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Post Office Limited

Preliminary note on the future of the Mediation Scheme

1 Introduction

- 1.1** We provided a Report to the Board of Post Office Limited ("**the Post Office**") on 26 March 2014 in respect of legal issues arising in connection with the Post Office and SPMRs' use of the Horizon system.
- 1.2** We are now asked to set out our preliminary views in respect of potential legal and financial exposure for Post Office in connection with, and suggested solutions for the future operation and direction of, the Initial Complaint Review and Mediation Scheme (the "**Scheme**") that was established to resolve complaints made by Subpostmasters ("**SPMRs**") about Horizon.
- 1.3** We have set out our views with reference to the key issues set out in paragraphs 3.1.2 to 3.1.5 of our first Report. When reading this paper, reference should be made to the background, aims, objectives and assumptions outlined in that report. This paper represents our preliminary views. It is subject to further discussion with and comment from the Post Office and as stated below, certain issues may require further analysis. There are choices to be made by the Post Office and the aim of this paper is to inform those choices.

2 The nature and extent of the risks arising from and associated with the Scheme in its current form

- 2.1** The Scheme is a mediation scheme. It is worth at the outset setting out a summary of what mediation is all about and how mediation is intended to work, as a process, in the context of the Scheme.
- 2.2** CEDR is the Centre for Effective Dispute Resolution and the body which, we understand, will be engaged to assist in mediations under the Scheme. The following is taken from the CEDR website:

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."
- 2.3** Mediation is, therefore, a technique for facilitating negotiations with the hope of arriving at an agreed settlement. The only pre-requisites are a dispute and a willingness on the part of the parties to explore the possibility of resolving it through agreement rather than some form of adjudication. Parties can agree to mediate where one party is sure that it owes no legal liability to the other. Sometimes mediation can be highly effective in resolving a dispute where the aggrieved party is essentially interested in securing an apology (which is not something typically available as of right in litigation or arbitration) or where the opportunity mediation provides the aggrieved party to explain their grievance to the independent mediator is, in and of itself, helpful in resolving the issues.
- 2.4** The question addressed in this section of the paper is whether there are risks in and associated with the Scheme. There are such risks and we outline them below. But it should be appreciated that more serious consequences would follow from a finding that

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there really are problems of a systemic nature with the Horizon system. That would not be a risk attached to the Scheme as such: either Horizon is reliable or it is not and, in fact, mediation is the dispute resolution technique least likely to establish the truth as to Horizon. If the work done by Second Sight or others does reveal systemic issues with the Horizon system then those issues present real and serious commercial and legal risks for the Post Office. On the information we have to date, we do not think that that is the case: we have seen nothing to suggest that Horizon is fundamentally flawed.

- 2.5** There are effectively four “risks” inherent in the Scheme, though they are of a very different nature and call for different mitigation. They are:

- 2.5.1** the financial costs associated with the risk of having to meet individual claims;
- 2.5.2** the costs of the applicants and Second Sight;
- 2.5.3** the public relations and reputational issues associated with not settling claims; and
- 2.5.4** the public relations, legal and reputational issues associated with settling claims.

The financial costs associated with claims

- 2.6** Clearly, if the Post Office does conclude in a particular case that it has legal liability to the relevant SPMR and that that liability can sensibly be quantified, it may choose to reach a settlement through the mediation process and pay the SPMR. Having not seen all of the complaints in the Scheme, we cannot yet put a number on either the likely claims which may translate into liability for the Post Office or the sums which may be due. From what we have seen to date, we think that the frequency of successful claims and their value may well be (very) low – certainly lower than the SPMRs and the Justice for Subpostmasters Alliance (“JFSA”) seem to contemplate.

- 2.7** Even if the Post Office concludes that it owes no legal liability to a SPMR in a particular case, it may decide to make ex gratia payments to the SPMR to encourage the swift and final resolution of the complaint (although we do not necessarily suggest the Post Office adopt such a course). We address this further below.

