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Dear Joanna,

Thank you for your letter of 20 March 2024 regarding the Post Office (Horizon System) Offences Bill. I have considered the issues you have raised carefully, and acknowledge the constitutional sensitivities involved in this Bill. The Government accepts that this legislation is an unprecedented, exceptional response to an exceptional situation. I trust that my response reassures you that we have carefully considered the issues involved and explains why we have concluded that this is the right course of action.

Constitutional appropriateness

Given the well-publicised concerns about the constitutional appropriateness of Parliament seeking to overturn convictions itself, could you please explain what consideration was given to addressing this through the courts expediting consideration of these appeals, including through additional help to the Criminal Cases Review Commission to sift through and seek out relevant cases?

The independence of the judiciary is an important safeguard of the freedoms enjoyed in the United Kingdom. This independence provides protection from the state intruding on issues related to guilt and innocence and is greatly valued by the public. The judiciary make their decisions through careful, considered, and fair analysis of the facts that are brought before them. The Post Office (Horizon System) Offences Bill seeks to address a specific and serious miscarriage of justice of a scale never seen before, the circumstances of which are exceptional. A miscarriage of justice on the scale of that uncovered through the inquiry into the Post Office Horizon scandal is in itself an affront to the rule of law. It is critical that swift action is taken now, and the UK's unwritten constitution is flexible enough to enable action such as this in exceptional circumstances without breaching constitutional norms.

We have carefully considered alternative solutions to this legislation, but still consider that this is the right course of action. Relying on the existing appeal processes, involving the Court of Appeal and Criminal Cases Review Commission, even if expedited, would entail subpostmasters choosing to lodge an appeal or to seek a review. Regrettably, many subpostmasters have lost faith in the justice system and have indicated that they wish to have no further involvement with the system.

Even for those who do wish to pursue an appeal, the length of time since the original convictions means that we are aware that in many cases there is now little or evidence. It is the government's view that postmasters should not have to worry about the impact this may have on the success of an appeal. In summary, pursuing an expedited appeals process might not achieve the objective of ensuring all wrongful convictions are quashed, while requiring minimal input from subpostmasters. This is why the legislation is necessary to swiftly clear the names of those who have been wrongfully convicted once and for all. The decision to pursue the legislative option should not be seen as a criticism of the judiciary or the courts. The courts have done what has been asked of them which is to consider the evidence brought before them as swiftly as possible.

Overturing convictions that were not reliant on Horizon evidence **Court of Appeal Cases**

Is it the Government's policy and intention that the Bill would quash criminal convictions that were not reliant on mistakes made by Horizon? Is it the Government's intention that individuals who, for example, stole from colleagues or customers and whose convictions were reliant on non-Horizon evidence would also be exonerated by this Bill? Has the Government considered replacing criteria E with a requirement that Horizon evidence was used in the conviction?

Has the Government considered drafting that would also exonerate those individuals whose convictions were reliant on inaccurate Horizon evidence and who had previously unsuccessfully appealed their convictions (perhaps because the appeal court at the time had not been aware of, or adequately considered, the inherent problems in the Horizon software)?

Could you please explain your reasoning in developing the policy and drafting of the Bill that would seem to result in those who unsuccessfully appealed their Horizon-based convictions not having their convictions quashed, whilst those whose convictions had nothing to do with Horizon evidence would have their convictions quashed? In light of these concerns, have you considered drafting that would quash the convictions of those whose convictions relied on Horizon evidence?

It is not the overall intention behind this Bill to quash convictions that were not reliant on mistakes made by Horizon. However, we accept the risk that, in quashing convictions meeting the conditions set out in the Bill, the legislation will inevitably quash some convictions which relate to crimes genuinely committed, where the conviction was not reliant on Horizon evidence. We consider that is an acceptable price to pay to achieve the aim of

quashing the convictions which were reliant on erroneous Horizon evidence. The conditions have been carefully drafted to limit this risk, as far as is possible, to ensure the Bill is targeted on those wrongly convicted and minimise the risk that those who defrauded the system are able to access taxpayer-funded compensation.

