

## IN THE POST OFFICE HORIZON IT INQUIRY

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### SUBMISSIONS ON BEHALF OF CORE PARTICIPANTS REPRESENTED BY HOWE & CO

#### ISSUES RELATING TO COMPENSATION

(In response to the request of the Chair dated 10 May 2022)

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## Introduction

1. The 157 Core Participants represented by Howe & Co are grateful to the Chair for his Provisional View dated 9 May 2022, and for the opportunity to address the urgent issue of compensation in hearings to take place in July 2022. It is a matter of grave concern to our clients that no details have been published in relation to the proposed remediation schemes which have arisen from Ministerial statements made on 21 July 2021 and 14 December 2021 (as to compensation for SPMs whose convictions have been quashed); and 22 March 2022 (as to GLO group compensation).
2. The Chair has heard from many SPM witnesses, as to their extreme financial circumstances in the absence of adequate or any compensation. An example is provided by Mr Kevin Palmer, who gave evidence on 23 February 2022:

*“Q. What is the current state your finances, Mr Palmer?”*

*A. They're in ruins. I've got a second mortgage in my home, I'm on a debt management plan, my credit rating is at zero, I ... This is the God's honest truth: this morning coming here my card declined at the car park to pay for the car parking before I got on the train this morning, and I had a decision to make of to leave the car there and hope I don't get a fine so I could get here in time to say this, but I managed to scramble round and find the money in the van and I'm here. But I didn't even have £2.60 to put in the meter this morning. We are living day-to-day, trying to survive.”*

3. Mr Palmer’s financial circumstances are shared by very many former SMPs. Many of our clients are traumatised as a direct result of how they have been treated by POL, many are impoverished, some face homelessness. They are deeply concerned that POL/BEIS seek to adopt a litigious approach in the current and anticipated compensation schemes.
4. The SPMs are victims of injustice visited upon them by an (effectively) public body not civil litigants and should not be treated as such for the purpose of any reparations scheme. They are entitled to fair and timely compensation efficiently delivered.

### **Necessity for full co-operation from BEIS/POL**

5. It is hoped that the 12 questions that the Chair has posed, (particularly in relation to: B – Final Compensation for SPMs with quashed convictions and C – Fair Compensation for the Group Litigation Claimants) will elicit answers from POL/BEIS, which will provide the clarity which is currently absent.
  
6. In the event that POL/ BEIS fail to provide answers to the 12 questions in line with the request by the Chair, we would ask that the Chair exercises his powers under Rule 21 of the Inquiries Act 2005 to compel meaningful written submissions and attendance at the July hearings, where further pertinent and material information can be put forward in response to the Chair's questions.

### **Potential for non-co-operation from institutions**

7. Howe & Co wish to highlight that they have regularly experienced, in other public inquiries, a tendency for institutional core participants to frustrate progress by making submissions to the effect that *'matters are currently under consideration and that the Inquiry will be updated when decisions have been reached'*, or that *the institution in question wishes to reflect on the submissions of other parties before acting*.
  
8. Any such submissions from BEIS or POL at the hearings in July 2022 would be unacceptable to clients, many of whom are in precarious financial situations, who are anxious for answers to the questions that the Chair has posed.

### **The potential role of HM Treasury**

9. It is anticipated that POL/BEIS might inform the Inquiry that they are unable to assist in relation to many of the questions which the Chair has posed, because the matter has been referred to HM Treasury for a decision as to funding. We understand that the Treasury budgeting processes are not designed to account for 'one-off' compensation/reparation demands and so, if the matter has indeed been referred, a decision may not be imminent.
  
10. In these circumstances we request that the Chair seeks clarification (within a timeframe which would enable CPs to respond) from POL and BEIS as to whether HM Treasury must agree/ approve any proposals or schemes. If this is the case, then we submit that the Inquiry should invite submissions from HM Treasury to ensure that it will be possible for progress to be made at the hearings on 6 and 13 July 2022.

### **Request for disclosure of BEIS/ POL responses**

11. Furthermore, Howe & Co asks that the submissions of all Core Participants on the compensation issues are published or otherwise disclosed in sufficient time prior to the hearings in July 2022.
  
12. Many of the questions posed can only be answered by POL/BEIS and it will necessary for Howe & Co to take instructions on the institutional responses in order to properly assist the Inquiry at the July hearings.
  
13. We would also request advanced sight of any submissions received from non CPs, such as HM Treasury or Freeths Solicitors.

## ISSUES ARISING FROM QUESTIONS POSED BY THE CHAIR

14. In addition to the points upon which the Chair has requested submissions, we wish to raise the following points on behalf of our clients:

**(1) The need for immediate payments.** Many of our clients have given evidence to the effect that they continue to endure substantial financial hardship because of the Horizon scandal. A significant cohort of SPMs face the ongoing effects of bankruptcy into which they were placed by POL. A primary objective is to achieve a measure of interim compensation to alleviate their often-desperate immediate financial situations. We would propose that BEIS/POL make urgent *ex gratia* hardship payments to every SPM who has been affected by the Horizon scandal. These payments should be made immediately. We maintain that £10,000 would be an appropriate sum to take account of the delays in implementation of the compensation schemes, and the appalling financial circumstances in which many of our clients continue to find themselves as a direct consequence of the actions of POL<sup>1</sup>.

Immediate action on interim payments would not be controversial or novel. As detailed elsewhere in these submissions there is a current precedent compensation scheme (the Lambeth Children's Homes Redress Scheme) that provides for payments to persons who were 'placed in harm's way'. SPMs who were compelled to operate the flawed Horizon in the relevant period were clearly placed in harm's way.

On the 7<sup>th</sup> of June Sir Robert Francis QC's report<sup>2</sup> was delivered setting out the proposed framework for delivery of compensation to the infected and affected survivors of the Infected Blood scandal. That report states (Recommendation 14) "*I recommend that the Government should immediately consider offering a standard*

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<sup>1</sup> We submit that these payments should not prejudice social security payments, nor incur any tax liability.

