Written evidence submitted by Ravi Nayer (WCS0016)

[Note: This evidence has been redacted by the Committee. [***] represents redacted text.]

1 Introduction

1.1 Thank you for the invitation to submit evidence to the Windrush Compensation Scheme Inquiry.

1.2 Two recent events have put beyond any doubt that the Home Office is currently failing to "*right the wrongs*" suffered by the Windrush generation through the Windrush Compensation Scheme. The first was the evidence given by Martin Forde QC to the Home Affairs Committee (the "**Committee**") on 9 December 2020. Mr Forde was appointed by the Home Office to design the Windrush Compensation Scheme, but during his evidence Mr Forde distanced himself from significant parts of that design, explaining that the Home Office had disagreed with his advice not to include highly contentious rules on mitigation and criminality[1] .

1.3 Second, on 14 December 2020, the Home Secretary announced (by a letter to *The Times,* and a press release on the Home Office[2] website) that every applicant to the Windrush Compensation Scheme who could demonstrate an Impact on Life claim would receive a fast-tracked payment of £10,000. The changes will need to be worked through. Whilst additional compensation for applicants is welcome and follows a long campaign by affected individuals and their advisers, this announcement raises several further questions. Central amongst those questions is how, in light of this increase in compensation, the Home Secretary was able to announce to Parliament in June 2020 that under the rules as then drafted, the Home Secretary "…*want[ed] everyone who has been wronged to get the maximum compensation to which they are entitled, and through this bespoke scheme, we are working to achieve that"*[3]*.*

1.4 These recent events suggest that until now the Home Office has tried to settle claims to the Windrush Compensation Scheme at a discount, using contentiously drawn rules and paying reduced compensation. That strategy has caused further pain and suffering to applicants and is a further breach of the duty the Home Office assumed to deliver fair compensation by the Windrush Compensation Scheme. For that reason, it is my view these recent events are further confirmation that the Committee's Inquiry is urgently needed. Through this submission, I hope to assist the Committee's work by applying my experience of many years working with redress schemes to identify principled matters related to the Windrush Compensation Scheme, which need urgent attention.

2 Background and Experience

2.1 I am a partner at Brown Rudnick LLP, and I lead our group litigation and collective redress practice in London. For most of my time practising, I have been retained by private and public companies interested in resolving commercial disputes including, for want of a better phrase, "mass torts". This means I have developed a breadth of experience of the ways and means entities defend group actions and navigate the vagaries of English civil procedure. My recent experience includes being called to give evidence about redress scheme structure and methodology to the Independent Inquiry into Child Sexual Abuse, which is

[1] See the *Home Affairs Committee, Oral Evidence: The Windrush Compensation Scheme* transcript at Q44 (https://committees.parliament.uk/oralevidence/1372/html/)
[2] See https://www.gov.uk/government/news/windrush-compensation-scheme-overhauled
[3] See Hansard 23 June 2020, Vol 677, Column 1194, Secretary of State for the Home Department

considering the implementation of a redress scheme to respond to historic abuse conducted across several UK institutions.

2.2 Brown Rudnick LLP, as a US headquartered firm, also has in-depth experience in designing and implementing redress schemes in the US. By way of example, my US colleagues David Molton and Sunni Beville are acting for the Coalition of Abused Scouts for Justice, a group representing thousands of former boy scouts, seeking the implementation of a mass settlement scheme against the Boy Scouts of America. David Molton also recently led a team instructed on the design and implementation of the PG&E Fire Victim Trust to provide compensation to victims of wildfires in California caused by utility firm PG&E. The firm therefore has deep and relevant experience in this area.

2.3 My team and I have recently been asked by the North Kensington Law Centre ("**NKLC**") and the Windrush Justice Clinic ("**WJC**") to consider and advise on some of the claims they are handling for victims against the Windrush Compensation Scheme. Given my background in redress schemes and my experience working with NKLC and WJC, I hope I am able to provide the Committee with guidance.

2.4 The specific points in the Committee's Terms of Reference that I respond to in this submission are:

(a) *"Is the Home Office managing to "right the wrongs" experienced by the Windrush generation through this Compensation Scheme?*

(i) *Are you confident that the Windrush Compensation Scheme is fair?*

(ii) *Is the level of compensation being offered by the Home Office adequate? If not, in which particular areas is it inadequate?*

(b) *Are the Windrush Compensation Scheme rules and the guidance for caseworkers working well?*

(i) *Are people being compensated fairly under these rules for the losses they have suffered, such as –but not limited to- actual financial losses?*

(ii) *If not, what changes would make the rules and guidance work better to give people fair compensation?"*

2.5 The purpose of my evidence is to (i) position the Windrush Compensation Scheme in the broader redress scheme context; (ii) provide an overview of the taxonomy of redress schemes that I have developed from my work in this area; (iii) identify what I consider to be the key failings of the Windrush Compensation Scheme; and (iv) make some preliminary suggestions about possible steps the Committee could now take to improve the Windrush Compensation Scheme, although I necessarily set these out in high-level terms as detailed proposals require further consultation with affected individuals and the Committee.