In developing the policy, we did consider including in the legislation a condition that Horizon evidence had been used in obtaining the conviction, however, this was rejected for several reasons. Firstly, the evidence presented in many cases no longer survives, so it would not be possible to establish whether or not Horizon evidence was used in the conviction. Secondly, such an approach would not in any event achieve the aim of ruling out in all cases the examples above such as stealing from customers or colleagues; in some of these cases Horizon evidence may well have been used. Thirdly, in order to determine whether such evidence was used, and the extent to which it was relied upon to secure a conviction, a case-by-case analysis would be required, which is the approach this legislation sets out to avoid so as to minimise the incursion into judicial decision-making.

Careful consideration has been given to the situation where individuals appealed their convictions to the Court of Appeal, and we recognise that those who chose to appeal their case through the courts may end up with a different outcome to those with similar cases who did not, and whose convictions may be quashed by the Bill. However, we believe that this difference in treatment is justified where the Court of Appeal has carefully considered matters and upheld convictions. In those cases, it would not be appropriate for the state to interfere in that process. This is why these cases were excluded from the scope of the provisions in the Bill. Cases are carefully considered on the evidence put before the court and a number of cases were upheld within the Hamilton judgment where the Court of Appeal considered that the reliability of Horizon evidence was not essential to the convictions in cases.

As clause 3(5) makes clear, where cases have been considered by the Court of Appeal, individuals are not barred from making an application to the Criminal Cases Review Commission, who could refer any such cases back to the Court if they consider that there is a real possibility that the conviction would not be upheld in the light of new evidence or argument. Evidence put before the Williams Inquiry in respect of the corruption of the Post Office's investigation and prosecution functions may be relevant in such cases. We consider that this approach is an effective limitation on the degree of interference with the role of the judiciary.

Explanatory Notes

There are parts of the Explanatory Notes that seem to be missing (paragraph 41 cuts off part way through an explanation as to the conditions for alleged offences and paragraph 34 refers to certain issues "noted in paragraph 20ff above", yet this paragraph 20ff doesn't seem to exist). Could you please provide this missing information?

An error in uploading the Explanatory Notes has resulted in some words missing from the end of paragraph 41. The sentence should read, “All of the conditions must be satisfied for an alleged offence **to be considered a “relevant offence” within the Bill**”.

We apologise for this oversight. These words will be added in the next version of the Explanatory Notes to be published when the Bill moves into the Lords.

At paragraph 34, the reference to “paragraph 20ff above” is a reference to the issues noted in paragraphs 20 and following which set out the legal issues relating to the quashing of convictions and subsequent amending of records. As cautions are not judicial in character, the issues raised in relation to cautions do not apply.

Delegated Powers

Clause 7 empowers the Secretary of State to make Statutory Instruments amending Acts of Parliament, without any suggestions as to why this power might be needed or how it might be used. “Henry VIII powers” which empower a Government Minister to amend an Act of Parliament by Statutory Instrument are a hugely significant power and should not be granted without a compelling reason. Why does the Government need this power and how does it intend to exercise it?

The Department has prepared a full delegated powers memorandum, which is published [here](#). We hope that will address the Committee’s questions about the scope and justification for the consequential power in the Bill. In light of the decision to extend this Bill to Northern Ireland, we will be submitting a supplementary Delegated Powers Memorandum.

Scottish Government and NIE intentions

We note that the bill applies only to England and Wales. Do you have an indication as to the intentions of the Scottish Government and the Northern Ireland Executive?

Our view ahead of introduction was that as Justice is a devolved matter in Scotland and Northern Ireland and that prosecutions were undertaken by state prosecutors in those jurisdictions, local decision makers should decide and be accountable for developing their respective approaches to quashing relevant convictions in Scotland and Northern Ireland. However, it has since become clear that Northern Ireland faces significant and unique challenges to delivering the necessary legislation at an expedited pace following its recent restoration after two years and its additional public consultation requirements.

