

# Building a Framework for Compensation and Redress

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Fair Business  
Banking



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### About this report

This report presents findings from research conducted for the APPG's inquiry into compensation schemes, highlighting the limitations of the UK framework for redress, key lessons learnt from a comparative study of ten schemes, from which are derived the fundamental building blocks of any fair and reasonable redress scheme. We present a series of recommendations - from less to more substantive, to ensure our redress framework is more consistent and delivers fairer outcomes. As well as considering existing research, the APPG held interviews with a range of stakeholders, including KCs, independent financial advisors (IFAs), legal experts, academics, and legal and representative bodies for victims, who also contributed written evidence.

### About the APPG for Fair Business Banking

The APPG is a cross-party group with members from the House of Commons and the House of Lords which puts forward policy recommendations to Government that encourage a finance system which allows enterprise to flourish and business to thrive. The Group acts as a forum and focal point for the SME community and financial services industry to deliver reforms in their long-term interest.

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# Foreword

Compensation and redress schemes are vehicles deployed to remedy the most sensitive problems in financial services. They must bear heavy loads. These include delivering justice for large groups of consumers and resolving complex legal claims without court proceedings.

Schemes have been established in response to some of the UK's most notorious banking sector scandals, including the HBoS Reading fraud, the collapse of London Capital & Finance, interest rate swap mis-selling and RBS' Global Restructuring Group's activities. Outside core financial services, the Horizon Shortfall Compensation Scheme for sub-postmasters and the BSPS scheme for steelworkers are two well-known examples.

Yet, to date, there has been no roadmap providing guidance on when and how a scheme should be established. Their bases are varied: some established by government or the Financial Conduct Authority, others by financial institutions; some pursuant to legislation, others on a voluntary basis. Whilst they draw their features from a variety of sources, including statutory inquiries and standing compensation and ADR schemes (notably the Financial Services Compensation Scheme and the Financial Ombudsman Service) each has its own unique rules.

However, all share a common root feature, namely an issue sufficiently grave to warrant a scheme being established. It is implicit from this that schemes must be designed to the highest standards and be capable of delivering redress fairly and efficiently. Regrettably, however, that has not been the case with many recent schemes.

The APPG on Fair Business Banking has a rich history of casting a spotlight on the most acute problems faced by banking consumers, including many of the scandals that have given rise to the schemes examined in this report. It is therefore entirely natural that the APPG would also shine a light on the schemes themselves. That is particularly so because, as explained in this report, many of the schemes of the past two decades have themselves suffered from serious problems which have hindered them from delivering the justice that consumers deserved.

Those problems are perhaps not surprising given schemes are established on an ad hoc basis, outside the usual court and ADR structures. Moreover, they are often established by the institutions within which the problems which need to be rectified arose in the first place. That creates an inherent risk of conflict of interest.

This report is the UK's first systematic review of redress and compensation schemes, and the first guide to best practice when schemes are designed and implemented. We should aspire to a world where the requirement for redress schemes does not arise in the first place. Indeed, the report proposes a financial service tribunal as a step towards that goal. However, given that destination is still some way distant, this report is essential reading for anyone involved in financial services redress schemes or the issues that give rise to them.

**Ned Beale, Partner, Hausfeld & Co LLP**

# Executive Summary

## What is the problem?

1. In recent years, the relationship between banks and their customers has been damaged by a series of high-profile incidents. Beyond the financial services sector, a series of high-profile scandals, **emanating from both private companies and government bodies, have eroded public trust.**
2. The **existing landscape of institutional mechanisms for redress is fragmented** - it includes the Financial Services Compensation Scheme (FSCS), Financial Ombudsman Service (FOS) and going to court. It is difficult for both firms and customers to navigate, and often **fails to produce fair and reasonable compensation** to those whose lives have been harmed by egregious misconduct and through no fault of their own.
3. Most mass redress schemes are ad hoc and voluntary: they are established to tackle a specific scandal, usually after the failure of a given firm's internal complaints procedures. These schemes have **attracted strong criticism.** The process is often designed in such a way that limits the liability of the offending party and **ultimately fails those it is ostensibly intended to help.**
4. Yet, in the words of Sir Robert Francis KC, who made recommendations on redress for the Infected Blood Scandal, **"compensation is a recognition of adversity which should not have happened"**, and an attempt to restore victims to the position they would have held.
5. While many schemes considered have a stated aim of providing fair compensation, the process—from inception to delivery—is often flawed and excludes meaningful victim involvement. This leads to unfair or insufficient offers and a **lack of trust in the outcomes.**

## Key findings

After examining a series of case studies, from the financial services sector and beyond, including the 9/11 Victim Compensation Fund, the Steel Workers' Compensation Scheme, and the Post Office Compensation Scheme, **some patterns and key lessons learnt emerge:**

- A **refusal to learn from past mistakes:** The design of many of these schemes display the same features that led to the wrongdoing in the first place:
  - The design and operation of the Windrush Compensation Scheme contained the **same bureaucratic insensitivities** that led to the Windrush scandal.

- The steel workers scheme is **not the first pension transfer scandal**. The methodology used to calculate redress, a “point in time” calculation, was a problem highlighted in this review, yet the FCA have not implemented these findings, and are still pursuing point in time calculations in this scheme over 20 years on.
- The redress framework, even for individual cases, is **highly complex, sometimes involving multiple schemes and placing a significant burden of proof on victims**:
  - The Cranston Review of Griggs Review highlighted the overly adversarial approach that came from placing a burden of proof on the customer, and from employing an **overly strict evidential threshold**, beyond that which would have applied had these claims been pursued in court. This created a situation in which it was all but impossible to prove both direct and consequential loss.
  - **Three separate compensation arrangements** have been made for the subpostmasters who were affected by the Horizon IT scandal.
  - In the case of the SWPS Compensation Scheme, not only were there multiple schemes, but some steel workers were **eligible for different schemes**, when there are significant variations in the compensation award depending on where redress is calculated.
- Conflicts of interest: Many of the schemes considered in this study **suffer from inherent or perceived conflicts of interest**:
  - The Cranston review highlighted the need for both **substantive independence, and the appearance of independence**, to ensure they have the trust of participants.
  - The Windrush Compensation Scheme’s administrator is the Home Office, **the perpetrator** of the original wrongdoing.
  - The Independent Financial Advisors responsible for giving unsuitable advice and causing thousands of steel workers to lose their life savings **are calculating how much** these pension members should be compensated.
- The challenges of “putting people back where they would have been” - Most schemes considered **fail to put victims back in the position they would have been**, had the adversity not occurred:
  - In the Windrush case, even when claimants have been successful, they have perceived the value of payments **as insufficient to compensate** for the harm suffered.
  - In the case of steel workers, **financial risk is introduced** onto the victims of the unsuitable advice: they would have been in a risk-free situation, in gold-plated pensions, while their compensation award now depends on market fluctuations.