- 2.8** This first “risk” and the extent of it is entirely within the control of the Post Office, insofar as the risk is dealt with within the framework of the Scheme (the outcomes of any adjudicated dispute resolution process, such as arbitration or litigation, are much less within the Post Office’s control). It does not have to agree to settle any claim, nor will it be forced to pay more in settlement than it is advised to, and is comfortable, paying. Mediation will not impose a solution on the Post Office. Moreover, the mediation process may be helpful in enabling SPMRs to understand the fact that they either do not have a claim in law, or that their claim is of less value than they had hoped, although we fear that expectations may have already been raised to unrealistic levels by what has been said in Parliament and in public and in the Scheme documentation.

The costs of the applicants and Second Sight

- 2.9** The costs of the applicants and of Second Sight will need to be borne in accordance with the Scheme Rules.
- 2.10** As to the costs of applicants, the Post Office has indicated it will (and we understand has been paying) up to £1,500 plus VAT towards the applicant’s reasonable costs of a professional adviser assisting them during Second Sight’s investigation of their claim and

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up to £750 plus VAT towards the cost of a professional adviser preparing for and attending a half-day mediation or up to £1,250 plus VAT for a full day mediation. Given the Scheme is closed and the number of applicants now capped, we assume the costs of providing applicants with representation is (worst case) capped at approximately £415,000 plus VAT. Some of those costs have already been incurred so the Post Office will need to consider how much further cost it is prepared to bear, together with the other financial risks associated with the Scheme, in deciding what to do about the Scheme.

- 2.11** We understand that Second Sight have billed over £500,000 [*Post Office to confirm*] for the work they have done to date. There are no agreed written engagement terms with Second Sight. There seems to be no pattern of regular instructions being given to Second Sight to direct its work. There is, therefore, a risk that the costs of Second Sight will continue to increase, in an unpredictable manner and without Second Sight necessarily assisting the Post Office to achieve the Scheme's objectives. This also raises the risk of a dispute arising with Second Sight as to the fees it says it is owed, particularly if the Post Office is unsatisfied with work it has done. In circumstances where it seems to us Second Sight have adopted a favourable disposition towards applicants and the JFSA and have become difficult for the Post Office to manage, such a dispute over fees could also raise reputational risks for the Post Office, if it leads to Second Sight taking an opposing position to the Post Office in public.

The public relations and reputational issues associated with not settling claims

- 2.12** Even if the Post Office concludes that there is no, or no established, legal liability to a particular SPMR there is a risk associated with not settling a claim. This is difficult both to gauge and to manage. It may also vary from case to case. For example, the public and any other reaction to the Post Office declining to pay a SPMR who has been convicted of theft from the Post Office could and perhaps should be quite different to cases not involving any prior judicial determination of criminal (or civil) liability.
- 2.13** Applicants have complained about issues, Second Sight have expressed some views, largely without any evidentiary support for those views having been explained, and recommended that cases are suitable for mediation. There may well be an expectation on the part of SPMRs that this indicates that the claim has some value. The establishment of the Scheme as a whole could doubtless be taken as encouraging the notion that there is a problem with Horizon and that claims could be based on that. However, there need be no expectation that every case will settle. Equally if no, or very few cases, are met with offers of compensation, this is likely to frustrate the expectations of the applicants and the JFSA (and, it seems, Second Sight) and doubtless generate some political and other comment. This is not a question of legal liability on the part of the Post Office but will call for some careful management.
- 2.14** There is always the possibility that applicants who think that they have a strong case may sue if they are not offered a satisfactory settlement. We think that this risk is low. As a practical matter many of the claims are for relatively modest sums (though we note a number of more substantial claims). This has an impact on the economic viability of litigation: the costs risk for a claimant would very often mean that whatever the merits of a claim there was no point in litigating it since the irrecoverable costs would very soon outstrip the value of the claim. Further, an applicant would be advised early on as to the merits of his claim, not least if he wishes to enter into funding arrangements to protect him from the risk of adverse costs orders.