2.6 My evidence assumes the issues arising out of the Windrush Compensation Scheme will not all be resolved in the first stage of the Committee's inquiry. From observing the very thoughtful evidence sessions run by the Committee on 9 December 2020, I have assumed that what is required now are changes that can be made in the short term to improve applicant engagement, and an outline of what might be addressed by the Committee in future. Although it is very regretful, I conclude that the Windrush Scheme delivers neither procedural nor substantive fairness, is underpaying compensation (even after the changes prefaced this week) and by its design, process and outcomes is furthering (not resolving) injustice.

2.7 All of the opinions expressed in this submission are my own, rather than belonging to my firm or to any of my clients, and nothing I say is intended to waive the legal professional privilege that exists between my firm and any of its clients.

3 Brief introduction to redress schemes

3.1 In order to consider the failures of the Windrush Compensation Scheme, it is helpful to set it alongside other redress schemes that might be considered instructive precedents. Over many years of advising on and studying the different redress scheme modalities, I have found the following taxonomy as an introduction to the four core types of redress scheme useful: (i) ad-hoc or private redress schemes; (ii) court assisted redress schemes; (iii) regulator-supervised redress schemes; and (iv) statutory redress schemes. The following table provides some recent examples of relevant redress schemes.

Scheme Taxonomy	Examples
Ad-hoc / Private Schemes	The Post Office Historical Shortfall Scheme, Lambeth Children's Homes Redress Scheme, The Construction Workers Compensation Scheme, News International Scheme, Manchester City FC Survivors Redress Scheme, Lloyd's Banking Group Customer Review
Court Assisted Schemes	CPP Scheme, Jimmy Savile Scheme, Al Scheme
Regulator Supervised Schemes	FCA/Firm negotiated redress procedures, for example see the Tesco Compensation Scheme and GRG Scheme, or a Voluntary Redress Scheme as envisioned under the Consumer Rights Act 2015
Statutory Schemes	Historical Institutional Abuse Redress Board (Applications and Appeals) Rules (Northern Ireland) 2020, Armed Forces Compensation Scheme; Financial Services Compensation Scheme, Financial Ombudsman Service, Scheme for Radiation Linked Diseases.

3.2 I have been personally involved, taught or spoken on many of the examples noted above. Despite the range of different subject matters, the redress schemes in this table have all been broadly labelled as "*compensation schemes",* "*redress schemes*" or "*collective redress schemes*", and are all methodologies used to resolve multiple claims. There are many good examples of successful redress schemes. Conversely, redress schemes are not immune to criticism and there are also recent examples of unsuccessful redress schemes, where the wrongdoer has been criticised for failing to address the loss and harm that its actions have caused.

3.3 The Lloyd's Banking Group Customer Review is an example of a redress scheme that has faced significant challenges. It was established to compensate small and medium sized business owners who had suffered serious harm as a result of a fraud. Its implementation was recently assessed by Sir Ross Cranston. In his report, he found that: "*the methodology and process of the Customer Review did not achieve the purpose of delivering fair and reasonable offers of compensation. My main recommendation is that customers' claims to direct and consequential loss must be reassessed*". The report insists that the victims must be consulted to improve the redress process. The intended outcome of the reassessment is

to ensure that all "*claims will have been properly addressed, in an open and transparent manner*"[4].

3.4 I highlight this example as only one incident where pressure is brought to bear for re-opening redress scheme design because the rules are not working for the applicants it is intended to redress. Part of the Committee's role must be to consider whether similar re-modelling is required in this case. Having considered the Windrush Compensation Scheme in some detail I believe simply making one or two changes will not resolve the problems that applicants are facing.

3.5 In my experience, in order to achieve fairness, the best redress schemes import, and use as their guiding principle, the concept of restorative justice. The concept is usually deployed in the criminal context, where it has been defined by the Crown Prosecution Service as, "*a process through which parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future*"[5]. It strikes me as no less relevant to an environment of systemic discrimination or institutional racism. In a redress scheme context, the principle of restorative justice requires wrongdoers to engage with applicants to fulfil an additional emotional need for recognition of the harm suffered, and an appreciation that redress beyond simply facilitating compensation payments is required to start to repair the damage caused. In this sense, restorative justice requires that the procedural rules governing the delivery of the award, as well as the award itself, are fair, which is of course an important aspect of the rule of law and democratic legitimacy. In my view the Windrush Compensation Scheme fails to deliver both (a) procedural fairness; and (b) fair compensation.

3.6 Hopefully this is an instructive albeit brief introduction to help further contextualise the Windrush Compensation Scheme, which might otherwise be situated only in the here and now of resolving bad PR. It follows that the Windrush Compensation Scheme is an ad-hoc redress scheme, designed and implemented by the Home Office to handle claims by eligible applicants in a way that resolves their claims as well as repairs some of the damage caused to the Home Office's reputation through the implementation of the hostile environment policies. The question for the Committee is whether it meets these ambitions, and whether recently announced changes ensure that it does.

