

POST OFFICE LIMITED
(Company Number 2154540)

Meeting of the SPARROW SUB-COMMITTEE
to be held from 12.30 – 13.30 on 12 January 2015 in the Boardroom (Room 501),
148 Old Street, London, EC1V 9HQ

Members of the Sparrow Sub-Committee (the 'Committee') will be asked to declare any interest that could give rise to conflict in relation to any item on the agenda at the beginning of the item in question. All interests so disclosed will be recorded in the minutes of the Committee. If the Chairman of the meeting deems it appropriate, the member shall absent himself or herself from all or part of the Committee's discussion of the matter.

12.30 1 Initial Complaint Review and Mediation Scheme

13.30 **CLOSE**

PRESENT: Alice Perkins (Chair)
Richard Callard
Alasdair Marnoch
Paula Vennells
Chris Aujard

SECRETARY: Alwen Lyons

IN ATTENDANCE: Belinda Crowe
Mark Davies

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POST OFFICE LTD BOARD SUB COMMITTEE

Initial Complaint Review and Mediation Scheme

1. Purpose

The purpose of this paper is to:

- 1.1. provide the Committee with an update on Scheme progress; and
- 1.2. seek the agreement of the Committee to the course of action set out at paragraph 8 below.

2. Case progress and investigation findings

- 2.1. **Annex 1** sets out the detail about case progress and investigation findings. To date we have found no evidence, nor has any been advanced by either an Applicant or Second Sight of either faults with the Horizon system or unsafe convictions (on the latter point, every case investigated has been scrutinised by our external criminal lawyers), and no convictions have been appealed.

3. General progress/issues

- 3.1. Since last summer Post Office has followed the strategy, agreed with the Board, of operating within the Working Group Terms of Reference whilst taking a less submissive approach. This has, not unexpectedly, resulted in a concerted attempt by JFSA to apply pressure to Post Office to mediate all cases where Second Sight so recommend. Having failed to persuade the Chair of the Working Group that Second Sight alone should determine whether a case should be submitted for mediation, JFSA has enlisted the support of MPs and the media in an attempt to pressurise Post Office into mediating all cases.
- 3.2. The General Counsel and Communications and Corporate Affairs Director have provided regular, ad hoc updates for the Board on significant developments over recent weeks, but in summary:
 - i. Following discussions and written exchanges with Post Office, James Arbuthnot MP issued a press release and open letter to the CEO withdrawing his support, along with purportedly 140 other MPs, for the Scheme having lost faith in Post Office and its commitment to the Scheme (although the evidence suggests only a small number of MPs are actively speaking out against Post Office). The primary reason was Post Office's refusal to commit to mediate all cases where Second Sight recommends mediation. This sparked a limited degree of media interest which was anticipated and managed so that it did not generate widespread coverage or materially impact on business as usual activities. A full analysis of the PR position is at **Annex 2**.
 - ii. JFSA has engaged Edwin Coe LPP to explore legal options should the Scheme not resolve Applicants' complaints. Alan Bates, following an email from the General Counsel, subsequently confirmed JFSA's continuing commitment to the Scheme despite exploring legal options describing its position as 'hoping for the best but planning for the worst'.
- 3.3. The BBC's "The One Show" featured Post Office and the Scheme for two consecutive weeks in what was a clearly co-ordinated JFSA/James Arbuthnot

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inspired media campaign. In addition, James Arbuthnot secured a Westminster Hall adjournment debate about the Scheme and Post Office's alleged lack of commitment to it (and therefore resolving Applicants' complaints). The debate was attended by around 20 MPs, 14 of whom spoke, and received little media coverage other than The One Show.

- 3.4. There were a number of elements to the media and MPs' accusations about Post Office. However, the main allegations now appear to centre on allegations of "miscarriages of justice", accusations about the "unfairness" of the Subpostmaster contract (the statement made in Parliament - without foundation but apparently based on a comment from Second Sight – was that "a person would have to be an economic and legal illiterate to be willing to sign it, because it is so slanted in favour of the Post Office") and bad faith by Post Office and its Board. A summary of the legal advice provided to Post Office on the Subpostmaster contract is at **Annex 3**.