- In both the IRHP scheme and the RBS GRG scheme it is clear that the total amount awarded for consequential loss in each was insufficient. The original HBOS review **did not produce a single offer of redress for Direct and Consequential loss**.
- Lack of timeliness is a consistent failing of the redress schemes considered here. Although **interim payments** have been awarded only in three of the compensation schemes considered here, they are a remedy to the common lack of timeliness, although usually after significant public outcry and criticism for the delays in the scheme. Such interim payments are crucial to ensuring that victims are returned as closely as possible to the situation they were in before the wrongdoing occurred, sooner rather than later.
- **Schemes often exclude groups of victims with no prospect of independent assessment**
  - **Insolvent victims** are unfairly excluded from most schemes and are not eligible for compensation. Even in cases where victims are nominally eligible, there is no structure that allows for the ultimate victims to be compensated. It is all but impossible to restore a company **without the express agreement of the secured creditor**—which, in the case of financial services cases, is often the bank that caused the distress in the first instance.
  - In the IRHP case, rather than setting out to proactively identify all customers eligible for redress and quantify their losses, the scheme took a negative approach, seeking first to **eliminate one third of customers** - the “sophisticated”.
  - In the Foskett Panel, Lloyds Bank still has final say on who is able to be considered by the Panel, resulting in the unfair exclusion of a small number of customers who have not had their eligibility independently assessed.
- Several schemes suffered from **a lack of transparency of processes, information and outcomes, and a corresponding lack of accountability**:
  - The Cranston review showed that the Bank adopted a **policy of not disclosing to customers the information** it held, needed by claimants to make their case, or its methodology for calculating compensation, leading to unfair outcomes.
  - Windrush victims faced similar evidentiary opacity, given that the Home Office **destroyed evidence** (thousands of landing cards and other records), meaning that claimants lacked the documentation to prove their right to remain in the UK.
  - In the IRHP case Swift’s independent review finds that there was “a **serious gap in the FCA’s accountability** for the implementation and outcomes of the Scheme, both substantive and in terms of fair process.”

The central conclusion of this report is that ad hoc compensation schemes that “reinvent the wheel” each time a scandal emerges **do not lead to optimal outcomes**. As we detail in this report, these single-issue schemes have led to unfair treatment, and often created

significant strains on claimants, in addition to the undue adversity that these schemes are supposedly designed to remedy.

So, how do we avoid this unfair outcome? How could our framework for redress be improved to ensure that we **learn from past schemes** and don't repeat the same mistakes?

## The Building Blocks of a Compensation Framework

1. **A collaborative approach and process:** There must be agreement between the perpetrator and victims on the detailed Terms of Reference (TORs) before the scheme is launched. The design and administration of the scheme should be a collaborative process, in which victims are consulted and their representatives sign off on the final TORs.
2. **Timeliness**, both in set-up and adjudication: It is essential that the redress scheme be set up in a timely manner, as soon as the adversity is revealed, to limit the continued effects of the adversity, and restore harm caused as soon as possible.
3. **Independence:** Having an entirely independent adjudicator, with no links to the offending organisation, is essential to guaranteeing that the outcomes are fair, and that victims trust the process and engage with it. The choice of professional firms and adjudicators must involve the participation and agreement of victims' representatives and groups.
4. **A recognition of adversity:** Putting individuals back where they would have been had it not happened should be the driving force behind the scheme.
5. **Transparency of processes and outcomes:** All pertinent information must be available to claimants. All evidence that is used to calculate awards must be made available to claimants, as well as detailed methodologies and descriptions of the process.
6. **Broad eligibility:** The scheme should actively seek to identify who is eligible for redress rather than who isn't, and eligibility must be broad enough to compensate all of those affected by the adversity. Where there is a question, there must be an independent process for evaluating eligibility that is open to anyone that considers that they may have been affected.
7. **Accessibility and legal costs:** Schemes should be designed to be accessible without legal assistance, and not place an unreasonable burden of proof on victims. If this is not possible, it should cover the expensive legal costs that are therefore necessary for claimants to access redress and ensure that full disclosure of information is available.
8. **Appeals mechanism:** Where applicants are dissatisfied with their assessment, they should have access to an internal review and after that an independent appeal panel.
9. **Fairness and efficiency** must be at the heart of the objectives of any redress scheme and must provide a sense of closure to victims.

### Key recommendations

- Recommendation 1: **Clear and compulsory guidelines for setting up a redress scheme**

As Andrew Bailey said when giving evidence to the Treasury Select Committee: “it just does not seem to be sensible that, every time one of these things happens, we have to set up something new.” (House of Commons, 2017).

At the very least, the Government must urgently publish a handbook establishing compulsory guidelines by which any public agency (such as the FCA or the Home Office), or any private firm or organisation (such as a bank or the Post Office), must abide when setting up a redress scheme, based on the nine core building blocks above.

- Recommendation 2: **Creating an arms-length body (ALB) responsible for setting up and overseeing redress schemes**

We must create an arms-length body, that could be activated when a scandal emerges, and co-funded by private sector firms responsible for wrongdoing. This body will be composed of expert panels, to ensure guaranteed independence of judgement. It will be accountable directly to Parliament and regulators for the expenditure of public funds and the fulfilment of its terms of reference, which must include maintaining trust and integrity in the system.

This body would deliver all of the building blocks which this report shows are fundamental to a fair and reasonable redress scheme.

- Recommendation 3: **Creating a Financial Services Tribunal (FST) and extending section 138hD to firms**

Taken together, all of the UK redress schemes studied in this report, whether active or completed, have cost around £3.761 billion. If we take only FS firms, the bill is substantial, falling to around £3.4 billion. Setting up a permanent body to adjudicate disputes in the financial sector, where both businesses of all sizes and individuals would be eligible to participate, would be far more cost effective.

By offering a forum for accessible and expert dispute resolution, many scandals could be avoided in the first place. Indeed, as individuals and businesses seek to resolve disputes, unfair business practices also come to light, which could provide an impetus for financial service providers to improve their service standards, as shown by the previous APPG report, Fair Business Banking for All. Secondly, repeated and systemic cases should automatically trigger the redress process outlined in the first two recommendations.