<sup>2</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1081007/Compensation\\_and\\_Redress\\_for\\_the\\_Victims\\_of\\_Infected\\_Blood\\_-\\_Recommendations\\_for\\_a\\_Framework\\_-\\_Sir\\_Robert\\_Francis\\_Final\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081007/Compensation_and_Redress_for_the_Victims_of_Infected_Blood_-_Recommendations_for_a_Framework_-_Sir_Robert_Francis_Final_.pdf)

*figure by way of substantial interim payments, on account of awards likely to be made under the scheme...”<sup>3</sup>,*

**(2) Interim payments for those who underwent prosecutions (not convicted).** Those clients who we represent who were part of the Group Litigation, and who were prosecuted and acquitted after trial have not been included in the interim payments scheme, which is limited to those who were convicted and whose convictions were overturned. They endured the same stresses of criminal proceedings but are in a worse position (in terms of compensation) as those who were convicted. The Chair will recall that Ms Sue Palmer stated at paragraph 118 of her witness statement dated 26 January 2022 that she often thinks that she made a mistake in pleading Not Guilty, because had she pleaded Guilty she would not have been acquitted by a jury and would now be in a position to access interim compensation.

Ms Jo Hamilton made a similar point in her evidence on 14 February 2022 when she said that she felt lucky to have had a criminal conviction because she had a chance of getting compensation (Transcript, page 133).

We submit that this paradox is unacceptable, and that those SPMs who were tried and acquitted (for example, Sue Palmer and Maureen McKelvey), those in respect of whom prosecutions were brought, but discontinued (For example, Susan Hazzleton) and those who received cautions (For example, Mr Joan Bailey, see exhibit WITN0316\_01/3) should all be included in the interim compensation ‘scheme’.

**(3) Interim payments for those who were subjected to civil proceedings.** We act for a number of Core Participants who were the subject of civil proceedings that were brought against them by POL, which were based on Horizon system shortfalls. The effects of the judgments which POL obtained against our clients have been, in many cases, as devastating as the effects of criminal convictions. One such example is Lee

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<sup>3</sup> We would suggest that the Inquiry considers generally the terms of the Recommendations from Sir Robert Francis which refer in particular to no implications as regards tax (Recommendation 15), independence of the scheme (Recommendation 16) and advocacy and advice (Recommendation 17).

Castleton, who successfully defended a civil claim brought by POL, only for POL to bring an appeal in the High Court. POL succeeded in the High Court (where Mr Castleton was unrepresented) and the resulting order included a costs order in favour of POL in the sum of £321,000<sup>4</sup>.

Mr Lee Castleton, who was made bankrupt and has endured the consequences of financial hardship, loss of career prospects and ongoing anger and depression ever since. The impact on him and his family were detailed by CTI on 19 May 2022 (see WITN03730100). We submit that should be unarguable that those SPMs who continue to suffer as a consequence of civil actions based on the flawed Horizon system should receive substantial interim payments.

**(4) Interim payments for Group Litigants and applicants to the HSS.** There is a similar urgent need for appropriate interim payments to be made to those who were party to the Group Litigation and those who have outstanding applications to the HSS. As detailed elsewhere in these submissions, both categories of victim have experienced exceptional and unreasonable delays in receiving any or any adequate compensation. Howe & Co have raised the urgent need for interim compensation with Mr Nick Reed (CEO of POL) and with Rt Hon Paul Scully as long ago as 22 October 2021. A copy of Howe & Co's letter to Mr Reed was published by the Inquiry on its website, in relation to the preliminary hearing on 8 November 2021. In that letter Howe & Co stated:

*As you will be aware, we act for 150 subpostmasters who are core participants in the Post Office Horizon IT Inquiry ('the Inquiry'). We write to you directly as, according to the Inquiry Chair's update, you have not retained solicitors. We write to ask for your confirmation that:*

- (i) You have commenced work on an holistic reparations scheme for subpostmasters and other persons affected by the Horizon IT scandal;*
- (ii) If you have not commenced that work, that Post Office Limited will start work immediately to establish a reparation scheme to adequately compensate subpostmasters; and*

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<sup>4</sup> See witness statement dated 13 May 2022 WITNO3730100 at paragraph 73

*(iii) Post Office Limited commits to providing a meaningful sum of interim compensation to all affected persons, within 28 days of application, in line with the scheme for interim payments for those criminally convicted, and who have had those convictions overturned. (Our emphasis)*

*(iv) That any future holistic compensation scheme will not exclude claimants in Bates and Others v Post Office Ltd; and*

*(v) That Post Office Limited (with the assistance of Government) will commit to returning to the Claimants in Bates and Others v Post Office Ltd the legal and funding costs they incurred in order to bring that claim.*

Howe & Co wrote to BEIS in similar terms by letter dated 6 December 2021 and addressed to Paul Scully MP. A copy of that letter accompanies these submissions.

**(5) Unreasonably onerous processes.** Many of our clients instruct that they are experiencing ‘victim fatigue’. They had hoped that after the often-traumatic process of giving evidence before the Inquiry would provide a degree of closure. Yet the HSS Scheme (and anticipated other non HSS schemes) require that SPMs establish causation and prove each and every loss. These requirements will serve to retraumatise our clients.

Furthermore, the burdens that are placed on SPMs in the current and anticipated reparations schemes are plainly unreasonable. For example, Mr Sethi stated in his evidence of 14 February 2022 that he was not in a position to answer questions put to him by the HSS/POL that related to matters 20 years ago, the answers of which ought to be known by the Post Office. (Transcript, page 78).

**(6) Inability to locate records.** Consistent with Mr Sethi’s evidence, it is anticipated that the proposed compensation schemes for the GLO litigants and those whose convictions have been overturned will mirror the HSS. If so, all SPMs who are entitled to reparations will be placed in a position where they will be required to prove matters in circumstances where they are unable to properly access evidence. SPMs have confirmed in their evidence in the Inquiry, their documents and records were

confiscated (arguably unlawfully) by POL upon suspending them and may be untraceable today.

Furthermore, it is likely that the very documents that POL require as contemporaneous evidence to establish entitlement to compensation will have been destroyed by POL. It is relevant to note that the position of POL during the mediation scheme when requested to produce documents and records was that these are routinely destroyed by POL after 6 years. This issue will feature in the evidence of Kay Linnell, who assisted the SPMs during that process. It is therefore a matter of some concern that the HSS places an onus on SPMs to adduce evidence, which has been seized by the Post Office and which most likely has been destroyed.