4. Analysis

- 4.1. Whilst Post Office is being accused of bad faith, the evidence suggests the opposite is true and that it is others involved in the Scheme who have acted in bad faith.
- 4.2. Post Office, in its role as Secretariat, has administered the Scheme efficiently and fairly and, as a party in each dispute, has acted in good faith, abiding by the obligations of confidentiality which binds all parties involved in the Working Group. Despite incurring direct financial costs to date of c£5m, and diverting resources away from Post Office's strategic priorities, the Scheme appears still not to have met the expectations of relevant stakeholders, or to have drawn a line under this issue in a way which might enable Post Office and Applicants to move forward.
- 4.3. This is not because of poor execution or lack of positive effort on the part of Post Office, but is instead reflective of the erroneous assumption which underpins the approach of Applicants and their supporters – that is, that Post Office is responsible, if not through Horizon then in other ways, for the difficulties they have experienced and/or the losses they have incurred. This has been exacerbated by the inappropriate and unjustified raising of expectations by Applicants' professional advisers, JFSA and MPs over what the Scheme can, and in their minds should, deliver in terms of significant compensation payments and/or Post Office support in efforts to have criminal convictions overturned.
- 4.4. Post Office brand has, in the process, sustained a degree of reputational damage. Even if the net volume of media interest has remained relatively low, negative public perception around this issue now exists and could, if left unchecked, have a negative commercial impact. Even in circumstances where Post Office might be free of its obligations of confidentiality and in a position to share more balanced factual information about the Scheme and the cases in it, the lazy but media-friendly David and Goliath characterisation of this story would likely retain much of its appeal, particularly for the small number of journalists who have focused attention, and their reputations, on insisting that there is a conspiracy at work against those in the Scheme.
- 4.5. Against this backdrop, it would be easy to forget that some real positives have emerged from this exercise.
- 4.6. Now all cases in the Scheme have been comprehensively re-investigated, Post Office can be satisfied that the real basis of the Applicants' complaints is not the

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reliability of the Horizon platform, but the Applicants' dissatisfaction with how Post Office engaged with them in their specific case. Further, there is still no evidence whatever of a systemic flaw in the Horizon system, which is critical to Post Office's entire operation across the network.

- 4.7. Moreover, the investigations have only identified a small number of cases in which Post Office could have done more to support individual Applicants (whether by being more timely in providing additional training, in responding to enquiries, or through other interventions), and even these do not suggest that Post Office acted unlawfully/outside of its legal rights. The investigations, and Post Office's responses to them, could therefore be used to paint a largely favourable picture of Post Office's commitment to properly engaging with the individuals running its network.

5. Challenges

- 5.1. As well as the challenges identified in the analysis above, the Working Group is not, in our view, operating in a way which supports the effective resolution of complaints because of the behaviour of its membership. Specifically:

- JFSA has:
 - sought to broaden the scope of the Scheme (notably to include the Subpostmaster contract), actively solicited media interest and mounted a political campaign to bring further pressure to bear on Post Office to change tack.
 - instructed a firm of solicitors, Edwin Coe LLP, to raise the temperature still further while ostensibly maintaining support for the Scheme. It appears that this support is conditional on the Scheme producing the results JFSA favours, results which the available evidence simply does not support.
 - declined to participate meaningfully in the business of the Working Group.
- Second Sight:
 - has not displayed the degree of impartiality Post Office would expect from independent advisers to the Working Group.
 - has recommended almost all cases for mediation, offering little evidence to support their recommendations other than concluding that mediation might offer the parties 'closure'.
 - are continuing to attempt to broaden the remit of the Scheme: most recently through a lengthy list of questions for Post Office to inform a further draft of their "Part Two" briefing report. This is an approach which closely reflects the wishes of JFSA and MPs.

- 5.2. Having been developed with the aim of attempting to resolve individual complaints about Horizon and associated issues, it seems clear that key stakeholders are now seeking to distort the Scheme to an extent which Post Office cannot tolerate. The evidence from recent events suggests that the Scheme will continue to be labelled as a sham by JFSA and MPs unless it produces a conclusion that Post Office (whether through Horizon or otherwise) is responsible for the difficulties and losses of Applicants and for wrongful convictions.

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- 5.3. In addition, the explicit threat of litigation now requires Post Office to consider whether disclosure of any further information should be undertaken in accordance with the Court's prescriptive rules, as opposed to the current voluntary, open basis in connection with an alternative dispute resolution scheme. This would be a fundamental departure from the existing Scheme arrangements.
- 5.4. As noted in previous advice, although Post Office would be seen by the man on the Clapham omnibus to have acted in good faith, it is clear that there will remain a small but vocal core of detractors who will not be persuaded.