# What is the issue?

## The scale of the problem

Over the past 20 years, over 12 compensation schemes have been set up to address the problems caused by huge scandals, which have affected at least 78,548 people in the UK<sup>1</sup>. In the financial services sector, we have seen how a series of high-profile scandals have damaged the reputation of financial institutions and their relationship with their customers (Hollinrake, 2018).

Although these practices have affected trust in our financial services, such wrongdoing goes beyond the financial sector. Private companies and government bodies, most recently the Post Office and the Home Office, have been the origin of egregious misconduct, eroding trust in our public and private institutions alike.

Yet, our attempts to provide fair and reasonable redress fail time and time again. We keep reinventing the wheel, and each time we are unsuccessful, further eroding public confidence.

## Current institutional mechanisms for redress

What options are available to consumers and businesses who seek compensation for the harm caused by mis-selling and other poor conduct?

While there are different dispute resolution mechanisms for individuals, consumers and businesses seeking redress, these are all based on individual cases, and are not designed for mass redress mechanisms. These mechanisms are discussed at length in the Fair Business Banking for All report (Hollinrake, 2018). The existing institutional redress framework (composed of the Financial Ombudsman Service, Financial Services Compensation Scheme, Business Banking Resolution Service, and the courts) is inconsistent and fragmented, and therefore fails to produce fair and reasonable compensation where lives and businesses have been harmed by gross misconduct. The lack of avenues for dispute resolution has led to the creation of various ad hoc redress schemes.

The FCA is empowered to impose consumer redress schemes on a firm (FCA, 2023). These statutory schemes have only been invoked on two occasions, only cover the FCA regulated sector, and are limited to situations where there has been "widespread or regular failure to comply with requirements". The offending firms are expected to identify which customers have been harmed by the identified failure, determine and pay the appropriate redress in each case. The requirement to consult is an important part of a statutory consumer redress scheme.

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<sup>1</sup> This figure only covers the 9 UK scandals studied in this report, and is a conservative estimate, as some scandals affected businesses (and therefore multiple people), and for others, the number is unknown (e.g. the Windrush scandal, where up to 500,000 people could have been affected).

In this study, we examine one of the two instances in which these powers have been invoked: The Steel Workers Pension Scheme case (SWPS), and analyse its limitations. There are restrictions on the use of a statutory consumer redress scheme which may explain why they are used so infrequently. For instance, the FCA can only use such a scheme for affected consumers who would be able to seek relief through legal proceedings. Some of the voluntary (“ad hoc”) schemes we consider, appear to have “cherry picked” some of the principles incorporated into statutory redress schemes and set aside others, such as the element of consultation.

### Current written guidance for ad hoc schemes

Publications to date rarely directly address voluntary or ad hoc redress schemes. A European Union briefing highlights that “collective redress procedures can take a variety of forms, including the entrustment of public or other representative entities with the enforcement of such collective claims” (European Commission, 2011). Another notable exception to the lack of publications on the subject are OECD recommendations, although these too are limited and focus on consumers (OECD, 2007). The OECD recommendations define dispute resolution as “inclusive and encompass(ing) informal and formal mechanisms, online and offline mechanisms, private and public sector mechanisms, and administrative and judicial mechanisms.”

In contrast with this definition, we make a distinction between dispute resolution (such as via the FOS) and redress. We instead focus on the latter, which comes into play when there is an acknowledged problem. In other words, where it has been recognised that a group of people or businesses has suffered an injury or loss for which compensation is intended to redress. This harm could be caused by a business activity that has already been recognised as wrong, either by liability in the sense of a legal wrong; but fault, negligence or an unlawful act are not necessary preconditions for compensation.

Sir Robert Francis KC, when making recommendations on how the redress scheme should be designed in the case of the Infected Blood Scandal, noted that “compensation is a recognition of adversity which should not have happened” (Francis, 2022). We take redress or compensation (we use both terms interchangeably) to mean compensation for economic or any other harm, in the form of a monetary remedy (e.g. a voluntary payment, damages, restitution, or other monetary relief). Critically, it should also involve the provision of support to victims, and above all, restoration of dignity.

There is precedent for establishing fundamental principles around redress. It is a basic principle of administrative justice that government bodies must have fair, accessible, and effective redress mechanisms. The Parliamentary and Health Service Ombudsman (PHSO) principles provide guidance on how public bodies should provide remedies and how public bodies should put things right (Parliamentary and Health Service Ombudsman, 2009). Indeed, here, the objective of a compensation scheme is usually “to put the person affected back into a position where they would have been, had there not been a negative impact

on them.” In the context of the Infected Blood Inquiry, Sir Robert Francis recommends “fair and proportionate compensation for the suffering and losses” of those affected by the wrongdoing.

In this report, we will consider 10 “ad hoc compensation schemes” through a series of case studies. These take a variety of forms including the entrustment of public or other representative entities with the enforcement of collective claims. Schemes considered span the financial services and beyond, as there are valuable lessons to be learnt from how redress mechanisms have been elaborated, no matter the sector responsible for the wrongdoing.

We will then draw out lessons from these various schemes and consider the building blocks of what a fair and reasonable redress scheme should look like. Finally, we will conclude with recommendations for the Government to reform how it addresses problems of large-scale wrongdoing, to build an equitable system of redress that ensures victims are adequately compensated for the harm they suffer because of misconduct.

Before we turn to specific case studies, it is important to distinguish between class actions and redress schemes. Since 2015, a new mechanism for opt-out collective claims has been available for claims that fall under competition law and “courts have their limitations (...), proceedings are expensive, time-consuming, and principally individual” (European Commission, 2011). As this is only available for consumers, and only in cases of competition claims, we are not focussing on this means for redress, as the corporate wrongdoing we are concerned with goes far wider than competition.



# What is wrong with the current system? Investigating through a series of case studies

## The Horizon Shortfall Compensation Scheme (HSCS)

### What is the story?

Starting in the late 1990s, the Post Office began installing Horizon accounting software, but faults in the software led to shortfalls in branches' accounts (Hansard, 2022). The Post Office demanded sub-postmasters cover the shortfalls, and in many cases wrongfully prosecuted them between 1999 and 2013 for false accounting or theft, in what has been confirmed as the biggest miscarriage of justice in UK courts.

Sub-postmasters complained about bugs in the system after it reported shortfalls, some of which amounted to many thousands of pounds. Some sub-postmasters attempted to plug the gap with their own money, even re-mortgaging their homes, in an (often fruitless) attempt to correct an error.