4 Discrimination

4.1 The Windrush Lessons Learned Review stopped short of making a finding that the hostile environment policies had discriminated against members of the Windrush generation, or that the Home Office was institutionally racist. However, it did conclude "*race clearly played a part in what occurred, [and] that some of the failings would be indicators of indirect discrimination if the department was not capable of establishing objective justification…*"[6]. More recently, the Equality and Human Rights Commission ("**EHRC**") found that the Home Office's hostile environment policies breached the Public Sector Equality Duty, which the EHRC described as "*an important safeguard to make sure that policymakers consciously identify and consider the potential and actual impact of their work on different groups*"[7]. The summary of the EHRC's findings stated that: "*Overall, we find that the Home Office did not*

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[4] See Sir Ross Cranston's statement launching the Cranston Review Report dated 10 December 2019 at http://www.cranstonreview.com/

[5] https://www.cps.gov.uk/legal-guidance/restorative-justice

[6] See pp. 13 and 14 of the *Windrush Lessons Learned Review,* dated 19 March 2020, Wendy Williams

[7] See p.4 of the *Public Sector Equality Duty assessment of hostile environment policies,* dated November 2020, Equality and Human Rights Commission

meet its duty to have due regard to advancing equality of opportunity for Black members of the Windrush generation…"[8].

4.2 Fairness requires that applicants are told what it is the Home Office is compensating them for. This is an important part of redress scheme design, because a claim based on discrimination under the Equality Act 2010 gives rise to a claim for injury to feelings, which is not available in, say, a claim for negligence. During his evidence to the Committee, Mr Forde briefly considered causes of action when he explained that other parties (such as former employers) might be liable to the applicants for loss caused by negligence, but there has been no indication as to whether any parties (including the Home Office) might be liable to applicants for direct or indirect discrimination. To ensure fair redress scheme design, the question of why redress is being paid by the Home Office needs to be resolved. I do not agree, as Mr Forde's evidence appeared to suggest, that the Home Office has assumed liability for altruistic reasons, or so as not to become a "sign-post" to direct applicants to other wrongdoers[9].

4.3 [***] Having previously discussed this with the Clerk of the Committee, I understand that this issue may fall to be considered in more detail at a later stage and indeed court process in which I may become involved may also play a role.

5 Fairness of the Windrush Compensation Scheme rules

5.1 Where parties seek to resolve their disputes through an ad-hoc redress scheme, they do so largely without the protection afforded to litigating parties by the Civil Procedure Rules 1998 ("**CPR**"). The CPR contains rules to address imbalances of power between parties, provides for claims to be managed by the courts and creates the inherent risk of adverse costs if civil procedure is breached. Where matters are resolved through an ad-hoc redress scheme, the only checks and balances available to the parties are those that are created *by the parties* or agreed between them. Evidential thresholds, standards of proof, time frames for responses and appeals and whether or not the redress scheme is operated on an adversarial or inquisitorial basis all need to be provided for by design as there is no supervening legal process external to the redress scheme. If, for example, the scheme was intended to be adversarial, and applicants' evidence was able to be challenged and awards reduced based on the evidence provided, then the rules should have made provision for legal advice to place applicants in a position to prepare their claim cognisant of the risks of an adversarial process. The application of rules (such as mitigation, discussed below) shift the Windrush Compensation Scheme towards an adversarial rather than inquisitorial process, which must be questionable in light of the damage already done by the hostile environment policy.

5.2 It becomes more important to build-in these procedural rules where there is an imbalance of power, historic distrust and where one party is unilaterally responsible for drafting the rules, as was the case between the Home Office and potential applicants. In my view the Windrush Compensation Scheme should be operated on an inquisitorial basis, and the role of the caseworkers should be to facilitate payments, rather than working in a partisan role to try and reduce award levels.

5.3 I outline below the most serious issues with the Windrush Compensation Scheme that the Home Office now needs to address.

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[8] See p.64 of the *Public Sector Equality Duty assessment of hostile environment policies,* dated November 2020, Equality and Human Rights Commission

[9] See the *Home Affairs Committee, Oral Evidence: The Windrush Compensation Scheme* transcript at Q34 (https://committees.parliament.uk/oralevidence/1372/html/)

5.4 **No paid for legal advice**. Given the seriousness of the issues and the damage caused to applicants, as well as the complexities with the rules and the claim form (considered below), it is problematic that the Windrush Compensation Scheme does not pay for applicants to seek advice from lawyers to assist them with their claims. I am not suggesting that this advice should be permitted to be provided on an uncapped fee basis, or that lawyers should be able to capitalise on the Windrush Compensation Scheme by agreeing success fees with their clients, as it is possible to create a methodology to prevent this happening (as I have done on different occasions in the past). However, there is no doubt that anecdotal experience of claims shows that Windrush Compensation Scheme applicants do require advice from experienced and qualified legal professionals to ensure that they are submitting their best claim.