6. Conclusion

- 6.1. In the circumstances set out in this paper, it is now difficult to see how the Scheme can achieve its objectives and properly function on its current path. Indeed Post Office now has the opportunity to alter the Scheme to something more realistic and proportionate to the issues raised in the complaints. What follows is a proposal and rationale for next steps.
- 6.2. An attempt to maintain the status quo will entail, inter alia:
- i. the continuation of a process conducted in the public eye, with every unpopular decision of Post Office being questioned and/or challenged in the media and in Parliament, with obligations of confidentiality preventing Post Office from making any sort of effective rebuttal;
 - ii. the completion by Second Sight, likely to coincide with the run-up to the General Election, of their final Part Two report which, judging from their approach to date and the questions they have put to Post Office to inform its content, is near certain to place further unsubstantiated 'charges' at Post Office's door and broaden, quite unjustifiably, the lines of enquiry it will be expected to address;
 - iii. a substantial risk of increased scrutiny in Parliament, perhaps through the Business, Innovation and Skills Select Committee, bringing with it an inevitable increase in the involvement and concern of Ministers in respect of this issue, when we need the focus on other matters of commercial importance to Post Office;
 - iv. a lengthy process given that there remain around 100 cases in the Scheme, the process of moving cases through the Working Group, attempting to challenge recommendations of mediation by Second Sight no matter how unjustified and scheduling and conducting mediations is certain to take much of 2015;
 - v. pressure to allow new cases in to the Scheme, some of which are likely to be entirely opportunistic (there is already evidence of this happening);
 - vi. poor results in terms of public perception since mediation can only resolve those complaints in which the Applicant has both a legitimate claim and is prepared to settle on reasonable terms. There are few such cases in the Scheme with many including excessive and unrealistic claims for consequential loss which limits the likelihood of a resolution. Post Office will be accused of bad faith in respect of each 'failure' to reach a resolution which is satisfactory from an Applicant's point of view (and/or that of JFSA and the MPs). Post Office will not be able to respond to these accusations while respecting confidentiality; and

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- vii. no meaningful reduction in the risk that Applicants, individually or as a group, will resort to litigation to pursue their claims against Post Office.

7. A way forward

- 7.1. January brings a number of important dates and activities in relation to the Scheme. We are taking a number of steps to mitigate the recent activities of JFSA and the media including:
 - i. providing a robust response to allegations in the media including writing to BBC lawyers where appropriate and engaging at senior levels with programme editors;
 - ii. writing to individual MPs who participated in the Westminster Hall debate to offer a meeting to discuss their, constituent's cases, with consent and generally discuss the Post Office position; and
 - iii. compiling a 'dossier' addressing the general accusations made against Post Office in the Westminster Hall debate which the Minister can be invited to table in Parliament.
- 7.2. Post Office responded to Second Sight's questions to inform their Part Two report on 7 January 2015, to be followed by a meeting on 9 January 2015 with relevant Post Office staff to discuss the issues raised in more detail. We plan to decline to respond to around a third of their 110 questions/requests for information as they are either out of scope of the Scheme or disproportionately wide 'fishing' requests with no direct reference to complaints in the Scheme.
- 7.3. The Scheme Working Group meets on 14 January 2015. This provides Post Office with an opportunity to make a final attempt to get the Scheme 'back on track' by seeking to gain acceptance of and adherence to:
 - i. the scheme and its processes as originally designed (by all);
 - ii. the Scheme's proper scope (Horizon and associated issues only);
 - iii. the need to respect obligations of confidentiality and actively to promote this to individual applicants; and
 - iv. (crucially) the principle that evidence must drive its recommendations and conclusions.
- 7.4. Post Office will also use the next meeting to clarify JFSA's intentions in relation to the instruction of Edwin Coe LLP (which we consider to be, at this stage, generally an exercise to exert pressure rather than, at this stage, a real litigation threat (see **Annex 4**). However we understand from JFSA's website that they plan to hold a meeting on 18 January 2015, primarily for Scheme Applicants. The meeting is described as being to report back in detail about recent events and to agree options for a way forward including "what it would mean if we opted to follow a legal route and how that might work".
- 7.5. However, our assessment is that getting the Scheme 'back on track' is unlikely. There would appear to be very little to be gained from a JFSA/MP perspective in participating in the Scheme on these balanced terms since it will not produce the pre-determined outcomes they seek. However, providing this final opportunity to address these issues sensibly will further demonstrate Post Office's genuine attempts to resolve Applicants' complaints.