**(7) Repayment of the outstanding settlement sums.** Many SPMs have given instructions to the effect that they do not see the proposed compensation schemes as compensation. Rather, they seek the return of the monies from the settlement agreement (with interest added) which they see as properly due to them. Taking the figures provided by the Chair in his 'Provisional View', the SPMs are entitled to £42m<sup>5</sup>, but to date have only received £10.5m of that sum. The 'return' of the outstanding £31.5m would provide approximately £56,000 per subpostmaster. In the event that the full sum of £57.75m (less the sum of £10.5m already received by SPMs) were to be returned, this would provide approximately £85,000 per subpostmaster). It is understood that these sums would be apportioned between the 555 by means of a system devised by Freeths solicitors in consultation with JFSA at the time of the group litigation (it is also understood that Freeths solicitors will address the Inquiry in separate submissions).

It is important to note that SPMs do not see the settlement sum as representing a fair outcome. Some of our clients will give evidence to the effect that the low figure was agreed as a consequence of POL withholding documents (such as the Clarke advices)

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<sup>5</sup> SPMs instruct that the repayment sum which has been requested on their behalf is £46.8 m plus interest.

and misrepresenting facts on issues that would have been relevant to the assessment of a reasonable settlement figure. It is anticipated that disclosure relating to Operation Sparrow will assist the Inquiry's understanding of POL's conduct in this regard.

**(8) Determination of disputes by independent person or panel.** By dividing the remainder (after legal and legal funding costs) by the number of claimants (555) subpostmasters received approximately £20,000 each (albeit many received far less). However, their losses because of Horizon have been estimated, often, to be well in excess of £100,000.<sup>6</sup> It is relevant to note that the House of Commons Business, Energy and Industrial Strategy Committee has received evidence to the effect that many SPMs would have been due around £700,000 in damages if they were returned to the positions that they would have been in but for the Horizon system.<sup>7</sup>

It is therefore clear that even after the return of the settlement sums, many SPMs will not have received adequate compensation and it will become necessary for further redress to be considered by an independent person or panel after return of the GLO litigation monies and payment of the proposed *ex gratia* payment.

**(9) Administration of scheme(s).** Our clients instruct that they would object to any compensation scheme being administered by POL or by Herbert Smith Freehills on behalf of POL. The current HSS scheme is not independent and has been described by APPG as '*firmly putting the fox in charge of the hen house.*'

We agree with the proposal by the Chair at paragraph 28 of the Provisional View that fairness demands that Post Office Limited should not be the final arbiter of whether an interim or final payment of compensation should be made in accordance with the

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<sup>6</sup> See House of Commons Business, Energy and Industrial Strategy Committee. Interim report. 17 February 2022. [Post Office and Horizon - Compensation: interim report - Business, Energy and Industrial Strategy Committee \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-and-industrial-strategy/interim-report-2022/)

<sup>7</sup> See House of Commons Business, Energy and Industrial Strategy Committee. Interim report. 17 February 2022 at paragraph 12.

Minister's announcements of 21 July 2021 and 14 December 2021, and that any disputes should be determined by an independent person or panel. In particular, it would be inappropriate for POL to play any part in the determination of aggravated or exemplary damages, which will be claimed by SPMs.

- (10) **Dispute resolution**. Our clients who have received offers under the HSS Scheme instruct that those offers are low and, in some cases derisory. For example, in the case of Fiona Elliot who gave evidence on 19 May 2022 (Pg 24, line 18 – 24):

*Q. You recently applied for compensation from the Historical Shortfall Scheme; is that right?*

*A. I did, I applied.*

*Q. How much roughly did you claim and how did you go about calculating that?*

*A. My accountant helped me complete it but I didn't get no legal assistance at all, so I done most of the form myself and by the time I put in all the losses and my wages that I lost out on and the retail end of it, and then I had two houses as well repossessed, buy to let properties, so by the time I put on that, it ended up at just over a million pounds, and they sent me an offer of 24,000 which was -- I was disgusted, you know, 24,000 doesn't even cover what I put in, you know, so it doesn't. I was totally disgusted.*

It is therefore anticipated that dispute resolution procedures will be necessary in most cases. We would suggest that disputes might be capable of resolution through arbitration. Such an arbitration scheme might provide for written submissions (initially by SPMs' representatives, followed by POL and with an opportunity for SPMs to respond). This may ensure reliable and timeous outcomes, an independent process and binding awards, which could be enforced if necessary.

In such a scheme, POL/ BEIS would be responsible for the arbitral fees of both parties and reasonable costs of those representing SPMs (along with any disbursements, such as medical or accounting reports, counsel's opinion as to quantum etc). We suggest that any such scheme should contain an agreed mechanism for the appointment of arbitrators. One mechanism which might prove suitable is the system adopted by the

International Cotton Association, whereby each party appoints an arbitrator and the President of the scheme appoints a chairman.

**(11) Legal assistance.** Any compensation scheme must provide a facility for legal representation that is meaningful and sufficient. The HSS makes no provision for legal assistance at the vital first application stage, and only provides for £1200 for legal assistance to consider, review and challenge an offer that has been made under the scheme. It is obvious that SPMs require legal and other professional assistance when preparing their claims, many of which are complex and potentially high value: the HSS provides none. As detailed elsewhere, the same is true of the interim compensation scheme.

As matters stand, it is our view that it would be deeply problematic for a solicitor to accept instructions to advise on offers made by the scheme's assessors in these complex cases where, at best, there is only provision for perhaps 3 hours' work. The acceptance of instructions on this basis would carry very significant risks that any advice given may be negligent. We submit that the compensation schemes must provide for sufficient representation to allow equality of arms between SPMs and POL/BEIS. Adequate funding for legal advice, and provision for disbursements to meet the cost of experts (forensic accountants and medical experts) is a fundamental prerequisite of any fair scheme.