5.5 The lack of paid legal advice means that applicants are left to work through the claim form themselves, approach Citizens' Advice or rely on pro-bono advice offered from law centres, such as the North Kensington Law Centre. I have some experience of the excellent work that NKLC have been doing, and it is clear to me that their involvement with these cases secures better outcomes for applicants. The Committee has heard directly from the committed Holly Stow at NKLC. However, I understand that the same level of service and client care is not capable of being provided by Citizens' Advice, who provide a short session to help complete the form but then leave applicants to it.

5.6 There are limitations to the services that organisations such as NKLC can provide, not least that they do not have the requisite number of experienced professionals which is needed to assist all applicants through the process. Law centres have also seen a considerable increase in demand for services since the beginning of the Coivd-19 pandemic, further stretching their resources. Several redress schemes have been able to accommodate this need for paid legal advice and support through either a fixed fee structure or a commitment to pay reasonable legal fees. By way of example, albeit there are many:

(a) the *Lambeth Children's Home Redress Scheme* provides that an applicant's costs will be covered on (i) a fixed basis, where the applicant secures a "Harm's Way" payment; and (ii) a reasonable basis, where the applicant is awarded a full redress payment[10];

(b) the *Historical Institutional Abuse Redress Board (Applications and Appeals) Rules (Northern Ireland) 2020* provides for tiered legal costs based on whether there has been an oral hearing in the case. The maximum costs award is almost £7,000 for solicitors and £1,000[11];

(c) the *Manchester City Football Club Survivors' Scheme*, which I designed, consulted on fees with applicant solicitors during the design and agreed fixed fee tariffs for assisting applicants to apply to the redress scheme.

5.7 Paying for legal advice for applicants directly benefits the Home Office. Experienced solicitors would help applicants to improve the presentation of their claims and supporting evidence. Claims are less likely to be submitted until the investigation work has been done, reducing the burden on caseworkers to piece together correspondence and evidence, or to prepare lengthy requests for further information.

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[10] See the *Lambeth Children's Home Redress Scheme*, at page 3

[11] See ss. 14, 15 and Schedule 1 of the *Historical Institutional Abuse Redress Board (Applications and Appeals) Rules (Northern Ireland) 2020*

5.8 **Unfair standard of proof**. The Windrush Compensation Scheme operates on the civil standard of proof, which requires applicants to show that their claim should succeed on a balance of probabilities. This is sensible in light of the fact that these claims would proceed in the civil courts, were they not resolved by application to the Windrush Compensation Scheme. However, when it comes to assessing claims for an actual earnings award in Annex D, a caseworker can only make an actual award if "*the evidence is clear and you are satisfied so as to be sure that… the applicant's or the deceased's employment was ended, or they otherwise stopped working, because they could not demonstrate their lawful status in the United Kingdom…and the applicant or the deceased took reasonable steps to resolve their lawful status in the United Kingdom*"[12]. I think it is now broadly recognised that the words "*satisfied so as to be sure that*" introduces a much higher standard of proof. I also understand that this issue is being reviewed and it remains to be seen how it is resolved, quite aside from the question as to why the Home Office included such an imbalance of rights within its compensation scheme in the first place.

5.9 It is important that this change is introduced and implemented fairly and there must be some concern, particularly following the way that the Windrush Compensation Scheme has been administered so far, that these changes will not be delivered or implemented in a considered way. The first risk is that the new wording, when it is introduced, should be applied retrospectively. This means that all general loss awards should be reassessed, to check whether an actual award should have been made when the evidence is assessed against the revised standard of proof. It is instructive to consider a case to highlight this issue. The applicant was dismissed from employment in 2014 shortly after being asked by their employer to produce evidence of their right to work in the UK. Not satisfied with this evidence, the employer proceeded to find that the applicant's role was redundant. The applicant was later informed by former colleagues that someone else had been employed to fill the role the applicant had left. In its first decision, the Home Office said that it was unable to make any award for loss of employment, as they had not been provided with evidence that the applicant had lost their job due to a failure to prove their right to work. In its Tier 1 Review decision (not issued until six months after the review had been requested), the Home Office found on the balance of probabilities the applicant's inability to demonstrate their lawful status "*played a significant part*" in the applicant's dismissal and the applicant was entitled to a general loss award. The Home Office could not make an actual award because "*they had not received a letter from [the applicant's] employer confirming your employment was ended because of an inability to prove your legal status*". It is clear this claim would now benefit from the change in the Home Office's approach.

5.10 Further assessment of previous claims should be made regardless of whether the applicant has applied for an actual award or not, as there can be no doubt the strength of the language in Annex D, as originally drafted, may have discouraged some people from applying for an actual earnings award. This is particularly the case if applicants were applying to the Windrush Compensation Scheme without being able to seek advice. The Committee needs oversight of how this review process is implemented.