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- 7.6. Importantly, it will also help manage and mitigate the risks of negative publicity and Judicial Review of the decisions Post Office makes about the future of the Scheme. The risk of a successful public law challenge has already been assessed as being low – recent legal advice suggests that this step will likely reduce it still further. A summary analysis of the Judicial Review risk is at **Annex 5** (which aligns with previous advice given to the Board last summer).
- 7.7. We have now been informed, as expected, that the same BBC team which made the One Show film is now planning a programme, for BBC Inside Out, on 19 January – the day after JFSA's planned meeting. We will continue to monitor and manage the media as we have to date.

8. Recommendation

- 8.1 The Committee is invited to note the immediate steps we are taking as in paragraph 7.1 and 7.2 above.
- 8.2 The Committee is further invited to agree that we:
- i. use the next meeting of the Working Group as a last attempt to set the Scheme back on track as set out in paragraph 7.3 to 7.4 above;
 - ii. write to JFSA after their meeting on 18 January to ask them to confirm their intentions as regards litigation; and
 - iii. draw up contingency plans to bring the Scheme in-house in the event that the steps set out above do not get the Scheme back on track which:
 - would move the governance and management of the Scheme in-house (dissolving the Working Group and/or ending Second Sight's current role);
 - would include a letter or statement which could be made public setting out the rationale for Post Office's decision to bring the Scheme in-house;
 - might include the retention of an independent oversight function in the interests of transparency and public confidence (not necessarily by Second Sight);
 - provide for discussions or, where appropriate, mediations with individual Applicants, where it is fair and reasonable to do so in order to try to resolve their complaints; and
 - preparing our own report of the Scheme so far and our findings as a document which could be provided to Applicants (as our response to Part Two was for mediation) and at the end of the Scheme be published as a formal report of the Scheme.
- 8.3 We will revert to the Committee with a detailed proposal (informed by legal advice) for bringing the Scheme in-house if, as anticipated, we do not get a satisfactory result from the steps set out above.

Chris Aujard/Mark Davies
8 January 2015

Initial Complaint Review and Mediation Scheme

Chris Aujard/Mark Davies
8 January 2015

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Annex 1

Case progress and investigation findings

1. There are now 106 cases remaining in the Scheme and Post Office has completed its investigation of all but two cases. In terms of case progress:
 - 16 cases have been resolved prior to consideration by the Working Group.
 - Of the 26 cases where the Working Group has made a recommendation on whether a case should be mediated:
 - it recommended against mediation in two cases;
 - Post Office declined to mediate two cases;
 - Post Office resolved two cases prior to the actual mediation; and
 - ten cases have been mediated; four have been resolved, five closed without resolution and one is on-going.
2. Cases have been 'resolved' for a variety of reasons but generally this has been where Post Office could arguably have done more to assist the Applicant and/or where the Applicant's expectations in terms of resolution was reasonable and broadly consistent with our assessment of the potential risk and cost of litigation. It has cost c£60k in total to settle the 22 cases which have been resolved. There are a number of cases in the Scheme where collection of debt was suspended pending investigation of the case through the Scheme and the ability to recover that debt is factored into mediation.

Overall investigation findings

3. As set out in the body of this paper we have found no evidence, nor has any been advanced by either an Applicant or Second Sight of either faults with the Horizon system or unsafe convictions (on the latter point, every case investigated has been scrutinised by our external criminal lawyers), and no convictions have been appealed.
4. Although there are a small number of cases where Post Office should or could have done more to assist Applicants, such as by intervening earlier when it was clear they were experiencing losses, in the majority of cases our investigations have shown that it has been the actions of the Applicants themselves which have caused or contributed to the losses they suffered in branch.
5. Where Post Office has recovered the losses, it has been entitled to do so under the terms of the contract or under statute. Also, where Post Office terminated its contract with the Subpostmaster, it did so under the terms of the contract, either for material breach or on the agreed notice. In these cases Post Office cannot and should not accept responsibility or make substantive compensation payments.

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1. The communications strategy to date has focussed on providing a measured and proportionate response to key audiences on the central allegation of faults within the Horizon system. There have therefore been proactive announcements on Post Office measures to investigate and address this and about the subsequent findings of Second Sight's 2013 published interim report.
2. Following the establishment of the Complaints Review and Mediation Scheme, media interest has narrowed and the story is only being **closely** followed by a very limited number of journalists, with two short bursts of active interest – one from the selective leaking of the confidential Part Two report produced by Second Sight and, more recently, from the orchestrated publicity when James Arbuthnot MP announced the withdrawal of his support for the Scheme and organised the Westminster Hall debate. The damage was contained as planned under the strategy. One journalist has, however, adopted the story as a personal campaign (see media analysis below).
3. Similarly, the story has failed to find any depth of traction with the majority of MPs. Few MPs have, in reality, continued to follow the progress of their constituency cases closely. Meetings have been offered on three occasions to all MPs with cases in the Scheme and there has been minimal take-up. Internally, the issue has been low-key and the periodic media attention has resulted in little increase in enquiries from postmasters or employees through Post Office channels. There has also been extremely muted interest from customers, with low-level customer comment on social media. Enquiries about Horizon's integrity or Post Office's handling of the cases are in single figures.