**(12) Inequality of Arms**

The failure of the HSS to offer adequate legal assistance is particularly concerning in light of evidence given by SPMs to the Inquiry that they felt powerless to challenge POL because of the vast resources of POL as a national institution. In Bates and Others v Post Office Limited (Judgment No 6 – Horizon Issues) [2019] EWHC 3408 (QB), Fraser

J alluded to the vast financial resources of Post Office Limited as opposed to the group litigants:

*“60. I have already explained that the Post Office has now used four different leading counsel, and it also engaged a second commercial firm of solicitors to act for it on its appeal. The claimants are funded by means of litigation funding, explained in Judgment No.3 so far as it is relevant. The claimants are ordinary individuals who ran branch Post Offices, and the Post Office is publicly funded.....”*

Jo Hamilton set out the views of many SPMs in her evidence on 14 February 2022 as to the manipulation by POL of its financial position in the group litigation:

*“Post Office knew we couldn't fight further because the funding pot was literally dry. We'd won two court victories and so although -- they limited the disclosure for the mediation and the settlement, and they basically ran us out of road and we were forced to accept the 58 million, which sounds a lot but, if litigation funding isn't covered, when -- if you can't recover the costs of the litigation, then you're up against it. So there was a point at which the scales would tip and Post Office knew it.”* (Transcript – page 130)

The inequality of arms as between SPMS and POL and BEIS continues.

We note the Government's response (published on 27 April 2022<sup>8</sup>) to Recommendation 8 of the House of Commons Business, Energy and Industrial Strategy Committee. Interim report, in which the BEIS has stated:

*“As of 25 March 2022, 1106 offers have been made, of which 966 (87%) claimants have responded and of which 911 (94%) have accepted (i.e. 82% of all offers made by 25 March have been accepted).*

*Of the postmasters who have responded to the offer, a total of 59 (6%) formally disputed the offer and have entered the Dispute Resolution Procedure. Of the 59 postmasters who have entered the Dispute Resolution Procedure, 21 have subsequently accepted an offer before reaching the mediation stage.”*

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<sup>8</sup> [Post Office and Horizon – Compensation: interim report. Government Response to the Committee's Eighth Report - Business, Energy and Industrial Strategy Committee \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-and-industrial-strategy/committees/interim-report-2022/)

However, it is a matter of concern that very many SPMs appear to have accepted offers under the HSS apparently without the benefit of legal advice.

We urge that Chair to direct POL and BEIS to provide data to the Inquiry as to what percentage of applicants were/were not represented at the time of application to the HSS, and what percentage were/were not represented when they accepted offers under the HSS. It may be highly instructive to examine the level of offer/award made to unrepresented applicants as opposed to represented applicants.

We submit that for there to be any actual or perceived fairness in the compensation schemes there must be adequate provision for legal advice and assistance, and funding to provide for expert evidence where necessary to support applications.

**(13) SPMs who have not come forward, or who have signed confidentiality agreements**

We submit that POL/BEIS should take active steps to locate the numerous SPMs who would be entitled to interim payments and compensation/ further compensation, but who have not come forward. Such payments should also be extended to those SPMs who have signed agreements with POL undertaking not to pursue any further sums by way of making future claims. This would appear to be the position of Martin Griffiths' widow, who appeared in a recent BBC Panorama documentary.

**RESPONSES TO THE 12 QUESTIONS POSED BY THE CHAIR**

**A. Historical Shortfall Scheme ("the HSS")**

**1. The heads of loss which are recoverable under the HSS and the reason(s) for any exclusions;**

15. The Scheme provides 'Consequential Loss Principles and Guidance'. The Scheme distinguishes between Shortfall Losses (the amount of a Horizon Shortfall that the

postmaster has repaid or is regarded by Post Office as still owing) and Consequential Losses (financial or non-financial loss that is not a Shortfall Loss).

16. The scheme places the burden of proof on SPMs. The guidance states:

*4.1.2. What is capable of being claimed as a Consequential Loss, along with the level of evidence required to meet the applicable legal tests, will depend on the facts of each case. The postmaster should explain in as much detail as possible: a) the particular loss being claimed; b) the specific amount of loss being claimed; c) how this loss was caused by a Horizon Shortfall; and d) the reasonable steps the postmaster took to reduce this loss, and the impact these steps had*

17. However, the guidance also states: *'Where the postmaster is unable to satisfy the burden of proof in relation to their claim, their claim may nonetheless be accepted in whole or in part if the Scheme considers it to be fair in all the circumstances.'* This statement is vague and unclear and should be properly clarified by POL/ BEIS.

18. Consequential losses are to be assessed on principles of causation, remoteness, mitigation and quantum will be based on putting the SPM into the position where he/she would have been but for the Horizon shortfall.

19. The HSS Heads of Loss are set out (in a non-exhaustive list) as:

Loss of earnings

Loss of Profits

Loss of Property (sale of asset/value of asset)

Loss of opportunity/ loss of chance (expanding the business)

Penalties/ general or increased costs of financing

Bankruptcy/ insolvency

Legal and professional fees

Stigma/ damage to reputation

Personal injury/ harassment

20. At every stage in the guidance, POL requires detailed evidence, preferably contemporaneous. The guidance states: (emphasis added)

### *3.2. Evidence*

*3.2.1. Claims which are supported by evidence are more likely to be successful. Guidance on how best to evidence any potential claims for Consequential Loss is set out further below.*

#### **3.2.2. Greater weight will be attached to;**

**a) contemporaneous evidence; and**

**b) factual evidence that is undisputed and/or verifiable.**

*3.2.3. The need to provide evidence is particularly important where a postmaster's claim relates to matters which are known only to the postmaster. While the burden is on postmasters to provide sufficient evidence to demonstrate their claim for Consequential Loss, the Scheme will also consider any relevant evidence Post Office holds when assessing the claim. **Any key supporting documentation relied upon will be shared with postmasters when they receive the outcome of their claims to enable them to consider whether they wish to accept the offers made to them.***

21. It is wholly unreasonable for POL to require contemporaneous evidence of events that in some cases took place over 20 years ago and where, in the majority of cases, POL denied SPMs access to their records at the point of suspending them. We repeat the point made at point (6) above that the records that POL requires from SPMs to establish claims for reparations may indeed have been destroyed by POL after 6 years. The unfairness presented by the absence of records is the fault of the Post Office and the significant passage of time has elapsed between the events that require reparation and the current schemes.

22. Furthermore, the SPMs who we represent would strongly object to the provision in the HSS whereby POL documentation is only provided to SPMs **after** receipt of offers. This provision is manifestly unfair and would appear to have been designed to place SPMs at a disadvantage.