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- 2.15** Similar considerations apply to group litigation or “class actions”. The expected combined value of claims and, on the basis of what we have seen, the weak merits of claims generally, does not, we think, give rise to any significant risk of group litigation being organised or backed by a litigation funder or firm of solicitors. Given the time which has now elapsed since SPMR complaints first came to light, the lack of any group litigation being commenced supports this.
- 2.16** If an applicant does proceed to litigation, the Post Office should give such claims very careful thought and steps can be taken to resolve them at an early stage if appropriate.
- The public relations, legal and reputational issues associated with settling claims
- 2.17** The last paragraphs indicate that there are risks – mostly reputational rather than legal – associated with not settling large numbers of claims. There is a counterbalancing factor: settling large numbers of claims where there is no clear legal liability involved also entails risk. There are two issues to consider:
- 2.17.1** the reaction of stakeholders to the payment of compensation to SPMRs where there is no legal liability to do so; and
- 2.17.2** the effects of such payments on the criminal convictions secured to date and sought in the future.
- 2.18** We have already outlined the situations in which the Post Office is likely to be under a legal liability to SPMRs. Payment of appropriate compensation in cases of legal liability should not be problematic. But making payments where there is no liability to do so may well attract criticism from stakeholders. We would include in this the vast majority of SPMRs who have paid losses to the Post Office in the past, seemingly without complaint. There may also be a question for the future as to whether the Post Office will find it as easy to recover relatively modest losses which SPMRs may have been accustomed to settling without dispute.
- 2.19** In the context of any claim, a defendant can take the view that a “nuisance value” payment may make sound economic and business sense. If it resolves a claim and avoids further cost then, even if the defendant is sure that he has no legal liability to pay it, he may decide it is worth paying a modest sum. But in the present context there are two points: first the Post Office will wish to keep in mind the likely precedent value of any such payment. Secondly, nuisance value payments are typically modest. Substantial payments would be harder to justify. But modest payments may, in the context of the amounts claimed by some applicants, be seen as “insulting” and ineffective in fully and finally resolving complaints.
- 2.20** It is also important to bear in mind the likely impact of payments of compensation on the criminal convictions secured to date. We say this not only in cases in which the Post Office has in fact secured a conviction and the person so convicted is now seeking compensation. It is also a point in relation to all convictions obtained so far and potentially to be obtained in the future.
- 2.21** If the Post Office pays compensation to those whom it has already prosecuted and convicted of relevant offences (in other words, the conviction is closely linked to the matters of which the SPMR now complains) it could be seen as constituting doubt in the Post Office's eyes as to whether there was further information casting doubt on the conviction. Why, it might be asked, would the Post Office otherwise be paying

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compensation? The Post Office, as a private prosecutor, has a duty of post-conviction disclosure. If it discovers further information which casts doubt on the conviction then it should disclose it, not only to the SPMR to whom it is paying compensation but to all others who could have been affected by the same facts. If the "further information" is as fundamental as the accuracy and reliability of Horizon itself, then potentially each and every prosecution to date and all in the future where Horizon featured as part of the evidence would be called into question. Clearly, if the Post Office does have such information, it must disclose it in accordance with its duties. However, if it does not, it may well be thought to be very unhelpful to give an impression which may be misinterpreted – namely that such information is available and has prompted a decision to pay compensation.

- 2.22** We have commented above that there is a risk in settling claims and an opposing risk which would arise if no or very few claims were settled. There is also an over-arching point in this respect: consistency of approach, whatever that approach may be, is likely to be important to all concerned. This is exacerbated in light of the lack of clearly stated and properly applied principles for recommendations to mediate and conclusions in relation to Horizon.

3 Whether and to what extent the Scheme, as currently structured, can be sensibly modified in order to improve the efficiency and effectiveness of its operation, and mitigate any of the risks identified above

- 3.1** The Scheme has closed to new entrants. The size of the class of applicants entitled to participate is now known to be [137] **[Post Office to confirm]** cases. We make no suggestions at this stage as to the need for, or shape of, any further Scheme.
- 3.2** It is worth noting what entry into the Scheme means and does not mean. The Scheme Overview states that eligibility for the Scheme is based on two criteria: first, a case must relate to a financial loss or unfair treatment that the SPMR believes he or she has suffered as a result of Horizon and secondly, the applicant must have previously raised their case with the Post Office and exhausted all existing internal complaint processes. The Scheme permits cases which have previously been settled with the Post Office. SPMRs have been told that if their case is suitable and they have provided accurate information, then it is likely that their case will go to mediation. It is not clear to us on what basis Second Sight determine whether a case is suitable.
- 3.3** The options which we have considered for the modification of the current Scheme include the following:
- 3.3.1** closing the Scheme altogether and declining to mediate any cases;
 - 3.3.2** clarifying that no case in which there is a criminal conviction or civil judgment is suitable for the Scheme/clarifying the Post Office's position in relation to such claims;
 - 3.3.3** formalising and revising the terms on which Second Sight are appointed;
 - 3.3.4** terminating Second Sight's appointment;
 - 3.3.5** clarifying the position of the Post Office independently of the facts of any individual claim including the production of a full and objective report on Horizon;