On balance, the UK Government has therefore concluded that the UK Government’s Bill should be amended to quash convictions in Northern Ireland in light of these unique circumstances. This is following cross-community backing in Northern Ireland for extension of the Bill to Northern Ireland.

Unlike in Northern Ireland, it will be feasible for the Scottish Government to legislate urgently in parallel to the Westminster Bill. Given Scotland’s historically separate legal jurisdiction and the unique role of the Lord Advocate and Crown Office and Procurator Fiscal Service in

respect of prosecutions in Scotland, it remains the UK Government's view that it is more appropriate for the Scottish Government to bring forward proposals to address prosecutions on this matter in Scotland, and for those to be scrutinised by the Scottish Parliament.

The Scottish Government has already indicated its intention to pursue legislation if the UK Government's Bill is not extended to Scotland. It is possible for the Scottish Government to bring forward legislation in tandem with the UK Government's Bill, and we understand from official-level engagement with Scottish Government officials that a Bill is being prepared. We remain committed to supporting the Scottish Government, to enable them to progress their own approach to overturn convictions of postmasters and others in their jurisdiction.

ECHR analysis

The explanations given in the explanatory notes as to compatibility with the European Convention on Human Rights merely note that "the Government does not consider that the Bill raises any significant issues in relation to the European Convention on Human Rights". Could your Department please provide more adequate analysis as to the human rights engaged by the issues raised including any potential Article 14 issues that might arise with the approach taken.

The Department has prepared a full ECHR memorandum, which is published here: <https://www.gov.uk/government/publications/post-office-horizon-system-offences-bill-supporting-documents>. We hope that will address some of the Committee's questions about the Department's human rights analysis.

In addition to that analysis we set out below an analysis of potential Article 14 issues and we will amend the ECHR memorandum to include this.

Article 14 provides that the enjoyment of the rights and freedoms set out in the Convention is to be secured without discrimination.

It might be argued that Article 14 is engaged by these provisions on the basis that these provisions are within the ambit of A1P1 (right to property), and a person who has had their conviction upheld by the Court of Appeal might say that they have an "other status" compared to someone whose conviction was based on similar facts, whose conviction is quashed by the legislation.

While the ECtHR has cast "other status" very widely¹, the government's position is that the category of "other status" should be restricted to innate or inherent personal characteristics that distinguish persons, or groups of people, from one another. It is by no means certain, therefore, that differential treatment could be established. It would also need to be demonstrated that the two are in an analogous position; whether that can be shown is likely to be highly fact specific.

¹ See, for example, *Beian v Romania (No. 1) (Application no. 30658/05)*, in which difference in treatment of cases with similar facts by the courts was considered capable of amounting to an "other status"

To the extent that any differential treatment between two such persons could be established, the government considers it is justified by the legitimate aim behind the Bill. First, given that the characteristic is not innate, the government would be afforded a wide margin, and any difference in treatment would require a lower level of justification than would a difference based on innate characteristics². As to that justification, the blanket nature of the legislation is necessary in order to swiftly right a serious miscarriage of justice and ensure access to compensation for persons affected, and the exclusion for cases previously considered and rejected by the senior appellate court is necessary to respect the principle of the separation of powers, and therefore to the maintenance of the rule of law. The measure is a proportionate means of achieving this aim, because it excludes only a very small number of cases, and those excluded retain access to the usual routes of appeal.

Standards of propriety

Does the Government consider that greater or clearer standards of propriety are needed for prosecutors (and especially private prosecutors)? Do such prosecutorial teams need some level of oversight by an independent body to ensure that appropriate prosecutorial standards are being met?

Sir Wyn Williams' Post Office Horizon IT Inquiry is examining in detail the failings that led to the Post Office scandal. It is possible that this will provide insight on the extent to which the private prosecution regime played a role in this particular injustice.