23. The Heads of Loss are deficient. They cover personal injury/harassment, but there is no provision to obtain expert evidence to support or quantify claims under these heads, as would normally be required in personal injury claims. Additionally, there is no reference or provision for aggravated damages. Neither is there any provision for exemplary damages in circumstances where the conduct of POL clearly warrants such an award. Neither does the scheme make any provision for interim payments.
24. The Heads of Loss should reflect (i) suffering caused to children and family members, (ii) the roles that family members have played in caring for traumatised SPMs and (iii) the fact that many SPMs have been required to work long into what would otherwise have been a planned retirement. The Inquiry has received a wealth of evidence on such matters.
25. As detailed at paragraphs 20 and 21 above, a substantial procedural flaw in the HSS is that there is no provision for disclosure of any documents relied upon by POL until after an offer has been made. This is wholly unacceptable. We submit that any scheme must provide for full disclosure of all relevant material to SPMs from the outset, particularly in the circumstances of POL having unlawfully retained SPMs' records when suspending them.

**2. Whether there has been delay and, if so, the cause(s) of delay in processing applications under the HSS;**

The Scheme has been the subject of delay, for which no explanations have been provided. For example, on 1 Apr 2021 the HSS wrote to our client Mr Baljit Sethi stating :

*..... Thank you for your email and also your patience during this time.*

*At this time there are no updates to communicate to you, but please be assured that as soon as there are, we will be in touch.....*

*Should you have any more questions about the Scheme in the meantime, please email us at [historicalshortfallscheme@postoffice.co.uk](mailto:historicalshortfallscheme@postoffice.co.uk). You can also find more information at [www.onepostoffice.co.uk/scheme](http://www.onepostoffice.co.uk/scheme).*

26. Mr Sethi was the Inquiry's first witness. In his oral evidence on 14 February 2022, he told the Inquiry that he applied to the HSS in February 2020 and that he received no responses from POL for 2 years, despite numerous attempts to chase for a response made through his Member of Parliament. In February 2022, and after the Inquiry published its schedule of witnesses, he received a request from the HSS for answers to 68 question (which included a number of sub-questions, which brought the total to approximately 100 questions).<sup>9</sup> Mr Sethi expressed considerable frustration while giving evidence that he was being asked to answer questions in relation to matters that had occurred some 20 years previously, in respect of which much information was held by the Post Office.

27. As at 6 June 2022 POL has still not responded to Mr Sethi's application or resolved his claim under HSS. Mr Sethi advises that there have been, *"No updates, no idea of timeframes and no offers made"*.

28. We submit that the HSS appears to operate in an inefficient, if not chaotic manner. This is also apparent from Mr Sethi's evidence on 14 February 2022, in which he said:

*" Yes, sir, but before that whatever information, when we put in for Historical Shortfall, they have asked me so many questions which we have answered and they keep repeating the same questions. The last time I wrote to them and I said, "You know, these questions, which you have asked me now again after six months, I already sent you this six months back", and then they came back to me saying, "Oh, sorry, there are lots of people dealing with this, so that person was dealing*

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<sup>9</sup> See Transcript 14 February 2022 at pages 76-78

*has mislaid it, the case has come to me new, so I need now reply from you". This like passing the buck from you to him, him to her, which will be never ending. Even if I answer these 100 questions tomorrow, some bright geezer might get up tomorrow and say, "Oh, Mr Sethi, you know what, now people have changed, could you please answer those 100 questions again".*

**3.The provision which has been made for applicants to obtain independent legal advice in respect of their claims under the HSS and whether it is adequate;**

29. As stated above, the HSS makes no provision for independent legal advice to assist an applicant to make an initial application. The only (minimal) provision made for independent legal advice (which does not appear to include provision for any reasonable and necessary disbursements), is in relation to the second (review) stage; after an initial offer has been made. This is unacceptable to our clients.

**No provision for legal advice to assist in the making of an application**

30. The point is set out in the HSS guidance, which provides, at page 6 in the section "Costs and Representation":

*"Q: Can I represent myself or do I need a solicitor?*

*A: The Scheme has been designed to be simple and user friendly to avoid the need to incur costs of legal representation. Applicants are welcome, however, to engage a lawyer or other professional adviser to provide independent representation at their own expense."*

31. This is consistent with the information that was provided to Mr Sethi. On 1 April 2021, approximately a year after Mr Sethi had made an application to be accepted within the HSS, Mr Sethi wrote to the Post Office HSS in the following terms:

*“..... I also asked you that I should be represented by a solicitor. The costs of this should be borne by the Post Office. ....”*

32. The Post Office HSS replied on the same day advising: (emphasis added)

*“..... Thank you for your emails received today and your email of 30 March.*

*We’d like to reassure you that we are doing all we can to review your claim as quickly as possible our email of 30 March.*

*We’d like to reassure you that we are doing all we can to review your claim as quickly as possible and we are sorry that we haven’t been able to give you a decision yet.*

***The scheme has been designed to be simple and user friendly to avoid the need to incur costs of legal representation.***

***Applicants are welcome, however, to engage a lawyer or other professional adviser to provide independent representation at their own expense...”***

33. The wording of that email to Mr Sethi clearly repeats the HSS guidance: POL does not consider that an applicant requires legal assistance. However, in the same HSS guidance document, and on the same page, in the section entitled “Assessment of Claims” it is stated:

*Q: Who makes the decision on whether my claim is successful?*

*A: Your application to the scheme will first be assessed for eligibility.*

*Herbert Smith Freehills, a law firm with wide experience and expertise in operating similar schemes, will be operating the scheme.*

34. We make 2 points on the approach taken by POL towards legal assistance in the HSS. Firstly, although POL does not consider that applicants require legal advice, POL considers that it does require independent legal advice. Furthermore, the Chair will be aware of the significant involvement of Herbert Smith Freehills for and on behalf of POL in the civil claim (Alan Bates & Others v Post Office Limited). Our clients

fundamentally object to the same firm of solicitors' administration of a scheme, which purports to be independent.

35. The guidance makes clear that the scheme requires significant documentary and other evidence to support claims under the heads provided. It is submitted that it is not reasonable for an unrepresented lay person to be required to navigate such a complex compensation scheme, which is governed by a whole range of complex legal principles, without the assistance of independent legal representation.