5.11 The second risk relates to how the standard of proof is now applied. It is one thing changing the redress scheme drafting, but applying the civil standard of proof also requires a reset in the approach of caseworkers. Further training may be required, as it is a fine balance to strike, requiring the caseworker to decide whether a "*fact in issue more probably occurred*

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[12] See page 46 of the *Guidance for decision makers considering cases under the Windrush Compensation Scheme, Version 5.0*, 9 October 2020

than not"[13]. In my experience of designing redress schemes, getting the balance right often requires redress scheme administrators to give applicants the benefit of the doubt in borderline issues. Never more is this the case than for claims where the cause of the harm is historic and concealed.

5.12 I would add here that where there is evidence that a significantly high number of claims are being sent for Tier 1 and perhaps Tier 2 reviews, which we have seen anecdotally, it suggests that there are systemic issues with the way that the first level review is being conducted. One reason for the disparity between the award a applicant is expecting to receive, and the award they receive, may be an inconsistent application of the standard of proof. This also goes to the way that offers under the Windrush Compensation Scheme cause further pain to individuals who have been variously ignored and not believed. It is very concerning that the receipt of an offer has so often enlarged this wound, which is the exact opposite of what it's aim should have been.

5.13 **Mitigation.** Question 3.15 of the claim form requires applicants to, "…*provide details of action you have taken in the past to try and obtain evidence if your lawful right to stay in the United Kingdom*". Where applicants have not taken any steps to resolve their status, they must confirm why not. Further, to be able to claim an actual earnings award, at Rule D4(d) an applicant must have taken "*reasonable steps to resolve their lawful status in the United Kingdom*".

5.14 Requiring an applicant to submit evidence that they have mitigated their loss reverses the burden of proof that exists in all civil proceedings (including discrimination claims), which requires a defendant to prove a claimant has failed to mitigate their loss. Further, what usually must be shown is that the applicant acted "*unreasonably*". The case law provides that "*there is a difference between acting reasonably and not acting unreasonably*"[14]. The main point is the courts do not generally apply a demanding standard to the claimant on the basis that the claimant is a victim of a wrong. As with many aspects of the Windrush Compensation Scheme, in the absence of guidance the question of whether an applicant has or has not acted reasonably requires a subjective assessment by the caseworker. The balance is particularly difficult to strike on mitigation, where for example a court will not necessarily consider it *unreasonable* that a claimant has not taken a better paid job to mitigate his losses of losing a job with the defendant[15]. The question of whether or not a claimant to the Windrush Compensation Scheme is likely to be highly fact dependent and it is certainly not the case that all (if any) claimants' failure to contact the Home Office will be considered to be "unreasonable".

5.15 It is another example of a rule that is particularly problematic to administer fairly in the absence of legal advice, and many applicants may therefore be applying for awards without appreciating the significance of this rule.

5.16 **Criminality.** Rule 4.5 entitles the Home Office to "*reduce or decline to make an award*" where a applicant has been convicted of a criminal offence and sentenced to more than four years or more in prison. This rule is entirely arbitrary and unfair and has no basis in English law, where the courts would not treat a victim of a tort or of discrimination any differently as a result of any criminal convictions that individual had. The basis on which the Home Office

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[13] The House of Lords' explanation on what the civil burden of proof requires, in the case: *In re B (Children) (FC)* [2008] UKHL 35, at para 13

[14] *Cooper Contracting Limited v Lindsey* [2016] I.C.R. D3 and Clerk and Lindsell on Torts 23rd edition at 27-09 to 27-11 *(Damages: General Principles – Mitigation)*

[15] This is the example given in *Cooper Contracting Limited v Lindsey* [2016] I.C.R.

considered it appropriate to include this rule is not clear. Further, there is in my view a risk it is a discriminatory approach, on the grounds that individuals who have been subjected to the hostile environment policy may have a higher engagement with the criminal justice system propensity to commit crime than other members of the population. This is a matter best investigated by an expert sociologist, but in the meantime and notwithstanding its legal provenance the inclusion of the rule only serves to exacerbate the division that the Home Office has caused through its hostile environment policy

5.17 **Lack of independence.** It is an important element of restorative justice that a wrongdoer should be directly accountable for redress to the victim – which is why I think in principle greater justice can be done by the wrongdoer personally making amends. The Windrush Compensation Scheme has been widely criticised because it is being administered by the Home Office[16]. I understand that there are several reasons why that is the case, not least the position taken by other governmental departments that the Home Office should be responsible to pay for the damage it has caused. However, the optimal position is that an independent redress scheme administrator is appointed to handle redress scheme claims. Without that separation, a redress scheme appears unfair.

5.18 The issue of independence is a highly topical one. Earlier this year, the All-Party Parliamentary Group on Fair Business Banking ("**APPG**") criticised the appointment of Herbert Smith Freehills to a redress scheme for the distribution of approximately £60 million to 550 former postmasters. The postmasters had alleged that faults with a Post Office IT system had led to them being wrongly accused of fraud. The APPG described the appointment of Herbert Smith Freehills as "*perverse*", given the firm's role advising the Post Office during the highly contentious litigation[17].