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- 3.3.6 formulating criteria by reference to which "standard" compensation would be paid to applicants irrespective of the legal merit of their claims; and
- 3.3.7 reviewing the basis on which the Working Group operates and putting the Post Office in greater control of the Working Group.

Closing the Scheme altogether and declining to mediate any cases

- 3.4 The first question is whether the Post Office could, legally, simply close the Scheme altogether, not simply to new applicants, but in its entirety. No cases (or further cases) would then be mediated. We think that the Post Office could do this but that a) the reputational risks involved in doing so would likely outweigh any potential upside and b) there may be a risk of judicial review actions being brought based on a legitimate expectation that cases would be dealt with in the Scheme or a dispute resolution process similar to it, in which the possibility of mediation remains open.
- 3.5 No case has yet proceeded to mediation. In a number of cases, Second Sight has expressed the view that the cases are suitable for mediation. The Post Office could decide not to mediate any further cases. We understand a contract will only be entered into with each applicant when they agree to mediate and the Post Office agrees to mediate with them. Prior to that there is no contract.
- 3.6 It could be said that the Post Office had encouraged applicants to think that their cases would be dealt with in the Scheme or a process similar to it and mediated, if suitable, and many will have spent time and money in reliance on that and foregone the opportunity (at least for the time being) of seeking other means of redress. There may be a risk of challenge by way of judicial review (an issue which could affect any further actions in relation to the Scheme). We comment further on this issue in paragraphs 4.4.2 and 5.3-5.4 below. We think however, at least for all practical purposes, it would not be acceptable to refuse to mediate any further cases. The Post Office has said that it is instituting the Scheme for good reason and this may lead to significant reputational damage which the Post Office cannot countenance if it decides to abandon the Scheme altogether and not mediate cases. If it is not going as planned, then the answer must be to fix the Scheme rather than to abandon it completely.

Clarifying that no case in which there is a criminal conviction or civil judgment is suitable for the Scheme/clarifying the Post Office's position in relation to such claims

- 3.7 This would go some way to moderating expectations and also reducing the number of claims which would potentially be recommended for mediation, so reducing costs.
- 3.8 It might be said that if this was the line the Post Office was going to take the claims should not have been let into the Scheme in the first place but we think the risks of carrying on with them outweigh such an accusation or any risk associated with it.

Formalising and revising the terms on which Second Sight are appointed

- 3.9 Second Sight have not signed their terms of engagement. This position needs to be regularised urgently. Second Sight should be working under a contract to which all parties have agreed, not least so as better to manage the scope and timeliness of the services they are providing and their fees.
- 3.10 Our impression, from the few cases we have examined to date, is that the process for assessing mediation cases is not clear, does not seem to be guided by legal advice as to

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the likely merits of the case and does not take into account conclusions supported by evidence as to the facts. We are unclear as to whether and how Second Sight are equipped to carry out this task. This could well lead to too many cases being referred to mediation in the sense that encouragement is given to applicants to think that their claims have both merit and financial value when in fact neither may be true. The converse might also apply – SPMRs being given unfairly pessimistic views about their claims – but on what we have seen Second Sight are far more likely to favour the SPMR's position. We think that it would be helpful were Second Sight to be given much clearer guidance as to these issues – which should probably come from the Working Group as a whole. Perhaps the Chairman could be persuaded to take on this issue for the benefit of all parties.

- 3.11** It would also be sensible to review the terms on which Second Sight are appointed and considering whether any improvements can be made.
- 3.12** Even without such formal contractual improvements, Second Sight are currently working without direction from any party. This is sub-optimal. Directions which could be given to Second Sight include:
 - 3.12.1** asking for details of Second Sight's experience and expertise relevant to the work they are currently doing, the aim would be to see where their work might usefully be supplemented;
 - 3.12.2** clarifying what work Second Sight have done to understand and comment on Horizon irrespective of the complaints made in any one case;
 - 3.12.3** requiring the production of a report addressing the operation of Horizon, although this may be better undertaken by another party (as we outline below); and
 - 3.12.4** requesting clarification and amplification of the basis for conclusions reached to date. For example, the letter we drafted and proposed be sent to Second Sight in respect of the case of Jane Brewer (M014).