36. By way of an example, section 5.10 deals with claims that may involve personal injury/harassment. A claim under this heading:

*"...will require evidence, preferably contemporaneous that the personal injury/harassment was caused by the Horizon shortfall. Post Masters should provide the following information when making a claim for personal injury/harassment;*

*(a) A detailed description of their injury including (i) the symptoms they have experienced; (ii) medical treatment they have received; (iii) any expenses/financial losses they have suffered; and (iv) the effect of their injury;*

*(b) A letter from their GP (or from another medical professional who has treated them) setting out details of matters including the nature and potential cause(s) of the injury;..."*

37. HSS operates unfairly in that it fails to provide for any legal advice and assistance during the preparation of claims. This is particularly unreasonable considering the onerous evidential requirements and lack of disclosure from POL. It is submitted that provision for independent legal advice is plainly necessary to assist subpostmasters and others in accessing, navigating and applying to the highly complex HSS scheme; and will similarly be necessary in the other schemes/processes. BEIS has accepted that the claims are complex in nature in its recent response to the select committee's interim report:

*“There have been 2,365 eligible claims to the Historical Shortfall Scheme. Each case is complex and unique, requiring specific examination of the details of the case and the circumstances in each.”*

38. Additionally, such provision is also likely to provide savings, as well presented and evidenced first applications will reduce the need for further stages of review under the scheme(s).

**Insufficient provision for legal advice after the making of an initial offer.**

39. The Terms of Reference of HSS state:

*19. Postmasters who would like to take independent legal advice to enable them to consider the terms of the offers made to them will have a period of four weeks to do so. Post Office will contribute a sum of £1,200 inclusive of VAT towards the cost of such independent advice save that, in cases where Post Office offers to pay the applicant’s claim in full (or largely in full), Post Office will contribute a sum of £400 inclusive of VAT towards such independent advice.*

40. There are obvious difficulties for solicitors agreeing to accept instructions to advise on settlement proposals in what will be complex and high value cases for a fee of £1200, including VAT, (this sum represents around 3 hours’ work for an adequately qualified and experienced solicitor). In the absence of adequate provision for independent legal advice (as well as provision for disbursements) a solicitor assisting an applicant runs a real risk of being criticised for failings in professional conduct and/or being liable for under-settling a claim.

41. Advancing a claim, for example, involving psychological personal injury that is not supported by an expert report and an advice on quantum from Counsel would be unlikely to withstand scrutiny by the Solicitors Regulation Authority.

42. Furthermore, any solicitor assisting (pro bono or for a reduced fee) could also face claims in relation to not properly conducting the application and for under-settling it.
43. Claims arising from under-settlement of damages form an established area of practice in personal injury and civil litigation. There are many law firms in England and Wales that specialise in such claims against solicitors for the under settlement of significant money claims. Thus, the absence of provision for legal advice and necessary disbursement is likely to act as a disincentive to law firms accepting instructions in these cases.
44. As matters stand, a solicitor would have to reach an arrangement with a Claimant (for example a contingency agreement), whereby a proportion of the damages/award and VAT would be taken up in legal costs. Similarly, an agreement would have to be reached in respect of the cost of disbursement, such as expert reports, which would have to be recovered/repaid from the damages/award.
45. Given the background of these cases, where the harms complained of were caused by (effectively) a public body, and where that body (POL/BEIS) has full access to funding for legal and other advice and assistance, forcing an applicant to have to enter into such an arrangement is unfair and inappropriate.
46. It would also appear that there is no provision for any legal advice within HSS for any of the dispute resolution procedures that are identified in the scheme and in the Government's response to the interim report of the select committee. These procedures are: mediation, small claims in the county court for claimed sums under £10,000 and arbitration for sums over £10,000.
47. Consequently, the failure to make provision (or proper provision) for independent legal advice is therefore unfair, is likely to prejudice applicants within HSS, lead to undervalued offers of compensation and to increase the number of reviews.

**4.The provision which has been made for interim payments pending completion of dispute resolution procedures under the HSS.**

48. There is no provision for interim payments within HSS. This is a significant failing of the scheme and exacerbates the already highly precarious financial positions of a substantial number of SPMs.

49. However, POL appears to apply a discretion to award interim payments. In the Government's response (published on 27 April 2022 <sup>10</sup>) to Recommendation 9 of the House of Commons Business, Energy and Industrial Strategy Committee Interim report, the Government has stated :

*Furthermore, the Post Office has prioritised claimants for interim payments in circumstances where concerns have been raised about the impact of the speed of progress on the claimant. As of 5 April 2022, 24 interim payments have been made on this basis.*

50. We submit that HSS should make express provision for interim payments in all cases. It is unacceptable that the matter is at the capricious discretion of Post Office Limited, which was responsible for committing the abuses in respect of which compensation is claimed under the scheme.

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<sup>10</sup> [Post Office and Horizon – Compensation: interim report. Government Response to the Committee's Eighth Report - Business, Energy and Industrial Strategy Committee \(parliament.uk\)](#)

**B Final Compensation for SPMs with Quashed Convictions**

**5.The principles which are being applied to the calculation of final compensation payments;**

51. BEIS has failed to release any details of the principles that are being applied in this category of cases. These cases differ in respect of HSS applications in a number of material respects. In particular employment opportunities, insurance premiums and the ability to rent property are affected by criminal convictions.
52. The Inquiry is urged to require BEIS to provide full details of the principles which will be applied.

**6.The mechanism(s) by which final compensation payments are being calculated;**

53. Again, BEIS has failed to release any information in relation to this issue. The Chair is requested to direct that BEIS provide such information. We submit that one principle which BEIS should adopt is that it will undertake not to seek to claw back any interim payment made to an SPM. We additionally suggest that any disputes should be referred to an independent arbitration within an appropriate arbitration scheme.

**7.The provision (if any) which is being made for applicants to obtain independent legal advice in relation to their claims;**

54. Whereas the principles and mechanisms for determining final compensation for SPMs with quashed convictions have not yet been settled, an interim compensation scheme has been in place since July 2021. That interim scheme, which allows for payments of up to £100,000, makes no provision for independent legal advice.

