

Working Paper 2
Comments on the Horizon Inquiry's
provisional list of issues

The Evidence Based Justice Lab
Post Office Scandal Project
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Comment on List of Issues

We set out here some general issues we perceive with the provisional list of issues and then in the form as requested by the Inquiry.

1. Schedule 1: A list of proposed amendments
2. Schedule 2: Reasons for those proposals.

General Issues

We are concerned that there is no apparent consideration of the conduct of the *Bates* litigation. Responsibility for litigation strategy and execution is an essential part of understanding why and how Post Office (POL) maintained an apparently untenable position on Horizon's robustness for so long. There should be particular reference to the oversight responsibilities of Board, especially the Chair and Non-Executive Directors (NEDs), and particularly the Chair of the Board's Audit and Risk Committee.

The Inquiry should also question the Board discharged its functions, in particular, the broader responsibilities of the CEO and the board for setting and overseeing strategy and agreeing multi-year plans. The litigation strategy pursued in the High Court and Court of Appeal proceedings falls squarely into those categories, for example.

Similarly, although this is covered in some respects in the list of questions, the role of lawyers and legal advice obtained by POL in the conduct of prosecutions and post-prosecution review and appeal work (which is not clearly covered) is an essential part of understanding how and why POL maintained, for so long, that the prosecutions were safe; as well as a significant part of a strategy for protecting the brand or reputation of POL. We note, for instance Paula Vennells' letter of 2020 to the BEIS Select Committee chair which draws attention to the role of lawyers in her decision making.¹

¹ <https://committees.parliament.uk/publications/1621/documents/15462/default/>

Schedule of Proposed Amendments

Amendment 3A: Insert after 3:

3A. What risks were known or anticipated at the commencement of Horizon development and how these were manifest in negotiation and contracting arrangements between POL, Fujitsu and the sponsoring department(s) in Government (as this may involve BEIS's predecessor and the DWP).

Amendment 13A: After 13 insert:

13A: What arrangements were put in place in POL and Fujitsu from the outset for monitoring the operation of Horizon, including the identification, resolution, and escalation of problems and fixes, as well as the archiving/consolidation of evidence and learning in this area?

B.15: What form did the pilot take and what feedback was received? How did the pilot operate on the ground and how was feedback acted on?

B.16 What role did the Audit and Risk Committee of the Board play at this stage of Horizon being adopted as an operating system?

Amendment 15A: After 15 insert:

15A What modifications to the contracting and reporting mechanisms between Fujitsu and POL occurred and for what reasons?

15B The extent to which such concerns, modifications and/or changes were disclosed in civil or criminal litigation and if they were not, why not.

15C How modifications were overseen and by whom.

Amendment 42f: After section e) robustness, insert:

f) Fairness

- The policies and practices around interviewing of SPMs and any limitations on attendance and representation imposed in policies and practices
- The resistance of disclosure requests by SPMs and their lawyers
- Failures to disclose evidence falling within POL's obligations as prosecutors
- Concerns about the reliability of evidence given by witnesses for or on behalf of POL in civil and criminal cases
- Concerns raised about the conduct of investigations and charging decisions, such as those raised By Second Sight

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- Concerns raised about the ways in which pleas were negotiated

Amendment 58A: Insert 58A

58A Who was responsible for advising, writing to, and negotiating with SPMs when suggesting or beginning litigation? How did they conduct that work?

Amendment B67A: Insert 67A

67A. When conducting an investigation:

- a) what information did auditors rely upon,
- b) was that sufficient,
- c) how did they follow up or respond to concerns raised by SPMs or others about Horizon, and,
- d) were there any limitations formal or informal on their ability to access necessary information?

Amendment 77A: We would add 77A:

77A. To what extent were initial decisions appropriate and within the contracts with SPMs.

Amendment 86A: We would add 86A:

86A: Who was responsible for decisions to litigate or threaten litigation for shortfalls and for the manner and content of communicating those decisions?

86B: What was the frequency, and what were the outcomes, of threatened and actual litigation on Horizon related matters.

86C: How was litigation conducted? How were firms and advocates selected and deselected for litigation and advocacy work (civil and criminal) by POL? How and by whom was the conduct of outsourced work reviewed?

Amendment 98: Insert at end of the questions, “What was the nature of that advice?”

Amendment 101A-D: Insert:

101A How did the handling of prosecutions meet or deviate from those policies, guidance to Crown Prosecutors, and the Attorney General’s Guidelines?

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101C What prior engagement with POL litigation did advisers, litigators, and advocates who participated in the *Bates, Hamilton* have? In what ways may this have influenced the conduct of the Hamilton or Bates litigation?

101D How were advisers, litigators, and advocates selected and deselected for litigation and advocacy work (civil and criminal) by POL? How and by whom was the conduct of outsourced work reviewed?

Amendment 108 add, “(d) their duty not to mislead.”