Terminating Second Sight's appointment

- 3.13** The Post Office could, instead, terminate Second Sight's appointment in relation to the Scheme. It is not obliged to see the exercise through if it thinks that it is not proceeding in an acceptable fashion. Indeed, it could be said that the Post Office has no choice as to this matter if it thinks that Second Sight lacks the skills required for the job, is under-resourced or is not carrying out its duties as it should and/or acting in accordance with the Post Office's instructions where relevant. Second Sight's views are likely to be influential for all parties – indeed that was the expectation behind their appointment. It is important that everyone has confidence in them.
- 3.14** Despite the fact that there are no terms of engagement in place with Second Sight, they would be entitled to payment at a reasonable rate for work already done. As we have mentioned, a termination of the arrangement might prompt a dispute over fees unless the Post Office was prepared to make a termination payment which satisfied Second Sight.
- 3.15** In fact, the clear impression which we have been given is that Second Sight are very "pro-applicant." Whether this stance has prompted the lack of rigour with which they have approached their work or whether that would have happened anyway is hard to say. But it is not hard to conclude that the JFSA think that they have support from Second Sight. This means that terminating Second Sight is likely to be seen as a move which is antagonistic

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on the part of the Post Office and will work against the interests of the SPMRs. It will be said that the Post Office simply dislikes the conclusions reached and is not prepared to do what it needs to in order to face the consequences. A response to that would call for open criticism of Second Sight which is likely to inflame matters further. It is a decision for the Post Office but we think it is not unlikely that the conclusion would be reached that terminating Second Sight is not a realistic option.

Clarifying the position of the Post Office independently of the facts of any individual claim including the production of a full and objective report on Horizon

- 3.16** This option would allow the Post Office to make up some of the ground which has currently been lost through the work of Second Sight.
- 3.17** It would, of course, have costs consequences. Engaging properly resourced and competent forensic accountants (probably from one of the "big four" accountancy firms) would mean that the Post Office was in a sense paying twice. But it would result, properly directed, in a report which could be used as a counter to Second Sight, to the extent that that was needed, and as a baseline for consideration of individual claims. It might also be useful in the context of further civil litigation. We have outlined what we think such a report might entail in our note dated 28 March 2014.
- 3.18** Some of the criticism which would come from the termination of Second Sight might apply here too, in that a report which concludes that there are no problems with Horizon could serve to justify the termination of Second Sight's appointment and counter any such criticism.

Formulating criteria by reference to which "standard" compensation would be paid to applicants irrespective of the legal merit of their claims

- 3.19** The facts of individual cases are hard to establish, particularly given the passage of time and the lack of documentary evidence. It would be possible to categorise applicants such that particular features of their case would attract standard payments. These would be ex gratia, would not require the applicant to prove their case, simply that their case had particular features which would meet previously stated conditions. Compensation schemes have been set up along such lines and can work very successfully.
- 3.20** The difficulties here are that it is only a very small subset of those SPMRs who have used Horizon and presumably paid losses who have now complained. But if everyone who has complained receives some form of payment the Post Office may well feel that it has to extend the Scheme to all those who have – ever – paid losses calculated by reference to Horizon. Why should the fact of complaint under the Scheme put a SPMR in a better position? If these are ex gratia payments - i.e. not based in any way on legal entitlement - then the SPMRs who have simply accepted and paid losses are likely to feel very aggrieved. Moreover, as we mention above, the sums which the Post Office is likely to feel comfortable paying as ex gratia payments are likely to be small. Claims are being made for larger and larger sums and those applicants are unlikely to be happy with substantially less than their claims.

Reviewing the basis on which the Working Group operates and putting the Post Office in greater control of the Working Group

- 3.21** The Working Group is not a legal entity in itself but it has an important role in the context of the Scheme. There seem to be no clear and agreed Terms of Reference yet. Decisions of

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the Working Group seem not to be binding on the Post Office, although some aspects of the draft Terms of Reference we have seen suggest they are intended to be. It is difficult to see, however, as a legal matter how they could be binding.