### Evaluating the Scheme

The Historical Shortfall Scheme was launched by the Post Office to independently assess applications from sub-postmasters who believed they may have experienced shortfalls (excluding those who were part of the High Court settlement, as there are separate compensation arrangements for those whose convictions are overturned). The Scheme was launched on 1 May 2020 and is still running. To date, 2,533 claims have been made, 2374 (94%) were deemed eligible. 82%, 1938, of these eligible claimants, have now received an offer, meaning that £52 million has now been offered (Post Office, 2023).

According to Howe and Co (representing 150 postmasters), the compensation scheme 'continues to be exceptionally slow, provides unfair and low offers to unrepresented postmasters... and refuses to entertain applications from persons who are plainly entitled to apply' (Howe and Co, 2022). There have been significant concerns about the delays in awards, and the impact of this poor progress on the claimants. According to Sir Wyn Williams, who chairs the ongoing Public Inquiry into the Post Office Horizon scandal, "the plain fact is that there are a significant number of applications unresolved more than 2 years after the applications were made." (Williams, 2023) He remains unconvinced that "complex applications within the HSS are being processed with sufficient vigour," even given, "a balance has to be struck between speed of decision making and ensuring that offers in settlement are full and fair."

## The Steel Workers Pension Scheme (SWPS) Compensation Scheme

### **What is the story?**

After Tata Steel experienced financial difficulty in 2017, its British Steel Pension Scheme (BSPS) was restructured (National Audit Office, 2022). Steel workers were given 90 days to decide if they wanted to transfer out into a new scheme, transfer out into a lump sum, or remain. 7,834 members chose to transfer their benefits out of the scheme, representing £2.8bn of the fund, off the back of what has since been deemed unsuitable advice by Independent Financial Advisors (IFA). The FCA estimates that financial advice was unsuitable in 47% of all BSPS cases and that there is not enough information to judge if advice was suitable or not in a further 32% of transfers.

Transferring out is lucrative work for IFAs, and the period was described as a “feeding frenzy”, with many IFAs even colluding to take advantage of pension members (BBC, 2017). The regulatory system left British Steel Pension Scheme members open to being manipulated and taken advantage of by unscrupulous financial advisers who personally profited from giving bad advice.

### **Evaluating the Compensation Scheme**

The British Steel Pension Scheme case has been slow to establish and is perceived by claimants as unfair. 25% of all BSPS members (around 1800) who received unsuitable advice have raised claims with redress organisations (such as the FOS or FSCS), yet the FCA has taken five years to propose a consumer redress scheme for members (National Audit Office, 2022). Despite gathering evidence on the case since 2018, the FCA only began considering the potential use of a scheme and analysing its impacts in early 2021 (House of Commons Committee of Public Accounts, 2022).

The FCA expects that over 1000 consumers will receive redress as a result (FCA, 2022). The scheme will cover most consumers who were advised between 26 May 2016 and 29 March 2018. There is a concern that as there are six years within which to claim or complain, time is fast running out for those who transferred out in 2016.

The FCA administers the scheme, but the firms responsible contact the members, assess whether advice was unsuitable, and calculate the awards (according to an FCA tool) (FCA, 2022). In essence, IFAs are marking their own homework.

## IRHP Compensation Scheme

### What is the Story?

Interest rate hedging products (IRHPs) are derivatives usually traded between large financially sophisticated organisations, but they were sold intensively between 2005 and 2008 by banks to thousands of their smaller business customers, including publicans, hoteliers, chip shop owners, farmers, care homes and doctors' surgeries. Banks sold them alongside or within loans as "protection" against fluctuating interest rates, but commonly failed to disclose the potential downsides and risks. When Bank of England base rate plunged to 0.5% in 2009, the "break costs" to exit many IRHPs ballooned, locking businesses into paying much high rates of interest and also crucially increased their risk to the bank which often increased costs further as well as restricting or withdrawing facilities, leading to a significant number of insolvencies and personal bankruptcies. The regulator, then the FSA, acted only once affected businesses had formed a campaign group and galvanised widespread cross-party support from MPs (Hansard, 2012). After undertaking a brief review in 2012, the FSA found "*serious failings in the sale of IRHPs to small businesses by some banks*" (FSA, 2013).

### Evaluating the Scheme

The full review and redress scheme began in 2013. It was intended to offer a reasonable alternative to litigation, averting the need for thousands of separate individual legal actions. The process exposed the huge scale of the mis-selling, at over 90% of the sales assessed (Financial Services Authority, 2013).

The scheme did not address the mis-selling of fixed rate loans with similar costs and risks as standalone products and over one third of sales - 10,577 out of the final scheme cohort of 30,784 - were excluded as they were businesses deemed to be "sophisticated", despite falling into the same regulatory category as all other scheme participants towards whom banks had a duty to meet the required regulatory standards (FCA, 2016). A total of £2.2 billion in redress was offered to eligible affected business owners by 9 banks. However, over 40% of redress outcomes included a replacement product, and the scheme largely avoided compensating customers for other losses such as lost profit and opportunity, paying out only £46million in total for Consequential Loss claims. An Independent Review of the scheme was highly critical of several aspects of the scheme, in particular its use of the concept of "sophistication" and the criteria used to define it (Swift, 2021).

## RBS GRG Compensation Scheme

### What's the story?

In the aftermath of the Global Financial Crisis (GFC), Royal Bank of Scotland (RBS) transferred up to 16,000 of its business customers with a total of £65 billion in assets into its Global Restructuring Group (GRG) (Heidi Blake, 2016). Ostensibly engaged in business support and turnaround, GRG was primarily a profit centre for the Bank (House of Commons Treasury Select Committee, 2015). Widespread allegations of serious mistreatment and damage to businesses while in RBS GRG led to a number of investigations. In 2014 the FCA appointed Promontory as a Skilled Person under section 166 of the Financial Services and Markets Act 2000 (FSMA) to conduct an independent review of RBS's treatment of SME customers in GRG. Promontory found "widespread inappropriate treatment of SME customers by RBS throughout the Relevant Period," and that "elements of this inappropriate treatment of customers should also be considered to be systematic" (Promontory, 2016).

### Evaluating the scheme

The continued engagement of MPs on this matter is an indication that constituents did not feel that their issues had been resolved. RBS GRG featured heavily in 3 Parliamentary debates in 2018 in which MPs were highly critical of RBS GRG, speaking of the damage inflicted on their constituents, while calling for a public inquiry and for a more effective form of dispute resolution than 'ad hoc' voluntary schemes (Hansard, 2018) (Hansard, 2018) (Hansard, 2018).