Other parties in the Scheme

4. There is apparent orchestration of publicity but the JFSA have remained largely silent on the record. Part of our communications plan is to ensure that their position is properly drawn out and made public regarding the conflict between their confirmation of support for the Scheme yet apparent criticism of it and instruction of solicitors.
5. Second Sight remain highly unlikely to go 'on the record' to media at this point. They have continued to be positioned by other stakeholders as an independent voice.
6. Sir Anthony Hooper has not been commenting publicly and is unlikely to do so. He is not predisposed to support any of the parties regarding communications, although might continue to be prepared to provide factual information via particular routes, as he did recently with a letter to Jo Swinson about mediation of cases. Post Office strategy with Sir Anthony will continue to respect and support his position as impartial Chair.
7. The Minister's current position regarding communications is to remain arm's length from Post Office's management of the issue and the detail of the Scheme, but supportive (within those constraints) in terms of ensuring high-level factual information about the approach is provided appropriately.
8. There are around 10 applicants who are providing media interviews. Their messaging is changing, as expected given the findings of investigations, from allegations about Horizon faults to wider Post Office issues – a central argument being that they were "forced" to falsely account (see media assessment below).

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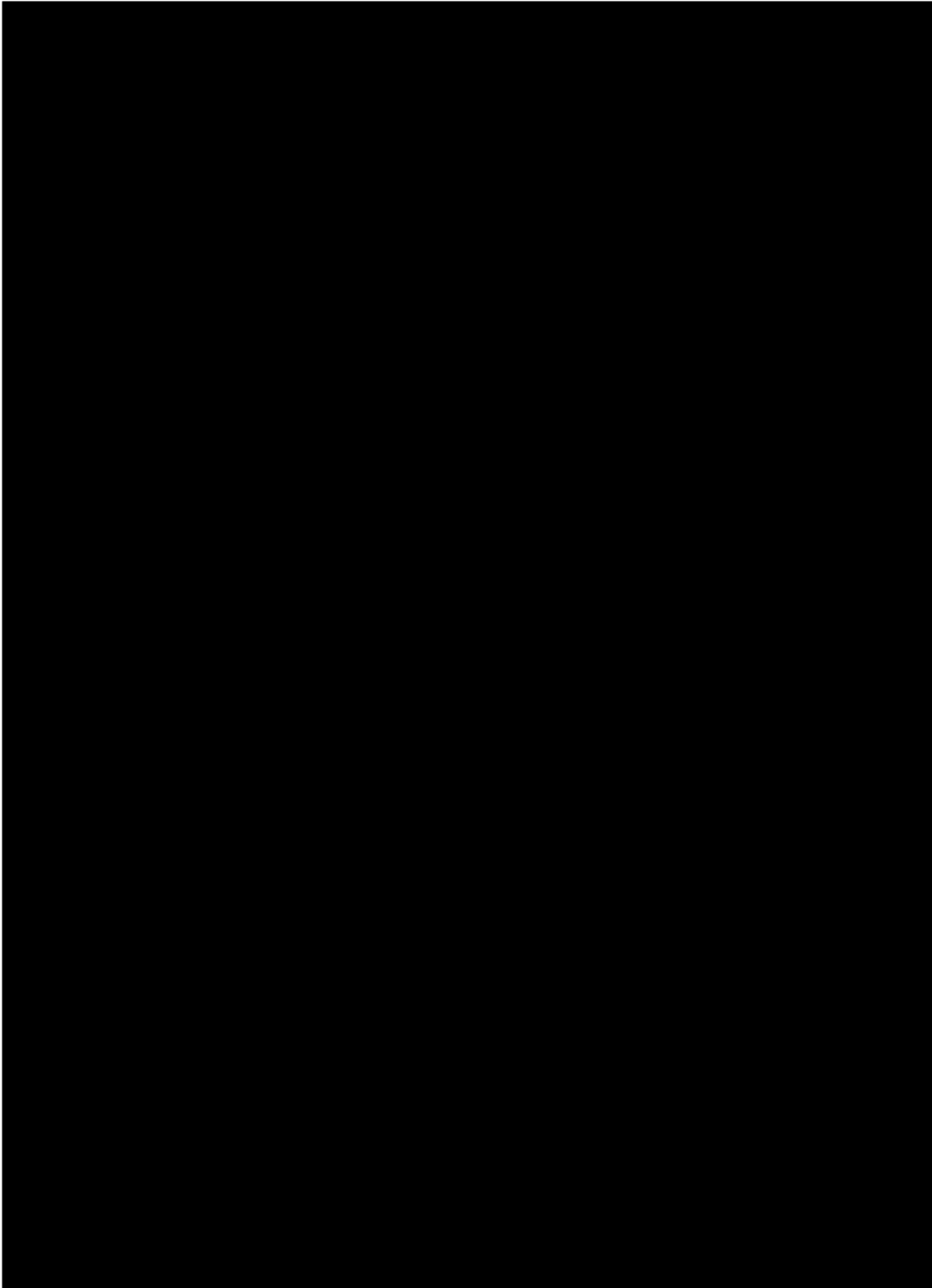
9. Media coverage drives the internal and customer interest for this issue - this interest remains minimal but any damaging perceptions caused by this coverage will be addressed with definitive, proactive and carefully targeted communications at moments of our choosing. These communications will support Post Office taking confident and assertive action to conclude the issue and are designed to draw the strongest possible line to separate myths from reality. This will not be without criticism or some further damage but it is vital to demonstrate confidence and to provide clear parameters for any future questioning on the issue.
10. One journalist has increasingly adopted the story as an attempted campaign, with recent films on BBC1's tabloid consumer programme, the One Show, mostly highlighting the criminal cases. Detailed rebuttals to the programme's senior editors has removed some of the most damaging and untrue content - about legalities of Post Office investigations processes – and there has also been measured legal correspondence from Post Office about both fairness of content and the requirement to disclose any evidence if it exists. The communications messaging, largely centred on the fact that there is no evidence of faults with Horizon that have caused the issues complained about, has been consistently landed, and is now acknowledged to a reasonable degree with most audiences. There remain a few particular individuals within audiences who will never accept this for a range of reasons, but they are increasingly isolated.
11. Communication plans address the predicted **changing nature of the allegations**, which focus increasingly on the Scheme itself, the criminal cases and Subpostmaster contracts, i.e.:
 - a) The Scheme being a “sham”;
 - b) Individuals being “forced” to commit the offence of false accounting and to pleading guilty to it;
 - c) Contracts being unfair and out-dated, passing all risk and responsibility for losses to postmasters with Post Office having no incentive to investigate.