55. Shortly after the announcement of the interim compensation scheme, Herbert Smith Freehills contacted Howe & Co Solicitors seeking information on the number of persons they represented who might be eligible for the interim compensation scheme. Initial contact was made by telephone and email on 23 July 2021. On the same date, 23 July 2021, Howe & Co Solicitors, emailed Ms Emmanuel of Herbert Smith Freehills materially asking:

*“Could you please let me know what provision is being made for our costs in contacting and assisting our clients in relation to the scheme?”*

56. Herbert Smith Freehills replied on the same date, 23 July 2021 materially advising in relation to legal costs:

*“Successful applicants for interim payments can obviously make use of their interim payments as they think fit but POL is not offering to pay any additional amount for legal costs in contacting clients or applying for interim payments. The application process should be straightforward.*

*By making interim payments available, POL would hope that applicants who wish to engage legal or expert assistance in quantifying their main claims at an early stage will be able to do so. Quantum information is obviously key to ADR which would help facilitate the early disposal of these cases.”*

57. Howe & Co wrote to Herbert Smith Freehills again on 26 July 2021 querying POL’s stance on provision for independent legal assistance:

*“ ..... There are some issues over representation, which will not impact on you or progressing the scheme.....*

*I would ask you to seek your client’s instructions regarding provision for their legal expenses. The suggestion in your email is that they could pay for representation from their compensation, which in the circumstances of these cases would be unacceptable.*

*I admit to real surprise at such parsimony, given the history (including the issue of legal costs in litigation involving the Post Office) of these cases that the Post Office considers it necessary to have legal representation, but feels that wrongly convicted subpostmasters whose lives have been devastated do not. Such a stance is unfair, unreasonable and will undermine any good will that your client hopes to accrue with this scheme. ....”*

58. Herbert Smith Freehills replied on 27 July 2021 advising:

*“..... As regards your question relating to coverage for legal costs, the position remains as per my email of Friday. Our client has volunteered these payments to ensure that deserving applicants receive something meaningful in the immediate term while final compensation arrangements are put in place (which will of course take longer to resolve). The fact and value of the interim payments took into account the fact that postmasters may wish to obtain legal representation and are being made on account, without prejudice to applicants’ rights, including as to any claims for the professional fees they may incur.”*

59. As can be seen, and as with the HSS, the position of POL is that no provision is made for independent legal advice or to instruct experts to assist in making such applications. The position of Herbert Smith Freehills that the interim awards include provision for legal assistance, without quantifying the amounts concerned or setting out the scope of such assistance is somewhat odd

**8.The procedure(s) which are being adopted to resolve disputes about the value of final compensation payments.**

60. No information has been forthcoming from BEIS, apart from the Government’s response (published on 27 April 2022<sup>11</sup>) to Recommendation 5 of the House of Commons Business, Energy and Industrial Strategy Committee. Interim report, in which the Government stated:

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<sup>11</sup> [Post Office and Horizon – Compensation: interim report. Government Response to the Committee’s Eighth Report - Business, Energy and Industrial Strategy Committee \(parliament.uk\)](#)

### *The Settlement Process*

*Each settlement requires an individual negotiation between the legal representatives of the postmaster and of the Post Office. The representatives will need to discuss all the matters in the claim to work out where agreement can be reached. Where it is not possible to reach agreement, the parties may jointly agree to a mediation. Mediation is a flexible, voluntary and confidential form of Alternative Dispute Resolution (ADR), in which a neutral third party assists parties to work towards a negotiated settlement of their dispute. Should it be necessary to move into mediation, the parties will agree on the appointment of a mediator to examine the areas of dispute and work towards a resolution. Independence is achieved by both parties agreeing on the mediator and the process to be followed. The parties retain control of the decision whether or not to settle and on what terms. To date, no negotiations have reached a stage where the parties jointly consider it to be beneficial to have a mediation.*

### *Government's Role*

*The Government has responsibility for providing the funding for settlement payments, agreeing significant decisions in relation to the settlement strategy and monitoring the Post Office's progress towards reaching final settlements. BEIS, supported by UKGI, has been involved in the design of the compensation programme and holds regular monitoring, decision-making and working group meetings, both internally and with the Post Office. This includes sign off on processes, principles and oversight on initial cases. This is to ensure that negotiations are advancing in line with the Government's desire to see timely and fair compensation delivered to postmasters.*

61. The process outlined in BEIS's response to the interim report appears to adopt a different approach to dispute resolution under HSS. We request that the Chair directs that BEIS provides clarification on this point and explains in more detail why no parties have sought to avail themselves of any facility for mediation.

### **C Fair Compensation for the Group Litigation Claimants**

#### **9.The principles which will be applied to the calculation of further compensation payments;**

62. No information has been released by BEIS since the Ministerial statement in March 2022. It is understood that Freeths Solicitors (who conducted the Group Litigation)

will be making submissions to the Inquiry. Such submissions may assist some of our clients and others in understanding how and on what basis discussions are being conducted and the extent to which matters have been or are likely to be resolved.

63. The Chair is requested to direct or otherwise require that BEIS is in a position to provide an update on this matter to the Inquiry.

64. Any monies recovered by SPMs in relation to the returned GLO legal and legal funding expenses will not adequately compensate them for their shortfall and consequential losses and it will be necessary for the scheme to be implemented to account for further remediation. The House of Commons Business, Energy and Industrial Strategy Committee Interim report, dated 17 February 2022 states:

*12..... However, we were told that the group action litigants had to use £46 million of this compensation to pay legal costs, leaving around £20,000 for each litigant, when many would have been due around £700,000 in damages if they were returned to the position they were in before issues became apparent with Horizon.*

65. It is relevant to note that any monies returned to the GLO group will not take account of malicious prosecution in circumstances where prosecutions were brought, which did not result in convictions. Neither will the returned moneys take account of aggravated or exemplary damages.

**10. The mechanism(s) by which further compensation payments will be calculated;**

66. Again, no information has been released by BEIS on this issue. The Chair is requested to require that BEIS provide full details as to the mechanism(s) by which further compensation payments will be calculated.