5.19 I am of course aware that the Home Office is the only organisation with authority to make a final determination about somebody's right to reside in the United Kingdom. However, the Windrush Compensation Scheme's focus is on awarding compensation, whilst the Windrush Scheme, operated by the Windrush Taskforce, is responsible for resolving an individual's status. In my view there is no reason why the Windrush Compensation Scheme could not be run independently of the Home Office, with questions relating to residential status being referred to the Windrush Taskforce when needed. The process of redress scheme administration would be further improved by appointing an independent legal expert to oversee the Windrush Compensation Scheme, who possesses familiarity with the rules and the subject matter and experienced in claims giving rise to loss of earnings and psychiatric damage or distress. I note that the Adjudicator's Office has the potential to operate as an important check on the Home Office's powers but its role is undermined in three ways: (a) Rules 10.15 to 10.17 only permit the Adjudicator's Office to make a recommendation to the Home Office, rather than a final decision; (b) the Adjudicator's Office is not mentioned at all in the rules (other than as an "independent person") and its role is only understood by reading page 91 of the Primary Claimant Guidance; and (c) applicants consider the Adjudicator's Office to be an extension of the Home Office (or at least the Government) rather than an independent body with the ability to hold the Home Office to account. An external appointment, which are often retired High Court judges, would provide a rigorous

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[16] See for example "*Black official quit 'racist' Windrush compensation scheme*", The Guardian, 18 November 2020, which reports that former senior Home Office employee Alexandrah Ankrah was *"troubled by the fact that several Home Office staff responsible for the compensation scheme had previously helped implement the hostile environment policies that had originally caused applicants so many problems".*

[17] See https://www.lawgazette.co.uk/news/herbert-smith-freehills-under-fire-for-post-office-advice/5105176.article

level of oversight to enhance the Tier 2 review work now being done by the Adjudicator's Office.

5.20 **Windrush Compensation Scheme documents**. Redress scheme take-up will be reduced by the extensive Windrush Compensation Scheme rules and the Primary Applicant Guidance, which are both over 40 pages long. This is particularly the case where applicants are unrepresented and document complexity risks causing unnecessary confusion and distress, and further resentment towards the Home Office. On this issue I disagree with Committee member Ms Laura Farris MP, who during the course of the evidence session on 9 December 2020 suggested to Mr Forde that the rules seemed "*to be fairly user-friendly in that the layperson could understand naturally where they might fall in respect of certain categories and certain thresholds*"[18]. I note that Mr Forde was far from persuaded himself that the documents were accessible, explaining that, "*I think the scheme is accessible but not to all. People have varying talents and abilities and degrees of understanding*"[19]. An unrepresented applicant would have very little sense of where to start in filling out the claim form. This is reflected in the claims I have reviewed which have now been referred to the NKLC. In many of those claims, the applicant has attempted to instigate the process without advice and the claim form contains very limited detail or background to the claim. Following NKLC's involvement, the applicant has subsequently prepared more detailed written submissions, either in the form of a witness statement or in the form of a letter sent by NKLC to the Windrush Compensation Scheme.

5.21 It is a failure in redress scheme design that claims should have to be developed in this way. Further, the lack of uniformity and the inevitably varied styles of responses that the form is going to encourage will also create challenges for caseworkers seeking to understand and assess these claims, leading to increased correspondence at the review stage and further delay. Most of all, this fault makes compensation a question of chance.

5.22 It is also concerning that in places the tone of these documents might be described as "hostile", rather than fostering the restorative justice ambitions of the Windrush Compensation Scheme. For example, there appear to be repeated references to "fraudulent claims" (see Rules 4.7 to 4.9 and the "Repayment" provisions at Rule 5), which might, in other contexts, be considered micro-aggressions.

6 Fairness of the Windrush Compensation Scheme awards

6.1 The Windrush Compensation Scheme is failing to pay affected individuals the compensation that they are entitled to and that the Home Office has promised to pay. The recurring issues in the cases I have considered so far are issues arising under employment and impact on life claims, which I focus on for the purposes of this submission. As discussed at the outset of my evidence, the recent changes made to the Windrush Compensation Scheme are likely to increase the level of awards paid to most applicants. There is still, however, a valid question as to whether those awards are fair, for the reasons I outline below. In my experience sudden changes to compensation levels are not generally indicative of corresponding restorative justice benefits where the reality is that the new awards are not available to many applicants, or the redress scheme is letting people down under other heads of loss or by its processes. It is important to recall that the Windrush Compensation

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[18] See the *Home Affairs Committee, Oral Evidence: The Windrush Compensation Scheme* transcript at Q51 (https://committees.parliament.uk/oralevidence/1372/html/)
[19] Ibid.

Scheme was launched with the promise of awarding £200 million[20], yet those promises to pay large amounts of compensation have not materialised.