“Remote access” is currently being used in an attempt to continue to cast some doubt about Horizon's integrity.
12. There are other connected and currently outlying allegations, but the communications plan manages these distractions and remains focussed on addressing the central, now very clearly unjustified point that Post Office is responsible for some miscarriages of justice and will not admit it/ is covering it up.

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Annex 3



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1. Edwin Coe LLP, self-styled as "*the UK's leading class action firm*", states on its website that JFSA has asked it to "*pursue the rights*" of Subpostmasters and that litigation "*appears inevitable*". Given this, it appears that JFSA is seeking to pursue some form of group action against Post Office, presumably to recover compensation.
2. English courts do not have US-style class actions. In England each individual claimant must ask the Court for a remedy, and the Court uses its case management powers to manage multiple, similar claims in the most efficient manner.
3. The legal basis and subject matter for this type of action by Subpostmasters is not currently clear. There are a number of issues that are sufficiently common to many Subpostmasters that *could* form the basis for some form of group action, particularly around the true meaning and effect of the standard Subpostmaster contract and the reliability of the accounting information provided by Horizon.
4. However, each Subpostmaster's claim will be dependent on their individual dealings with Post Office. It is therefore difficult to envisage a scenario where a single Court decision would automatically give rise to compensation being paid to many. Instead, it is likely that there would be substantial satellite litigation before a Court could make any compensation award.
5. The greatest practical bar to a group claim is likely to be cost. This type of litigation is costly and many of the Applicants are in financial difficulty. There are third party funders in the market (some of whom are very aggressive) who fund this type of litigation in return for a cut of the compensation awarded. However they will only do so if the legal merits of the claim are good and the return on their investment high. Therefore even if a third party funder could be found, it is questionable whether on-going funding would be available through to Court proceedings when the true strength and value of the Applicants' claims are assessed against legal principles and not the artificially inflated figures many have put forward.
6. Edwin Coe does not, however, need to win in Court to be successful. It is possible that their involvement is part of a strategy involving legal proceedings, media attacks and political pressure to force Post Office to the negotiating table. Edwin Coe would only need to find a viable, even if weak, legal claim to go down this route.
7. However having reviewed all Scheme cases, it is difficult to see an obviously meritorious claim against Post Office that would have wide application to many Subpostmasters. In 2011, Shoosmiths claimed to have gathered 100+ Subpostmasters and attempted to run a test case challenging Horizon. Post Office defeated this claim on procedural grounds and Shoosmiths did not try again. This demonstrates that a group action is not an easy proposition.
8. In any event it would take time for Edwin Coe/JFSA to marshal and organise a critical mass of Applicants into a group action. It would require a legally binding governance structure in order to make decisions on behalf of the whole group, funding and they should, in accordance with court rules, send a Letter of Claim to Post Office and consider its reply before commencing Court proceedings. These steps could take 2 - 6 months.