In November 2016 RBS set aside £400m to cover both an automatic refund process for certain fees to some SME customers who were in GRG between 2008 and 2013 and a complaints review process. It was a voluntary scheme, designed by RBS with the qualified approval of the FCA. Offers totalling £150.4m were made to 4,509 customers in respect of refunds for complex fees and/or redress for direct loss. A further £4.2m was offered in respect of Consequential Loss (Blackburne, 2022).

The information-gathering, assessment, and decision-making processes in respect of both direct loss and consequential loss were conducted or directed in-house, behind closed doors, by RBS. although customers could appeal their decision to an Independent Third Party (ITP). More than 1 in 3 of the 2693 complainants appealed one or more aspects of their outcome to the ITP and almost half of all those who made Consequential Loss claims also appealed (Blackburne, 2022). It took until the end of 2020 to deliver final outcomes in respect of all categories of loss to all participating in-scope customers, meaning that some may have been waiting up to 10 years for redress.

## The Foskett Panel

### What is the story?

Senior managers at the Reading branch of HBOS bank (later bought by Lloyds) destroyed a number of small businesses by artificially distressing, and in many cases asset stripping, them (Verity, 2017). The extensive activities drained the bank and small businesses of about £245m and left hundreds of people in severe financial difficulties (Neate, 2022). In 2017 six people were jailed for a total of 47 years for their involvement in the fraud (Huw Jones, 2019).

The Griggs Review, established by Lloyds to compensate victims of the HBOS Reading fraud, was heavily criticised by MPs (Hansard, 2020). Sir Ross Cranston was commissioned by Lloyds in agreement with the FCA to review the Griggs Review. Sir Ross' Review pointed to serious shortcomings in the Griggs Review, most notably its adversarial approach (Cranston, 2019). Sir Ross was subsequently asked by Lloyds to assist with establishing a framework for the reassessment process. This resulted in the eventual publication of the Cranston Re-review, which set a framework whereby victims of the HBOS Impaired Assets unit would receive fair and reasonable offers of compensation (Cranston, 2020). The Foskett Panel, led by Sir David Foskett, was then created to design, and administer a compensation scheme in line with the recommendations in the Cranston Re-review (Foskett Panel, 2020).

### Evaluating the Scheme

The Foskett Panel has delivered significant redress to victims who, under the previous Griggs Review, had been told they had no case for compensation. The objectives are to provide a non-legalistic, fair, and common-sense process of properly compensating victims of the HBOS fraud which was also as quick as reasonably possible. Significant improvements have been made to ensure the system is quick (APPG Fair Business Banking, 2022). There are still concerns from victims about the speed of the process, the independence of the advisors, the lack of an independent appeal mechanism and the fact that Lloyds Bank is still able to exclude potential victims from a fair assessment of their status (Keats, 2022) (Hurley, 2022).

## The Windrush Compensation Scheme

### **What is the story?**

The 'Windrush' generation are those who arrived in the UK from Caribbean countries between 1948 and 1973. The name 'Windrush' derives from the 'HMT Empire Windrush' ship which brought one of the first large groups of Caribbean people to the UK in 1948. As large parts of the Caribbean were, at the time, part of the British commonwealth, those who arrived were automatically British subjects and free to permanently live and work in the UK.

Thousands of Commonwealth citizens were affected by the government's 'Hostile Environment' legislation - a policy announced in 2012 which tasked the NHS, the Department for Work and Pensions, landlords, banks, employers and many others with enforcing immigration controls. Because many of the Windrush generation arrived as children on their parents' passports, and the Home Office destroyed thousands of landing cards and other records, many lacked the documentation to prove their right to remain in the UK.

### **Evaluating the Scheme**

The Windrush Compensation Scheme has not delivered on its objectives (House of Commons Home Affairs Select Committee, 2021). As of the end of September 2021, only 20.1% of the initially estimated 15,000 eligible claimants have applied to the scheme and only 5.8% have received any compensation. It further compounds the Windrush scandal that twenty-three individuals (as of March 2022) have died without receiving compensation for the hardship they endured (Hansard, 2022).

Parliament and the media have criticised the complexity of the claim process and the length of time it takes for claimants to receive compensation, with many claimants dying before receiving payment (National Audit Office, 2021). There is no demonstrably independent, single-stage review process, such as a judge-led panel, available to victims (House of Commons Home Affairs Select Committee, 2021).

## The 9/11 Victim Compensation Fund

### **What's the story?**

On September 11th 2001, nineteen terrorists from al-Qaeda hijacked four commercial aeroplanes, deliberately crashing two of the planes into the upper floors of the North and South Towers of the World Trade Center complex. The Twin Towers ultimately collapsed because of the damage sustained from the impacts and the resulting fires. The U.S. Centers for Disease Control and Prevention estimates 400,000 people were exposed to caustic dust and toxic pollutants at the New York site. It is predicted deaths from 9/11 illnesses could outnumber the number of people killed in the attack.

### **Evaluating the compensation scheme**

Congress established the September 11th Victim Compensation Fund (VCF or Fund) to assist the direct victims of these attacks and their families (VCF). The Fund allowed for substantial payments from the United States Treasury on a no-fault basis. Under the original statute, compensation was available only to families of victims killed in the actual attacks and those survivors with direct physical injuries. There was substantial and widespread criticism of the fund being initially limited to those injured by the crash, and of the delay in reactivation after the first scheme ended (Kim, 2019). Ten years later, after becoming a major partisan point in Congress, the fund was extended to first responders and people present on the site, notably to clean up.

The VCF ended in 2021 having awarded a total of over \$9.3 billion to nearly 42,000 individuals. Over 70,000 claims have been submitted. 40,000 of these were from first responders, 30,000 from victims. 67,000 were for personal injury, 4000 were deceased claims (VCF, 2022). Claimants have to prove that they suffer from an illness that has been determined to be an “eligible 9/11-related physical condition”, and that they were present in the New York City exposure zone at that time (VCF, 2023). This burden is challenging to bear for claimants, especially with regard to finding documentation supporting their presence at an eligible location after so many years have passed.

## The Infected Blood Inquiry Recommendations

### What's the story?

In the 1970s and 1980s 4,689 people with haemophilia and other bleeding disorders were infected with HIV and hepatitis viruses through the use of contaminated clotting factors. Some of those unintentionally infected their partners, often because they were unaware of their own infection. Since then, more than 3,000 people have died and of the 1,243 people infected with HIV fewer than 250 are still alive. Some families were subjected to appalling abuse, resulting in them being forced out of jobs or having to leave their homes. As a result, many people who were infected or affected by the scandal continue to keep it a secret (The Haemophilia Society).