**11. The provision (if any) which will be made for applicants to obtain independent legal advice in relation to their claims;**

67. If the GLO legal fees monies are returned to the litigants, as stated above, it will be highly unlikely that GLO litigants will achieve fair compensation as the average payment (after the sum requested is divided by 555) will be approximately £57,000 (albeit it seems likely that there will be a high degree of variation given the variation in awards at the time of the initial settlement). In some cases it is likely that the proposed compensation scheme might not even cover the shortfalls paid by SPMs to POL.
68. It is therefore imperative that SPMs receive appropriate legal advice in relation to what are likely, in the majority of cases, to amount to highly complex claims. The sums granted under the HSS (if applied to these categories of claims) would be wholly inadequate for this purpose.
69. The issue of provision for independent legal advice for Group Litigants is a matter that Howe & Co have raised with the Department of Business. Most recently in Howe & Co's letter of 28 March 2022, the following clarification was sought:

*We write following the announcement of a new compensation scheme for those subpostmasters and others who were claimants in the group litigation.*

*We remind you that we do not act for the JFSA, or the group claimants in respect of their litigation. However, the individuals for whom we act (in relation to the Post Office Horizon IT Inquiry) have an interest in, and will be affected by, your recently-announcement compensation scheme. Our clients have read about that scheme with a cautious optimism, but have instructed us to raise two matters with you which are of concern to them and on which they seek clarity from you and your department:*

*1. That the Scheme (be it a distinct scheme or an extension of the existing Historic Shortfall Scheme ('HSS')) will include provision for legal and other professional advice, to assist subpostmasters in accessing the compensation which it provides; and*

2. Where Scheme claimants have been made bankrupt by, or as a result of Horizon and Post Office's actions, what steps you propose to ensure that compensation provided by the scheme is not absorbed or subsumed by trustees in bankruptcy.

*Provision for legal and other professional advice*

*We note that the HSS does not make provision for any legal advice to those seeking to claim from it. Legal assistance will, in some cases, naturally require provision to instruct forensic accountants or other experts. As you will appreciate, applications to the HSS are inherently complex. Claimants are not legal or financial experts. Claimants cannot be expected to navigate a complicated, important and potentially life-changing compensation process without adequate legal advice.*

*Our clients consider that meaningful applications can only be made with the benefit of proper legal representation and advice. Our clients consider that forcing claimants to make applications for compensation without advice risks fundamentally undermining the stated goal of the Scheme, and will leave them once again without adequate or sufficient compensation to reflect their losses.*

*Claims which are comprehensive, properly prepared and sufficiently detailed will not only be significantly quicker to administer, but will result in fewer queries and fewer requests for further information, and fewer appeals for further review. In addition to the clear fairness of claimants having legal advice, there is a practical basis for doing so.*

*Provision for legal advice to a compensation scheme for claimants is not new. As per our previous correspondence, the Lambeth and Windrush compensation schemes, both set up and funded by central government, include provision for professional advice for claimants.*

*The imperative to provide professional advice for claimants in this instance is even more compelling. One of the most egregious injustices faced by our clients were the hurdles they faced in accessing professional advice. Access to that advice and the cost of that advice, is one of Minister's stated motivations for wishing to extend compensation to group claimant subpostmasters.*

*Our clients seek urgent clarification from you that the Scheme will include provision to claimants for accessing legal advice...*

70. A response to that letter (sent by Rob Brightwell Deputy Director, BEIS Response to Post Office Horizon Inquiry) was received on 8 April 2022. That letter materially advised:

*“ ..... LITIGANT SUBPOSTMASTERS’ COMPENSATION*

*Thank you for your letter of 28 March to Minister Scully. I have been asked to reply.*

*We are currently working to develop arrangements for the further compensation for litigants in the Horizon Group Litigation Order case announced by the Minister on 22 March. Your letter raises the issues of provision for professional advice and treatment of bankrupt claimants. These points were already firmly on our agenda, but I am grateful for your thoughts on them, which we will take into account as our work develops.*

*I would be happy to have a further discussion with you once our work has progressed, if you would find that helpful.*

71. Although the matter of provision for independent legal advice and assistance is said to be *“firmly on our agenda”*, no detail has been forthcoming. Given the approach of POL and BEIS in the HSS and interim compensation schemes, those represented by Howe & Co are not confident that there will be provision (or adequate provision) for independent legal advice.
  
72. Our clients urge that this is a matter upon which POL, BEIS and (if appropriate) HM Treasury must make clear statements that are disclosed prior to the scheduled hearings in July 2022, and in good time for core participants to respond.
  
73. The stance by POL/BEIS that it will not provide reasonable access to legal advice and assistance to victims of a scandal is inconsistent with arrangements in other reparation schemes. An example of a current comparator government funded compensation scheme is the Lambeth Children’s Homes Redress scheme, which makes provision for independent legal advice to assist with claims.

**12.The procedure(s) which will be adopted to resolve disputes about the value of further compensation payments.**

74. No details have been provided as to how disputes are to be resolved. As previously stated, a possible solution would be an arbitration scheme, which would provide reliable, independent and timely outcomes. However, any such scheme must contain provision to cover adequate legal funding to representation and disbursements for experts where appropriate. In our submission the hearings in July 2022 must elicit full answers from BEIS and POL on matters which were the subject of enquiries by Howe & Co in correspondence some 8 months ago, and to which substantive replies have not been forthcoming.
75. We would propose referral of any disputes to arbitration as detailed above. The costs of the arbitration should be met by BEIS and there should be provision within the scheme for speedy resolution of claims.
76. We agree with the Chair that it would be inappropriate for POL or Herbert Smith Freehills to administer the proposed scheme or play any role in dispute resolution. We note the position of the Government that is outlined in BEIS' response to Recommendation 11 of the select committee's interim report to the effect that :

*“The Government believes that the Post Office cannot fully move on until it has righted the wrongs of the past and that it is therefore appropriate that the Post Office itself takes responsibility for making amends to the postmasters affected by the Horizon IT issues and that the Government holds it to account for doing so in a fair and consistent manner. The Government agrees that it is also right, for the reasons outlined by the Committee, that the Post Office itself is not the judge and jury in assessment of individual claims.”*

77. Our clients completely reject any notion that the Post Office should remain as the final arbiter in compensating those whose lives it has ruined, so as to enable it to 'move on'. Many SPMs would find such a notion to be offensive. Neither could our clients possibly accept BEIS' subsequent statement that Herbert Smith Freehill's role is 'to assess *claims purely against legal principles and present options for the Panel to consider quantum of compensation*'.

78. The involvement of POL and Herbert Smith Freehills in the administration and determination of awards in any compensation or reparation scheme relating to SPMs would necessarily lead a fair-minded and informed observer to the conclusion that there was a real possibility of bias.

### **Conclusion**

79. We will address the matters raised in these written submissions and any matters arising from responses by other Core Participants and non-Core Participants at the hearings on 6 and 13 July 2022. In the meantime, we would be happy to provide any clarification on the matters raised in this document if requested, or otherwise assist the Inquiry further.

SAM STEIN QC

CHRISTOPHER JACOBS

HOWE & CO

8<sup>th</sup> June 2022