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1. JFSA and/or individual sub-postmasters would face real difficulties in mounting a successful public law challenge against a decision by Post Office to bring the Scheme in-house, particularly where (as envisaged in the attached paper) Post Office has tried (and failed) to get the original Scheme “back on track”. These difficulties arise for a number of different reasons.
2. First, it is important to emphasise that not all decisions of a public body (i.e. a body that is susceptible to judicial review) are reviewable. In particular, a private law decision of a public body will not be reviewable. It is a matter of fact and degree as to whether a particular decision is private or public in nature.² In this case, the underlying complaints which are the subject of the Scheme are private law claims (in essence, for breach of contract). Although some complaints do involve allegations of wrongful conviction (and therefore could be deemed to have some public law aspect), the role of Post Office vis-à-vis a convicted sub-postmaster arises out of a relationship founded in private law (a contract or possibly in tort). Thus, the underlying rights which are in play are not really public law rights – they are private law rights which derive from a contractual relationship freely entered into by subpostmasters and Post Office.
3. Second, as a result of that analysis (and on the hypothetical assumption that the Scheme had not been introduced), a decision by Post Office to mediate (or to refuse to mediate) a complaint by a subpostmaster would not be susceptible to judicial review. The same is true for a decision by Post Office to bring proceedings against the subpostmaster (or to defend proceedings brought by a subpostmaster). Such decisions would be ones taken in relation to private law rights and would not be reviewable. The question that then arises is whether by creating the Scheme, Post Office has endowed JFSA or sub-postmasters with wider public law rights than otherwise existed in private law.
4. Third, the Scheme provides a framework within which attempts can be made to resolve private disputes between subpostmasters and Post Office, without the need for litigation. According to the Press Release issued by Post Office when it announced the creation of the Scheme, the Scheme was intended to allow “*sub-postmasters and the Post Office to investigate and to try to resolve a sub-postmaster’s concerns*”. The Scheme was thus a voluntary scheme (i.e. one to which subpostmasters could decide to submit) which was intended to attempt to resolve individual cases (rather than to identify and solve systemic problems). This strongly suggests that the Scheme did not create wider public law rights; it is private in nature and decisions taken in relation to it (whether to continue it or to end it or to accept recommendations made by the Working Party) are private in

² E.g. (a) where powers derive from agreement of the parties and give rise to private rights, then the decision will not be a public law decision (*R v Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909); (b) a decision of the PIA Ombudsman was not reviewable because his legal authority arose from consensual submission to his jurisdiction (*R (Moover) v PIA* [2001] EWHC Admin 247 at [12]). Similarly, a decision of the Insurance Ombudsman was not reviewable (see *R v Insurance Ombudsman, ex parte Aegon Life* [1994] CLC 88); and (c) a claim for unpaid remuneration is a “classic private law claim based on breach of contract” *Swann v AG Turks & Caicos* [2009] UKPC 22 at [14]).

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nature and not therefore susceptible to judicial review. If that is right (and there are strong arguments to say that it is), the Administrative Court has no jurisdiction over a decision taken by Post Office in relation to the Scheme.