### Evaluating the Compensation Scheme

In 2017 Prime Minister Theresa May announced that a statutory public inquiry would be held into the contaminated blood scandal, after a long campaign by victim representatives and MPs (Theresa May, 2017). Since that announcement, more than 100 people infected and affected by the scandal have died. More will die before the inquiry reaches its conclusions.

The Government won't say how compensation will be calculated until the Blood Inquiry reports in Summer 2023. Sir Robert was entrusted with making recommendations for the design and administration of an ad hoc redress scheme (Francis, 2022). However, the Government has failed to give any certainty about the timeline for the publication of their response to this report (Hansard, 2022). A cross-Government working group, co-ordinated by the Cabinet Office, is taking forward workstreams informed by Sir Robert's recommendations (Hansard, 2022).



## LCF Compensation Scheme

### What's the story?

LCF was a Financial Conduct Authority (FCA) authorised firm, which issued unregulated 'mini-bonds', to investors and speculatively invested the funds received. LCF went into administration in January 2019, leaving 11,625 bondholders facing collective losses of £267 million (Neville, 2021). LCF's business model was unusual, as it was an FCA authorised firm generating no income from FCA regulated activities, thereby allowing the selling of the unregulated minibonds to benefit from the 'Halo Effect' of association with an FCA authorised firm (Glen, 2021). Bondholders also stated that LCF used a range of dishonest tactics to encourage them to invest. Novice investors were encouraged to declare themselves to be sophisticated to access products that should have been out of reach, and some personalised marketing communications significantly downplayed the risk involved in investing. As a result of the regulatory failings of the FCA, and limited scope of the statutory Financial Services Compensation Scheme, the Treasury ordered a bespoke compensation scheme be set up to compensate LCF investors.

### Evaluating the Scheme

The Scheme paid 80% of bondholders' principal investment in eligible bonds, up to a maximum of £68,000. Where bondholders had received interest on their bonds, distributions from the insolvency administrators, Smith & Williamson, or compensation from the FSCS for LCF bonds, this reduced the amount of compensation payable under the Scheme (HM Treasury, 2021).

The Scheme appears to have delivered on its objectives. Upon closing on 31st October 2022, FSCS successfully made payments to at least 99.5% of eligible claimants, and paid out more than £115 million in compensation (FSCS, 2022).



## Tesco Compensation Scheme

### What's the story?

On 29 August 2014, Tesco published a trading update in which it stated that it expected trading profit for the six months ending 23 August 2014 to be in the region of £1.1bn. The August Statement contained information that gave a misleading impression as to certain qualifying investments in particular, the Company's shares and certain Tesco group bonds. A false market was created in the Relevant Securities and Tesco was found guilty of market abuse (FCA, 2017). Net purchasers of Tesco bonds and shares therefore bought them at an artificially inflated price. Tesco entered a deferred prosecution agreement with the SFO and was required by the FCA under Section 384 of the Financial Services and Markets act to set up a scheme to reimburse net purchasers of shares and bonds (SFO, 2019).

### Evaluating the Scheme

The scheme was designed to be straightforward for claimants. Legal representation was not necessary and the relevant information was intended to be accessible for claimants. KPMG tried to contact all eligible claimants by email. Claimants not contacted by the scheme could make a claim by providing evidence of their share and bond purchases and evidence of any sales during the relevant period (Horne, 2018).

The scheme was set-up with an £85 million compensation pot (FCA, 2017), and appears to have delivered on its objectives.

## Lessons learnt from the case studies

### Common flaws

#### *Lack of independence*

Many of the schemes considered in this study suffer from inherent conflicts of interest. It is critical that not only are all parties undertaking the scheme independent, but that they are also *seen to be independent*.

In both the **RBS GRG complaints scheme** and the original scheme for **victims of the HBOS IAR fraud**, the firm responsible for paying the redress designed and ran the scheme, decided which customers should be compensated and by how much and assembled the evidence on which to base those decisions. RBS, Barclays, Lloyds and HSBC banking groups, the most prolific perpetrators of the mis-selling of IRHPs, also had a large hand in designing and moulding the scheme to give redressal to those who were mis-sold those products. The design of this scheme incorporated many bank-friendly provisions, such as the "sophistication" criterion which excluded thousands of potential beneficiaries.

In the **Post Office scheme**, HSF, a law firm that was involved in the original settlement which has now been reopened by the scandal, designed the forms used to collect evidence from victims and provided an initial legal opinion (House of Commons BEIS Committee, 2022). Although the decision-making panel which determines awards is composed of legal, accountancy and retail experts, the way the form was formulated could affect the evidence put before them. The form, designed by HSF, includes an unclear question about the consequences faced by victims after the scandal. Had it been designed by a claimant firm, it may have been designed quite differently, with useful prompts aimed at helping claimants think of the knock-on effects they faced.

In the **steel workers case**, the FCA is supervising the firms' assessment of the scale of their failings, and therefore of the corresponding award. However, as part of the failings experienced by BPS is the Financial Conduct Authority "consistently being behind the curve in responding" to the catastrophic impact on BPS members, and in supervising the offending firms by letting this unscrupulous behaviour continue, the FCA could be considered in part responsible for the situation (House of Commons Committee of Public Accounts, 2022). Having offending firms set up, administer and oversee the scheme could therefore be seen as a lack of independence.

Both the appearance of independence and substantive independence are important. In the **HBOS Reading case**, it seems "an appearance of a conflict is a conflict of interest" (Hurley, 2022). As the Cranston review (Cranston, 2019) put it: "The appearance of independence is as important as the substance: an independent reviewer must not only act independently but appear to do so." The concern in this case, was that FTI consulting was involved in calculating compensation awards, yet the CEO of FTI Consulting is an insolvency practitioner who previously worked with Lloyds. The panel and its advisors, including FTI consulting, came to very different valuations to claimants' independent advisors, in a similar way to the Post Office outcomes.

The mechanism of "skilled persons" acting as Independent Reviewers was built into the IRHP scheme to inject a degree of independence and objectivity and the RBS GRG and HBOS schemes each had their equivalent:

- In the **RBS GRG case**, the information-gathering, assessment, and decision-making processes in respect of both direct loss and consequential loss were conducted or directed in-house by RB. An "Independent Third Party" was responsible for adjudicating appeals, concerns have been raised that the judge appointed to this role was directly remunerated by the bank. There was some disclosure of principles, but the assessments and decisions were made behind closed doors. More than one third of claimants appeal their outcomes, which points to the lack of satisfaction of victims with the value of the award, as in the two cases above.