- 3.22** Also, there seems to be a lack of control over the Working Group's decision-making process for the Post Office. There have already been several meetings and decisions taken, so there may be an expectation that the Working Group will (and in fairness to cases it has already overseen, must) carry on as it has done to date, regardless of what the current draft of concluded Terms of Reference might say.
- 3.23** As with Second Sight, we suggest finalising the Terms of Reference as soon as possible. The terms should clearly define the Working Group's role as a whole and that of its component parts. Consistent with the notion that the Post Office is not bound to mediate cases or, indeed, carry on with the Scheme at all, the terms should clearly indicate that decisions of the Working Group are not binding. A sensible regime should be implemented for resolving deadlocked decisions which is not likely always to result in unfavourable outcomes for the Post Office.

Where to next

- 3.24** In deciding what to do next, including which if any of the suggestions above it adopts, it is important that the Post Office clarify what its key objectives are in respect of the Scheme and SPMRs' concerns about Horizon. In this regard, we suggest attention turn back to the questions posed in section 3.3 of our first Report. In particular, what Post Office does next very much depends on the answers to these questions:
- 3.24.1** how much more costs does the Post Office wish to incur to run the Scheme (or any alternative or modified form of it) and resolve the issues with Horizon raised by SPMRs?
- 3.24.2** Is the Post Office more concerned about its overall public reputation, its relations with HMG and MPs or its ongoing relationships with all SPMRs?
- 3.24.3** In dealing with applicants, does the Post Office wish to take a more or less conciliatory approach?
- 3.24.4** In respect of providing redress to Applicants, does the Post Office wish:
- (i) to compensate all applicants in accordance with their claim regardless of the nature of their complaint, simply to "make the problem go away" (assuming it would have that affect)?
 - (ii) to compensate all applicants on a more limited basis by reference to objective criteria?
 - (iii) not to provide monetary compensation at all and seek to address SPMRs' concerns in other ways, such as by way of apology, additional training, upgraded hardware etc.?
 - (iv) to take a harder line and not provide redress of any kind?
- 3.24.5** Does the Post Office wish to get to the bottom of the alleged "problems" with Horizon or only to the extent necessary to satisfactorily resolve the complaints in the Scheme, if that?

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- 3.24.6 Does the Post Office think there will always be a proportion of SPMRs dissatisfied with Horizon, any replacement for it and other systems or services provided by the Post Office to SPMRs so there is little point in taking a holistic approach to resolving issues with Horizon or seeking fully to satisfy all applicants in this case?
- 3.25 Plainly, the answers to the questions above may well not sit neatly together but a balance inevitably has to be struck. Such balance primarily depends on the relative importance of each of those answers to the Post Office, in light of our view that the Post Office generally has a strong legal position in respect of loss recovery, many of the complaints we have seen appear to lack legal merit and the Post Office is probably not legally bound to carry on with the Scheme in its current form.
- 4 The nature of any dispute resolution (or similar) mechanisms that could be established either in order to replace the Scheme or augment its operation. In particular, whether adjudication, arbitration and the use of ombudsman services might be more appropriate than the Scheme**
- 4.1 The outcome of any one dispute resolution mechanism can never be known with any certainty nor is it likely to be a “silver bullet” in any particular case, but especially when implemented on a broader scale. Each mechanism will have its own advantages and disadvantages, particularly in circumstances, such as the present, where the nature of complaints vary (amongst other things) as to:
- 4.1.1 their subject matter;
 - 4.1.2 the time at which the conduct the subject of the complaints occurred;
 - 4.1.3 their monetary value; and
 - 4.1.4 the quality of evidence available and ability or likelihood of cases being made out to any reasonable standard.
- 4.2 Further, we concluded in our first Report that the Post Office has a sound legal basis for carrying out and defending loss recovery and that many of the claims in the Scheme are likely to be over-ambitious and difficult to prove. In those circumstances, there seems to us limited merit in adopting a dispute resolution mechanism better suited for resolving complex factual and legal issues, to resolve complaints in the Scheme in all cases. That would, in effect, be akin to using an unwieldy and expensive “hammer” to crack many small “nuts”.
- 4.3 There may well be issues, some the same, some different, to those presently encountered with the Scheme, in imposing on or agreeing with the applicants an alternative dispute resolution mechanism. That does not rule out, however, the viability of using alternative mechanisms in particular cases. In short, a “one size fits all” approach may inevitably leave all parties concerned dissatisfied with the outcome.
- 4.4 As we say above, abandoning the Scheme altogether does not seem feasible. In particular, doing so:
- 4.4.1 will waste costs incurred to date by the Post Office;
 - 4.4.2 may give rise to a risk of judicial review claims over the disappointment of legitimate expectations raised on the part of applicants that their complaints would