All legal duties on prosecutors regarding their conduct of a case apply regardless of whether it is a public or a private prosecution. Additionally, any private prosecutor must comply with the Criminal Procedure Rules 2020 which set out the rules for bringing a prosecution. Where a private prosecution is brought, defendants have the option to refer their case to the CPS should they wish to do so. If referred, the CPS will review the case papers to determine whether to proceed with the prosecution or, if they find prosecution not to be in the public interest, discontinue prosecution.

Whilst the Government believes that private prosecutions are an important and necessary part of the judicial system, we are examining the wider question of private prosecutions and have committed to looking again at the Justice Select Committee's recommendations in their 2020 report as part of this work, including the recommendation to introduce an inspection regime for organisations which bring significant numbers of private prosecutions to ensure investigations and prosecutions are subject to the same standards as their public counterparts.

Computer Evidence

Are clearer guidelines needed as to processes to follow before relying on evidence generated by IT systems, and as to processes to follow where concerns are raised about the reliability of an IT system used in evidence? What efforts are being taken to ensure

² See *R(RJM) v SSWP* [2008] UKHL 63; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26

investigators, prosecutors, advocates and the judiciary are clear as to the standards to apply before relying on such evidence?

The current common law rule presumption applies to evidence. The common law rule is that a “presumption will exist that the computer producing the evidential record was working properly at the material time and that the record is therefore admissible as real evidence”. However, this presumption may be rebutted if evidence to the contrary is adduced. In that event, it will be for the party seeking to produce the computer record in evidence to satisfy the court that the computer was working properly at the material time.

We recognise the calls for a review of the law on computer evidence. However, the implications of that are far reaching across all parts of the criminal justice system and need to be carefully considered.

We await the outcome of Sir Wyn Williams’ Inquiry which is examining in detail the failings that led to the Post Office scandal. It would not be appropriate for the Government to pre-empt those findings.

Pending the outcome of the Inquiry, the Criminal Procedure Rules Committee will consider current practices and potential problems relating to the reliability of computer evidence, drawing on case law and experience in England and Wales and other jurisdictions.

What caused this to happen, and what can be done to prevent it

Why were the human rights abuses and abuses of justice not brought to light sooner in the Post Office scandal? What prevented effective access to justice and the enforcement of human rights in these cases? Is there any evidence that non-disclosure agreements played a role in preventing access to justice and the exposure of systemic violations? What can be done in the future to ensure that such miscarriages of justice are brought to light sooner?

The first two questions are again matters for the Williams Inquiry and we will not pre-empt its findings.

There are legal limits to how non-disclosure agreements (NDAs) can be used in an employment context, which mean that an NDA would be void and unenforceable in certain circumstances. For example, an NDA cannot be used to prevent workers from reporting a crime to the police or cooperating in a criminal investigation as this could be an attempt by the employer to pervert the course of justice or conceal a criminal offence. An NDA cannot be used to prevent a worker from blowing the whistle by making a protected disclosure that they reasonably believe shows wrongdoing and is in the public interest to a lawyer or certain regulatory bodies or other prescribed person for whistleblowing purposes.

Post Office has in place a 'speak up' process, where postmasters can use this process to raise issues and have them investigated appropriately.

With regards to whether there is evidence that NDAs played a role in the Horizon scandal, we expect this is something that the Post Office Horizon IT Inquiry might want to consider. Separately, the Government is taking action to review whether the whistleblowing framework is effective at meeting its intended objectives. The full Terms of Reference for the review are available at: <https://www.gov.uk/government/publications/review-of-the-whistleblowing-framework>, and the review is due to be published this year.

I am copying this letter to the Secretary of State for Justice, the Chair of the Business and Trade Committee and the Chair of the Justice Select Committee.

Best wishes,

A handwritten signature in black ink that reads "Kemi Badenoch". The signature is written in a cursive, flowing style.

THE RT HON KEMI BADENOCH MP

Secretary of State for Business and Trade, President of the Board of Trade and
Minister for Women and Equalities