- In the **IRHP case**, the FCA appeared to be supervising but there was no real oversight of all the different banks and their “Independent” Reviewers to ensure consistency of application of methodology, principles, and outcomes. There did not appear to be a large degree of separation between the banks and Independent Reviewer. Swift observes that “the Skilled Persons would not actively participate in meetings between customers and the banks to discuss redress decisions or offers but would attend only as silent observers,” and this “failed to reassure customers that the banks were being kept in check and undermined trust in the effectiveness of the Skilled Persons” (Swift, 2021)

There have also been strong concerns about independence in the **Windrush scheme**. One victim, who was detained in an immigration removal centre in 2017 and booked on a flight back to Jamaica after living in Britain for 52 years, described the dilemma as follows: “The Home Office shouldn’t be policing itself. (...) At least if it was moved to another department, we would feel satisfied that the people who are dealing with us are treating us fairly. (Gentleman, 2021) Born in Saint Kitts as a British subject, Mr Herbert-Small, 41, an IT engineer who struggled to secure his immigration status due to the government’s hostile environment policies, reiterated this lack of independence: “The idea of the transgressor in this case being the Home Office and also being the administer of justice to right its own wrongs puts the victims at risk of being open to more harm. It is difficult enough for a victim to have to face their abuser, much less to rely on said abuser for redress” (White, 2021).

### *A refusal to learn from past mistakes*

The FCA has not learnt from past mistakes that would have avoided unfair treatment in the design of the **SWPS compensation scheme**. This is not the first pension transfer scandal (House of Commons Public Accounts Committee, 2022). The Securities and Investment Board (SIB) and the retail self-regulating organisations (SROs) undertook an industry-wide pensions transfer review, in 1993<sup>1</sup> (Cooper, 2014). Having a point in time calculation was a problem highlighted in this review, yet the FCA have not implemented these findings, and are still pursuing point in time calculations. In the case of the steel workers, these are pension members who should have remained in a gold-plated pension. They would not have transferred out had they not been given unsuitable advice, yet they are now having to check what is happening with the markets regularly. The scheme introduces financial risk, which would not have been there had the adversity not happened.

The **Windrush case** also illustrates the problem created by an inability to learn from past mistakes, although it is more serious as the lack of change pertains to the scandal at the root of the compensation scheme itself. Indeed, the design and operation of the compensation scheme contained the same bureaucratic insensitivities that led to the Windrush scandal in the first place. The House of Commons Home Affairs Select Committee found that instead

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<sup>1</sup> The results of this work, along with other evidence which gave rise to cause for concern, prompted it to announce, in December 1993, that it was setting up a Regulators’ Steering Group to make recommendations on the standards which should apply both to the future conduct of investment business in the area of pension transfers and opt outs and to reviews of past cases.

of providing a remedy, for many people the Windrush Compensation Scheme has actually worsened the injustices faced as a result of the Windrush scandal (House of Commons Home Affairs Select Committee, 2021). The scandal was caused by obstacles such as “often insurmountable” requirements for decades-worth of evidence from the Windrush generation to demonstrate their time in the UK and significant application fees.

The **scheme replicated** these challenges, by imposing an excessive burden on claimants to provide documentary evidence of losses, long delays in processing, poor communication and inadequate staffing. The Williams Review, led by Wendy Williams, HM Inspector of Constabulary and Fire and Rescue Services, identified a “culture of disbelief and carelessness” in the running of the scheme (Williams, 2020). One victim discussed the evidential burden they face: “[M]entally, it’s destroying me... I had no access to the NHS. So, when they ask for evidence to prove that I’m having mental health issues, where am I supposed to get this evidence from, considering I have no access to help?” (Justice, 2021)

### *The need to streamline the process for more consistency and clarity*

Three separate compensation arrangements have been made for the **subpostmasters** who were affected by **the Horizon IT scandal**<sup>2</sup>. Having three separate schemes, with different principles and systems in place to determine awards, makes it both difficult for claimants to navigate and creates an inherent inconsistency of treatment. The Government recognised this unfairness, and created a new compensation scheme for those initially excluded in December 2022, the GLO group, to try to remedy this gap in treatment, to “enable them to receive similar compensation to their peers” (BEIS, 2022)

However, having a number of schemes has made it more challenging to **subpostmasters**, and created the impression that agencies are passing the buck. One subpostmaster highlighted the perceived injustice and unnecessary complexity of the framework: “I just don’t understand why there has to be three schemes. I just don’t understand it. It seems that things are getting passed between different departments, different budgets, different people getting involved, and I just worry that – you know, we’ve got a group of people that have been through an awful lot. Twenty years of beating your head against a wall. Is it really fair now, to start splitting people up and start making it really complicated?”

In the case of the **SWPS Compensation Scheme**, not only are there multiple schemes, but some of the same steel workers are eligible for different schemes. Pension members who initially went to the FOS and whose IFA went insolvent then had to go to the FSCS, and received a wildly different award. Consequently, steel worker pensioners had a difficult choice to make, in deciding which one would yield the fairest outcome. There are significant variations in the amount of compensation awarded to BSPS members based on who redress is calculated by (FOS, FSCS or the FCA compensation scheme).

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2 One is available for those who were convicted as a result of the scandal, and whose convictions have been overturned. This scheme is the Overturned Historical Convictions Compensation, which has paid out over £12 million in compensation. Those eligible for this scheme are not eligible for the Historical Shortfalls Compensation Scheme, under consideration in this study. The 555 postmasters who had taken the first legal action against the Post Office over Horizon received £43 million plus legal costs in a settlement, but were not eligible for the Historical Shortfalls scheme. For these postmasters in the Group Litigation Order (GLO) group, a separate compensation scheme has been created.

There was an additional factor of time, **members can be grouped into three cohorts**: those who received awards prior to the increase in the FSCS cap to £85,000, those who received redress before inflation assumptions were reviewed, and those who received their awards prior to the 2022 mini-budget and the war in Ukraine. As David Neilly, a former member of the British Steel Pension Scheme, put it, “people are going to be left thousands of pounds worse off because they didn’t know to get their complaints in sooner”, those in that second cohort (Cumbo, 2021). As Philippa Hann put it when she gave evidence to the Public Accounts Committee: “The figures for those who are receiving compensation from the FSCS now, compared with the people in that first cohort of steel workers who received compensation, have more or less doubled. (...) You are working shoulder to shoulder with another steel worker who took steps, simply through a twist of fate, at a slightly different time, and they have received double the compensation that you have received” (House of Commons Public Account Committee, 2022). This lack of consistency and clarity in framework has led to outcomes that are clearly unjust and unfair.