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be processed fully through the Scheme or something similar to it (we elaborate on this risk further below);

4.4.3 may lead to the commencement of some litigation in substitution for applications in the Scheme (whether or not they have merit, but particularly those in which the claims at stake are more significant) and at least further legal costs in that regard;

4.4.4 will likely anger various interested parties further and therefore not address any long term issues between them and the Post Office over Horizon; and

4.4.5 may lead to criticism of the Post Office for changing course.

4.5 Therefore, it seems to us that any consideration of possible alternative dispute resolution mechanisms should be limited to them being applied in limited, particular cases where appropriate. Each of them could be adopted by agreement with an applicant where it appears that mediation is unlikely to resolve the dispute or achieve a satisfactory outcome e.g. because of the amount being claimed and/or the complexity of the factual and legal (if any) issues involved. We outline the following alternative dispute resolution mechanisms and whether and how in the present context they could be appropriately deployed.

4.5.1 Adjudication – this mechanism involves the appointment of a third party expert to whom the parties put their respective cases in writing and/or orally. The terms of reference would be agreed and this could include making the adjudicator's decision final and binding. This is usually a more costly and time consuming process than, say, mediation, but less so than arbitration or litigation. It comes with the risk that the expert will not decide the case in a predictable or reasoned way sufficient to satisfy the parties that an acceptable degree of rigour has been applied to the matter. It is better suited to more complex factual questions where some degree of expertise is needed. The process and outcome can be kept confidential. In short, it would allow the Post Office to apply a degree of rigour to any more factually substantial or complex cases and may achieve resolutions where mediation cannot, because it should involve the application of reasoned analysis to the claim by a respected, independent third party. There may be a few cases in the Scheme where this would be appropriate, mediation having first failed.

4.5.2 Arbitration – this is closer to a court-based process than adjudication or mediation, in that one or three appointed arbitrators, at least one of which has a legal background, come to a reasoned and usually binding decision on the facts, having applied any relevant legal principles and followed certain procedures similar to those used in court, i.e. the filing of written and oral evidence which is subject to cross examination and which can be preceded by the exchange of potentially relevant documents by the parties. The process and outcome is usually confidential. It is a much more costly, time-consuming and lengthy exercise than mediation. However, it comes with the greater likelihood of rigour being applied to the facts and the “legally correct” outcome being achieved, to the extent that is important to the Post Office, and litigation, which is not confidential, being avoided. It is plainly ill-suited to all or most of the complaints in the Scheme given the limited legal basis in the complaints we have seen, its cost and the time needed to reach a conclusion. However, there may be a very limited number of cases, particularly those in which the most substantial compensation is sought and where there is material doubt over the facts and legal issues, which the Post Office might consider could appropriately be dealt with by way of arbitration, if mediation has failed.

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- 4.5.3 Financial Ombudsman Service – it does not appear to us that complaints made in respect of Horizon by SPMRs fall within the scope of the Financial Ombudsman Service's complaints-handling jurisdiction, as the SPMRs should not be seen as "eligible complainants".