Loss of earnings

6.2 Without explanation, and contrary to the Home Office's statements, the Windrush Compensation Scheme fails to provide both past and future loss of earnings to applicants who lost their jobs, or were unable to obtain new employment, as a result of the hostile environment policy. Instead, the Windrush Compensation Scheme pays only past loss, in the form of either a general loss award or a so-called actual loss award, which fails to account for the loss an applicant has *actually* suffered. Prior to the 14 December 2020, the general award was capped at 12 months' salary. The general award cap is to be lifted, although the full details of the changes have not yet been published. As with the first version of the rules, it is the detail that really matters and which I have not yet had an opportunity to consider and comment on in this evidence. What is known is that prior to 14 December 2020, in order to be able to claim for the higher, actual loss award, the applicant needed to show that:

(a) they had taken "*reasonable steps to resolve their lawful status in the UK*" (Rule D4(d)) (i.e. the applicant is required to prove they have mitigated their loss); and

(b) the Home Office must be "*satisfied so as to be sure that the applicant meets the requirements*" for an actual loss award (Rule D8) (i.e. the Home Office can consider claims for actual loss against a standard of proof that is higher than "on the balance of probabilities").

6.3 Where the distinction between a general and actual loss award lies in the application of unfair mitigation and standard of proof rules, it follows that there is no fair or reasonable basis for a two-tier system for employment loss. On that basis I consider that these requirements should be removed for *all* claims to the Windrush Compensation Scheme.

6.4 The consideration then is what losses should be recoverable under an actual loss award and my view is that these should be made up of both past and future losses. The award for *past loss* is currently calculated by multiplying the number of months comprising the period of loss by the net pay of an applicant at a dated fixed by Rule D8. This is a rudimentary approach to a technical exercise. It makes no provision for the fact that during employment an applicant may have benefited from pension contributions; increased salaries due to promotions; higher tax-free brackets over time and interest. The calculation makes no provision for *future loss* of earnings where the applicant is still out of work and can show, on the balance of probabilities, that they remain out of work because of the damage caused by the Windrush scandal. This may be for myriad reasons. One such reason is likely to be the years of employment lost as a result of the hostile environment policy having created a gap in an applicant's experience that makes it difficult for them to return to work. Another is that the psychiatric injury caused to applicants has resulted in them being unable to work, or unable to return to their previous role.

6.5 If it is the intention of the Home Office to pay actual past loss, then the fairest way to make an award is by referring the applicant's data to actuaries retained by the Home Office to produce an independent and robust actual award based on past and future loss. If this cannot be achieved for all applicants, for example because an applicant has not retained their payslips from past employment, then further work should be done to develop a tariff

[20] See Hansard 3 April 2019, Column 1048, Vol 657, Secretary of State for the Home Department

system with actuarial input to fairly compensate those applicants based on assumptions of what they are likely to have lost. I note that the Home Office has suggested that might be the approach now taken, but it remains to be seen whether the tariffs are fair and reflect the reality of what a claimant might have recovered through civil proceedings.

Impact on Life

6.6 At the time of writing, the awards for Impact on Life are in a state of flux. The Home Secretary's announcement on 14 December 2020 promised to pay £10,000 to any applicant who could demonstrate that they have suffered any impact on their life as a result of the Windrush scandal. The statement also confirmed that the £10,000 payment would be part of a new Impact on Life scale that will be designed to pay up to £100,000, and that the impact categories would be reorganised slightly to account for the tariff increases. Plainly the changes raise serious questions as to why the Home Office underpaid Impact on Life awards to begin with or how that position can be reconciled with many comments made in the House of Commons by successive Home Secretaries.

6.7 I have considered Annex H post 14 December 2020. The phrase "Impact on Life" is vague and unhelpful, and what Annex H in fact seeks to do is make an award to compensate applicants for psychiatric injury and injured feelings caused by the hostile environment policy. Although the figures have now been changed considerably by the Home Office, my central concern about awarding damages for psychiatric losses and injured feelings is the same as it was prior to the changes being announced. At law, these injuries require professional diagnosis by the instruction of expert psychiatrists. Rule 6.6 of the Windrush Compensation Scheme allows the Home Office to obtain medical evidence, where it "*considers that medical or other expert evidence is required*". That is a broad discretion and I consider the Home Office should be required to confirm how many times it has been used. The better approach would either be to (a) ensure that all applicants to the Windrush Compensation Scheme can, at their option, request to see a psychiatric expert at the Home Office's cost; or (b) require that psychiatric reports are mandatory to assess claims for awards at, say, the upper levels on the Impact on Life tariff, a version of which I have previously deployed on similar redress schemes.

6.8 If anything, with more significant amounts of compensation now available the pressure on caseworkers to get the assessment right also increases. Simply channelling more notional funding into the tariff system is not going to make a caseworker any more capable of making what is a highly specialist decision about an applicant's health, reviewed only through a description of how the applicant considers they have suffered on the claim form, completed without (in most cases) legal representation.

6.9 Turning now to the award levels, in my view there are two fundamental issues with the approach taken:

(a) The first issue is that the tariff design means the Windrush Compensation Scheme is still at risk (even after the 14 December 2020 changes) of underpaying, when compared with the Judicial College Guidelines (15th Edition) (the "**Guidelines**") for psychiatric injury, and the guidance provided by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No 2)*[21] (the "**Vento Scale**"), for damages resulting from injured feelings. An applicant in discrimination claims, which these at least in part are, is entitled to *both* heads of loss when there has been a breach of the Equality Act 2010[22]. By way of further explanation:

[21] [2003] IRLR 10

(i) the Guidelines provide four scales of injury ranging from "*Less Severe*" to "*Severe"*, and considers: i) the injured person's ability to cope with life, education, and work; ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact; iii) the extent to which treatment would be successful; and iv) future vulnerability (the "**Factors**"); and

(ii) the Vento Scale divides injuries to feelings into three bands.