Amendment 108A: Add:

108A: How adequate was the actual conduct of investigations? In particular:

- What was done by way of preparation; implementing questioning strategies; pre-interview disclosure; and, decisions on allowing accompaniment and representation, including legal representation?
- What input was there to this process from internal audit findings?
- Which suspects were told that they were the only person blaming Horizon and on what basis?
- How were transcripts of interview handled and reviewed and what steps were taken as a result?

Amendment 114A: Insert:

“What (if any) advice, or guidance did they receive regarding the choice and appropriateness of individual charges”

Amendment 117A: We would add:

117A. What policies, guidance or principles did they apply when making charging decisions? Were they applied appropriately?

118. Delete the words “of theft”. Add a further bullet point, “did the approach accord with the guidance of the DPP to Crown prosecutors and AG Guidelines?”

Amendment 122:

122. After the words “Who was responsible for” add the words, advising on, instructing, and/or.”

Amendment 122A: Insert (if not dealt with elsewhere):

122A. How were experts, independent solicitors and counsel chosen to conduct prosecutions and appeals? What criteria were applied and what reviews

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were carried out of their performance and outcomes? How were they kept informed of developments? What checks were made against conflicts of interest? How were they supervised? What records are available particularly of any reports on casework given by them? Were any removed from the prosecuting or appeals list used by POL?

Amendment 129A: Add:

129A What lessons were learned from acquittals in Horizon cases and what debriefing took place? In particular what review of “expert evidence” was carried out in acquittal cases? Generally what further disclosure to the defence in other cases was made as a result of acquittals?

Amendment 130: Add the words “, and after,” after “in the course of”.

Amendment 141A: Add:

141A: What part did financial considerations and issues of confiscation play in prosecuting decisions and acceptance of pleas?

141B: When was confiscation sought? What compensation orders were sought and on what evidence?

Amendment 157A insert:

157A. How and by whom were the selection, instruction, management and engagement with, and reporting from the following conducted: independent auditors and other experts reporting on relevant Horizon matters such as E&Y; Second Sight and Detica.

157B: How and by whom was the departure and replacement of staff in legal (and audit) functions managed? Were exit interviews conducted, for instance? And how were the results of those coordinated.

157C: What contractual restrictions were placed on those engaging with or leaving POL/Fujitsu, such as non-disclosure agreements?

157D. What formal and informal reporting lines existed between key, non –Board level staff and non-executives (the Chair and the Senior Independent Director in particular)?

157E. What training, development and support for ethics and independence in audit, compliance, and legal teams was provided?

157F How did appraisal, performance management, and incentive/bonus plans impact on behaviour in key functions?

Amendment 165. After “matters” add the words: “including within the Board and Non-Exec Directors.”

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Amendment 172C-H: Add in:

172C. How did POL's Board, and in particular the board Audit and Risk Committee (ARC) play in understanding, overseeing, and responding to the Horizon system and associated litigation?

172D. What did the ARC know about auditor concerns regarding Horizon, e.g. about lack of access to relevant information, and how did it seek to ensure the independence of internal and external audit?

172E. Whether, how, and when was the external auditor asked to investigate the controls around Horizon to establish SPMs dishonesty or other causes?

172F. How were annual audit plans formulated and agreed with the audit committee and confirmed and overseen by ARC/the Board?

172G. What internal audits did the audit committee direct the internal auditors to undertake?

172H. What was the external auditors view of the continually rising litigation costs?

173I. What role did the ARC, and the Board, and other sub-committees play in the management of independent investigations such as the Second Sight investigation.

173J: What was the engagement of the Chair and NEDs at critical junctures?

173J: What advice/evidence was sought and what business risks were considered which informed the Board's agreement to the litigation strategy.

Amendment 184A: Insert words at the end of this para. "This includes approach of Government, POL, and others, in relation to dealing with complaints, mediations, and offers of compensation (including its level), as well as the processes deployed in dealing with SPMs and their families."

Brief reasons for proposals

Amendment A3: the understanding of risk and its reflection in contractual arrangements is an important element in understanding how the arrangements between Fujitsu and POL came to be as they were and also the state of knowledge in the two organisations at inception. It may also explain penalty and charging arrangements, seen in *Hamilton* to influence Fujitsu's tendency to attribute Horizon problems to user-error, and POL's reluctance to seek horizon data. The identity of personnel involved in these discussions and their ongoing role in the Horizon saga may also prove important.

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Amendment 13: it is self-evidently important how reporting and monitoring was conceived of and implemented from the beginning of the pilot; at the end of it; and on an ongoing basis. We consider that this aligns with basic risk management processes.

Amendment 15A-C: this should provide important and documented evidence of changes in approach and the reasons for them, which may also have impacted on the behaviour of employees in Fujitsu and POL. It would also the extent of engagement between legal and Horizon ‘on the ground’ and at the strategic level. This may help explain POL’s conduct during litigation and whilst engaging in reputation management. These suggestions are also relevant to the conduct of various pieces of litigation.