5 In the event that a decision is made by the Board to discontinue the Scheme, what steps the Post Office could take to minimise any existing legal risks

- 5.1 As we say above, discontinuing the Scheme altogether and refusing to mediate any cases may not be practically feasible or ultimately the best approach for the Post Office to take. However, if it decides to take that course, there are certain matters to bear in mind and steps that can be taken to minimise the impact.
- 5.2 First, it should be realised that the underlying legal merit of complaints in the Scheme is unaffected by the Scheme itself and whether it continues. Either the Post Office has liability in that regard or it does not. Discontinuing the Scheme will make no difference to that. It may in fact decrease the likelihood of the Post Office having to pay compensation or excessive compensation because the Post Office would then no longer be tied to a process in respect of which there is an expectation and consequent pressure to pay compensation, even when it is not legally obliged to do so.
- 5.3 As we say above, based on our preliminary views, there may be a risk that discontinuing the Scheme could lead to the commencement of judicial review actions against the Post Office by aggrieved applicants or a group of them (or the JFSA). Any risk the Post Office has in that regard could be mitigated by ensuring there is a viable, alternative dispute resolution process in place. If the Post Office offers applicants something different which still genuinely aims to address their concerns, then it would be more difficult for them to argue that their legitimate expectations – that their complaints would be handled and considered fairly in a process in which they had a genuine chance of having their claim mediated and compensation paid – have not been substantially met. Flatly refusing to mediate any claims or otherwise engage with applicants about their claim would plainly heighten that risk.
- 5.4 An application for judicial review would be an unwelcome development regardless of the outcome and would result in adverse publicity. The question of whether and in what circumstances the decisions of the Post Office in relation to its relationship with SPMRs within the Scheme could be susceptible to judicial review is a complex one calling, we think, for specialist advice. We would recommend obtaining the opinion of a QC whose practice focuses on this area both for an assessment of the risks of judicial review and for thoughts as to how they may best be mitigated.
- 5.5 Ensuring there is some viable alternative process in place if and when the Scheme is discontinued also reduces the risk that disaffected applicants, particularly those seeking substantial compensation, may resort to litigation seeking compensation. Even if their claims have limited legal merit, they may nonetheless commence proceedings as a negotiation tactic to pressure the Post Office into paying more generous compensation than they might otherwise have done, if the Post Office would have paid any at all. This would be a risky tactic on the part of the SPMR in cases where their claim has limited if any legal merit but not one which we can altogether rule out. Having seen only a small sample of complaints, it is difficult to say how many such cases there could be or indeed,

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whether any such SPMRs are in a position to take such a risk, although it would probably not be many.

- 5.6** We understand that one of the options the Post Office has considered as an alternative to mediating complaints in the Scheme is making ex gratia payments to all applicants. We have identified the potential problems with such an approach above. However, if this course is taken, payments should be maximised to match or come close to matching as many compensation claims as the Post Office's budgetary constraints allow. If the payments do not cover amounts claimed in even the smallest cases, they are unlikely to please many, if any, applicants. There will almost certainly be applicants who are dissatisfied in any event by an ex gratia payment because they will not receive compensation of the order they may be expecting (whether reasonably or not) or because they feel unfairly treated by not having their claim fully considered and mediated and their case heard. But at least those who do not seek compensation or whose claims are small would more likely be satisfied, which may be worth the cost.
- 5.7** As we say above, SPMRs who are not applicants to the Scheme may feel aggrieved by not receiving an ex gratia payment when many applicants will have no legal basis for receiving it.
- 5.8** If the Scheme is terminated, then Second Sight should be paid what they say they are owed (within reasonable bounds) to seek to prevent them becoming hostile and, potentially, commencing an action for alleged unpaid fees. Such a claim may lead to further adverse publicity and provide another forum for criticism of the Post Office in the context of Horizon and the Scheme. If possible (we appreciate it may not be), it may be worth, when terminating Second Sight's engagement and paying their fees, seeking their agreement to a term (which we understand has been sought in the current draft terms) designed to limit their further involvement with SPMR complaints about Horizon.
- 5.9** Whatever steps the Post Office were to take subsequent to discontinuing the Scheme, we suggest that they be clearly and consistently communicated to all stakeholders. While it is obviously important not to communicate with applicants and SPMRs in such a way as to inflame matters further, giving assurances and setting expectations which the Post Office is not in a position to meet or sending unclear messages which are liable to and do change materially, may once again in due course raise similar reputational and, potentially, legal issues for the Post Office, as those which are currently cause for concern. The Post Office should also ensure that it maintains control to the extent possible over whatever it might propose as an alternative to the Scheme e.g. at the outset, agreeing terms of engagement with or setting out clear operating guidelines for all third parties.

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