(b) The table below compares the awards for the most serious injuries available from the Windrush Compensation Scheme, the Guidelines and on the Vento scale. Although I am taking the most serious injuries and comparing them, the disparity exists for lesser injuries as well. It is evident that the highest award under the Windrush Compensation Scheme could still be lower than an award at the mid-level of the Guidelines and the highest level on the Vento (allowing for a reduction in both when they are combined), even before consideration is given as to whether an award could be made under both heads of loss.

Scheme Level 5	**Judicial College Guidelines**	**Vento Scale**
£100,000+	£46,780 to £98,750	£27,000 to £45,000[23]
Profound impacts on a applicant's life which are likely to be irreversible. This is expected to involve major physical or mental health impacts, where the applicant has been permanently affected or where recovery or return to a relatively normal life is likely to take (or has taken) several years.	In these cases, the injured person will have marked problems with respect to the Factors and the prognosis will be very poor.	For the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of race.

6.10 I also note that there is a substantial difference between Level 4 (£70,000) and Level 5 (£100,000) on the Impact on Life tariff. In the cases I have reviewed, there has been a tendency for caseworkers to avoid placing applicants into the top level on the tariff, when the difference between those tariffs was only £3,000. Anecdotally, I have been told that the highest level of damages under the old tariff was never awarded. I have also been told that in one case a letter from the Home Office referred to "*profound impact*" but proceeded to make an award of £7,000. Now that the difference between Level 4 and Level 5 in the Impact on Life tariff is £30,000, there must be real concern that the highest tariff levels will never be used.

7 Windrush Compensation Scheme changes

7.1 Whilst a redress scheme will never be a perfect solution for all participants, it is intended to be a compromise of rights between interested parties. It is evident that this compromise has

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[22] See s.119(4) (Remedies): "*An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)*".

[23] The Vento Scale was last updated on 27 March 2020 by the presidents of the Employment Tribunals of England & Wales and Scotland and apply to cases presented after 6 April 2020. See: https://www.judiciary.uk/wp-content/uploads/2013/08/Presidential-Guidance-Vento-Bands-Third-Addendum-27-March-2020.pdf

not been achieved to date and many potential applicants do not currently view the Windrush Compensation Scheme as an holistic response to their hurt and loss. I have set out above what I consider to be the main issues with the Windrush Compensation Scheme. There is of course more to say, but I have tried to keep this submission to a manageable length. The Windrush Compensation Scheme has clearly been a missed opportunity to do right by those who have suffered and I believe that a better balance can and should be achieved.

7.2 Conscious of the Committee's objectives, I have split next steps into short-term and some longer-term solutions.

Short-term (by February 2021)

7.3 *Suspend Rules 4.5 and 4.6 (Criminality)*. There is in our view no basis for these Rules. They provide the Home Office with an arbitrary power that could result in manifest unfairness or a discriminatory result.

7.4 *Suspend Rules 4.7 to 4.9 (Fraud) and Repayment (Rule 5)*. As I have discussed above, I consider these Rules create mistrust and are unnecessary. If the Windrush Compensation Scheme is properly drafted, fraudulent claims will be minimal and should be capable of being identified by Windrush Compensation Scheme Administrators.

7.5 *Past claims*. All previous applicants should be contacted to explain that the Rules are going to be reviewed and assessed independently. Once the review is complete, all applicants should be contacted to confirm the outcome.

Longer-term (by Autumn 2021)

7.6 There is no quick fix to resolving the Windrush Compensation Scheme. However, I think real progress could be achieved by Autumn 2021 and I would be very happy to discuss how I can assist with that work. This work might involve:

(a) A Windrush Compensation Scheme review to assess what is and is not working and consequential changes to the Windrush Compensation Scheme. I consider fairness requires the review to be conducted independently of the Home Office.

(b) A consultation with Citizens' Advice and other advisers who have been assisting applicants with the Windrush Compensation Scheme to understand what is not working.

(c) Revisiting the awards available for all heads of loss to ensure fairness is being achieved.

(d) Simplifying the Windrush Compensation Scheme documents and ensuring that applicants are not required to provide more than the civil courts would require.

(e) Considering new rules to enable applicants to seek qualified legal advice to pursue their claims.

(f) Revisiting the approach for the provision of medical evidence to support a claim for psychiatric injury.

8 Next steps

8.1 I hope the above evidence is helpful to the Committee's ongoing work. I would, of course, be very happy to give evidence in person, assist with any working groups or contribute in another way the Committee might find constructive in light of the limited Parliamentary time which might be available for this issue in 2021.

December 2020