Amendment 42f: A critical omission here is the extent and timing of knowledge of actual or potential problems with the investigation and prosecution of shortfall cases. It will be recalled the Court of Appeal indicated in Hamilton non-disclosure and investigatory problems were deliberate. Reassurances offered, by professional advisers and others on these subjects, and to whom within POL, is also critical to understanding corporate decision-making on Horizon.

Amendment 58A. 58 appears to relate to policies and guidance. The giving of advice on individual case and the management of strategy for, instruction on, threatening, and conducting litigation is also important and should be included. This was an area where Fraser J indicated some conduct was oppressive.

Amendment 67A: The actual conduct of investigations/audits appears to be missing from this list of questions, we think simply as an oversight.

Amendment 77A: The quality of the initial decisions are of greater practical significance than the appeals process and should be included.

Amendment 86A and C: Conducting civil proceedings is too narrow: intimating or threatening such proceedings is also important. We would add: who was responsible for decisions to litigate or threaten litigation for shortfalls and for the manner and content of communicating those decisions?

Amendment 86B: The Inquiry should collect information on the frequency, and outcomes, of threatened and actual litigation on Horizon related matters to establish a sense of the scale of behaviour.

Amendment 86C: The instructions for, and conduct of, the litigation against Lee Castleton (and similar cases if they exist) would provide critical insights into the culture, evidence gathering, litigation (including disclosure) and communications strategies being deployed by POL in relation to Horizon at the time. This case, or cases, should be a specific point of investigation for the Inquiry. The way in which litigation was conducted should be investigated, especially given the concerns expressed by Fraser J in *Bates* about oppressive conduct.

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Amendment 98A: the nature of the advice is important in assessing how the organisation behaved

Amendment 101A-D: The set of issues looked at in the provisional list of issues on private prosecution is rather limited, even though this is a, perhaps the, critical issue of concern arising from the Horizon saga to date.

Amendment 108: this is self-explanatory.

Amendment 108A: We would add issue on the actual conduct of investigations. We have in mind apparent problems with the quality of preparation; questioning strategies; pre-interview disclosure; and, decisions on allowing accompaniment and representation, including legal representation.

We wonder if there needs to be some emphasis on what practices, if any, were adopted by investigators to pursue alternative lines of enquiry (including potential defences)? The emphasis at the moment is on policies rather than actual practices.

Amendment 114A: This reflects what is asked at 133.

Amendment 117A-B: Appropriateness also requires a consideration of the evidence, for and against charging, in individual cases.

Amendment 118: We understand the emphasis on theft, but there may also be issues of concern around other charges given the general absence of evidence of dishonesty. The extent to which the approach accords with professional standards is important.

Amendment 122: We anticipate a need to consider separately the responsibility for instructing, advising on, and conducting proceedings given the role of POL in-house teams and solicitors firms in prosecution as well as barristers in private practice.

Amendment 122A: As elsewhere the way in which POL instructed and managed outside experts and lawyers may be important. We make some suggestions here as to the sorts of issue that are potentially relevant.

Amendment 129A: Good prosecution practice.

Amendment 130: It should be made clear that disclosure matters being considered by the Inquiry includes disclosure (and failure to disclose) post-conviction when criminal proceedings were not live and relating to any appeals.

Amendment 141A: These are important matters which may explain or contextualise POL's approach to SPM prosecution and shortfall recovery.

Amendment 157A-F: We are surprised to see no reference to the selection, instruction, management and engagement with, and reporting from independent

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auditors and other experts on Horizon matters given, amongst other things, E&Y; Second Sight and Detica reports.

The management of, and response to, Second Sight's investigation is an element of critical importance which should be included.

The departure and replacement of staff in legal (and audit) functions is a matter to which the Inquiry should pay some regard. The departure of POL's General Counsel in 2013 appears to be of particular potential significance, given its timing.

Our own work with in-house lawyers and Board members suggests that existence and operation of formal and informal reporting lines between key, non-Board level staff and non-executives (the Chair and the Senior Independent Director in particular) is very important.

Training, development and support for ethics and independence in compliance and legal teams is another issue of some significance, as can other matters relevant to culture (such as incentive/bonus plans). The minutes of the Board remuneration committee should be reviewed. Was there for instance any executive bonus allocation to successful prosecutions?

Amendment 165B. Our discussions with experienced non-executive directors suggest this should include some investigation of Board level knowledge and experience.

Amendment 172C-J: The absence of a specific focus on Board oversight of Horizon, and all associated litigation is striking. There also needs to be a specific focus on the Audit and Risk Committee to establish what it did and what it ought to have done. We consider it important to distinguish between internal auditors and external auditors. The performance of both is the responsibility of the audit committee and the full board. The CEO and/or Board members should have met with both sets of auditors independently. What meetings took place in that context?

Amendment 184A: Responses to the human impact should include the approach in relation to dealing with complaints, mediations, and offers of compensation, as well as the processes deployed in dealing with SPMs and their families. Substantive outcomes (such as whether compensation restores SPMs to the position they should be in) and procedural justice are both key elements.

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