5. Fourth, it has always been accepted by all parties to the Scheme that it is open to Post Office (or indeed an individual subpostmaster) to decline to follow a recommendation of the Working Party that mediation should take place. In those circumstances:
 - a. It is difficult to see how a decision by the Working Party could be susceptible to judicial review – it is not a final decision but simply a recommendation. Any claim for judicial review against a decision of the Working Party would be premature in that it is merely a preparatory step on the road to a decision by Post Office as to whether mediation is to be undertaken (see, by analogy, R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government [2008] EWCA Civ 148 at [32]-[36]).
 - b. Self-evidently, a decision by a sub-postmaster not to mediate a case would not be susceptible to judicial review. The sub-postmaster is not a public body.
 - c. If (contrary to paragraph 4 above) there is a sufficient public law element in a decision by the Post Office not to mediate a particular case to make such a decision in principle susceptible to judicial review, then the Post Office's public law duties are limited.
 - i. Although Post Office would be required in each case to take the recommendation of the Working Party into account, it would be entitled to assign such weight to the recommendation as is appropriate and it would not be bound by the recommendation; the only basis on which the Court would intervene to set aside a decision not to mediate would be on grounds of irrationality (see, by analogy in the context of prison law and the Secretary of State's power to depart from a recommendation of the Parole Board, R (Harris) v Secretary of State for Justice [2014] EWHC 3752 (Admin) at [31]).
 - ii. The test of irrationality is a high one, in that the decision must be "*something so absurd that no sensible person could ever dream that it lay within the powers of the authority*": see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 at 229. When formulating the test, the Courts have repeatedly emphasised the high threshold that needs to be met in order to show unreasonableness that is unlawful: see e.g. R v Ministry of Defence, ex parte Smith [1996] QB 517, at 558C ("*high*" threshold); R v Lord Chancellor, ex parte Maxwell [1997] 1 WLR 104, at 109B ("*a mountain to climb*").

On that basis, a challenge to a decision by Post Office not to mediate an individual case would be difficult to mount (even if the subpostmaster was able to jump the hurdle identified in paragraph 4 above (i.e. to show that there is a sufficient public law element to make the decision susceptible to judicial review)).³

³ Indeed, it could be said that the sub-postmaster has an alternative private law remedy to a refusal to mediate; namely an adverse costs order in any subsequent civil proceedings (in that the Courts may penalise a party who unreasonably refuses to mediate a civil case). The availability of such a remedy makes it even less likely that judicial review would be available to challenge an individual refusal to mediate a particular case.

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6. Fifth, if Post Office decided to withdraw the Scheme entirely or to take the Scheme in-house and if (contrary to paragraph 4 above) there is sufficient public law element to make such a decision susceptible to judicial review, JFSA and/or sub-postmasters would face difficulties in succeeding in any challenge:
- a. Legitimate expectation. JFSA and/or subpostmasters could say that they had a legitimate expectation that the Scheme would be operated by Post Office until all cases had been considered by the Working Party and that, by ending the Scheme in its current form, their legitimate expectations have been breached. In order to meet such a challenge, Post Office would need to assemble and deploy evidence to show that the Scheme has broken down and is not working. An existing scheme or policy may be changed where there is a material change in circumstances: see *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 at [37].
 - b. Irrationality. The JFSA and/or subpostmasters could say that it is irrational for Post Office to withdraw or to alter the Scheme. In order to succeed in such a claim, they would need to satisfy the high threshold for irrationality in public law (see paragraph 5(c)(ii) above). In order to meet such a challenge, Post Office would need to assemble and deploy evidence to show that the Scheme has broken down and that, as a result, its decision to withdraw or alter the Scheme was not irrational.
 - c. Remedy. It is likely that the only remedy that could be sought in any successful judicial review would be to require Post Office to reconsider its decision to withdraw the Scheme or to take it in-house.⁴ The utility of judicial review proceedings to JFSA and/or subpostmasters would therefore be limited and the remedy would run counter to JFSA's current position that it has lost faith in the Scheme as a result of bad faith on the part of Post Office.
7. Sixth, a decision by Post Office to seek to get the Scheme "back on track" (as envisaged in the main body of the note) would materially reduce the risk of complaints such as those identified in paragraph 6 being successful. Post Office would, in effect, be gathering evidence (a) to demonstrate a change in circumstances and (b) to inform any decision to terminate the Scheme.
8. Finally, should Post Office's attempt to get the Scheme "back on track" fail and should Post Office wish to act with the utmost caution, Post Office could thereafter undertake an informal consultation exercise (i.e. Post Office could send a "minded to terminate" letter in order to flush out any arguments that might be deployed by JFSA and/or subpostmasters as to why the Scheme should be preserved in its current form). In light of the proposal that is currently under consideration (i.e. to attempt to get the Scheme "back on track"), this is not a matter for now - but possibly for future consideration.

⁴ It is most unlikely that the Court would compel Post Office (through a mandatory order) to keep the Scheme open until the very end or to submit to mediation in all cases still pending under the Scheme.