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