#### *Issues around putting people back where they would have been*

In May 2018 the Home Office launched a Consultation, as a first step to designing **the Windrush scheme**, seeking to better understand what happened and individuals’ personal stories (Home Office, 2019). The Home Office considered whether the scheme should aim to put people back in the position that they would have been in or whether it would offer appropriate compensation for the whole impact suffered. The Home Office believed the former was fairer, but would be operationally complex, difficult to assess accurately and



costly to administer. It chose a design which included banded tariff payments across a range of compensation categories and with a wide range of eligible claimants including family members and relatives of deceased individuals (National Audit Office, 2021).

This choice, according to victims, has meant that the Home Office does not deliver on its stated aim to “right the wrongs” suffered by the **Windrush generation**. Even when claimants have been successful, they have perceived the value of payments as insufficient to compensate for the harm suffered (National Audit Office, 2021). The banded tariff payments cover a wide range: deportation equates to £10,000, denial of access to housing services corresponds to £1000; denial of access to free NHS healthcare is worth £500; denial of access to higher education, £500; Denial of access to banking services, £200. Per month of homelessness as a direct result of Home Office policies, victims receive £250 (Home Office, 2023).

For the FCA, in the case of **the SWPS Compensation Scheme**, redress aims to put consumers back in the financial position they would have been had they remained in their scheme, “as far as is possible”. There is a legitimate feeling that the amount of redress is insufficient. We have seen that some of the losses suffered by the clients are up to almost half a million pounds (National Audit Office, 2022). So, in a certain number of cases, the £85,000, (what compensation is capped at in the FSCS) will be inadequate. Some of these steel workers ought to have been receiving £25,000 or £30,000 a year in retirement and their losses are hundreds of thousands of pounds, so there is a huge inadequacy of compensation.

There is limited data available on the allocation and distribution of redress for consequential loss made available to businesses through the **IRHP scheme** and the **RBS GRG scheme** but it is clear that the total amount awarded for consequential loss in each would not have been sufficient to satisfy very many large claims, particularly since insolvency was likely to be an issue in both of these schemes. The original HBOS review did not produce a single offer of redress for Direct and Consequential loss (D&C). In the view of Sir Ross Cranston there were “unacceptable barriers to claims for D&C loss” (Cranston, 2019). He found that such an outcome “undermines the substantive and procedural integrity of the Customer Review” and that customers “misunderstood the basis on which the Bank was compensating them and they were deprived of the opportunity to challenge the quantification of the financial loss.” A common theme across the schemes we looked at is a failure to produce meaningful redress for those who have been pushed into to insolvency or personal bankruptcy as a result of the financial damage they have sustained.

### *Problems of accountability*

Another recurring theme observed is a lack of accountability of the administrator or supervisor of the scheme. There can be an opacity around who is administering the scheme, how it is organised, how decision-making takes place, and what the outcomes are Without access to all of the relevant information, it is difficult for participants, Parliament and the wider public to hold accountable those responsible for administering redress.

In **the HBOS Reading case**, the Cranston review recognised that in the original Griggs Customer Review the lack of disclosure of both the evidence held by the bank, and the methodology used to calculate redress, “did not provide a reasonable basis on which to deliver fair outcomes for customers” (Cranston, 2019). In the subsequent Foskett Panel process, designed following the publication of the Cranston re-review, participants still did not understand the entirety of the rationale for outcomes. Although the customer journey is clear, how the panel arrived at its final award is unclear and subject to disagreement from victims.

For instance, in the both the **RBS GRG** and **original HBOS scheme** there does not appear to have been any person or authority beyond the Independent Reviewer and ITP respectively to hold either firm to account. The FCA confirmed that it was limited in any action it could take in respect to RBS, for instance: “The fact that GRG was largely outside the jurisdiction of the FCA is important. There are no enforceable regulatory rules, for example ‘conduct of business’ rules, against which to assess GRG’s treatment of SME customers” (FCA, 2018).

Swift finds that in failing to ensure the methodology and rules of **the IRHP scheme** were available to participants, “the FSA/FCA did not strike the appropriate balance between the two public interest principles of transparency and the protection of confidential information” (Swift, 2021). He also finds that there was “a serious gap in the FCA’s accountability for the implementation and outcomes of the Scheme, both substantive and in terms of fair process. There was no way of challenging the FCA in respect of decisions under the Scheme, no means of judicially reviewing the decision of the banks as confirmed by the Skilled Persons, and no right of appeal to an independent tribunal from these decisions – thus leading to a lack of accountability in respect of what was and remained an exercise of regulatory powers.”

### *Lack of transparency and information asymmetry*

We have seen how lack of transparency of the rules of a scheme or of the evidence it relies on can compound existing information asymmetry between those who have suffered damage and those responsible for that damage.

Both the **IRHP review** and the original **HBOS Griggs Review** involved a similar lack of transparency around how decisions on eligibility and redress were made. In neither scheme were methodology and rules published at the outset, case data and evidence considered in the decision-making process were not routinely shared with participants and only a limited level of detail was given in redress outcomes.

Sir Ross Cranston comments in relation to **the original HBOS scheme**: “it seems to me that the information needs of customers included at least some explanation by the Bank of: (a) the basis on which their claims for compensation would be assessed; and (b) the outcome of the assessment of their case explained in sufficient detail to enable them to understand the reasoning, and to challenge it if necessary” (Cranston, 2019).

In respect of **the IRHP scheme** the Swift Review found that “the FSA/FCA’s communications to stakeholders, and the public generally, did not provide a level playing field between the banks (who were privy to all the information regarding the Scheme Terms) and the potential beneficiaries of the Scheme (who were not)” (Swift, 2021).

The failure of **the Post Office** to provide evidence to all of the victims in that case has hampered their ability to compile a comprehensive case for redress. As the determination of awards is not tariff-based, with determinations made on a case-by-case basis, there is no certainty or clarity on which outcomes correspond to which situations. This has led to huge discrepancies between amounts awarded, and what claimants and their representatives estimate they should be compensated, and significant variations between amounts awarded to very similar cases (Post Office Horizon IT Inquiry, 2022). However, the Scheme does have to present its Consequential Loss outcome to the postmaster in a clear, succinct manner, setting out information sufficient to allow the postmaster to understand the basis for the conclusion reached (Post Office, 2023).

In the case of **Windrush victims**, the problem was destruction of evidence; the Home Office destroyed thousands of landing cards and other records, leaving its claimants lacking crucial documentation to prove their right to remain in the UK, and their citizenship status.

### *Delays*

We observe long delays in many instances between the events that caused damage, the setting up of a scheme to provide redress to victims and also the subsequent delivery of that redress. Lack of timeliness has been a consistent failing of past redress schemes.

**Windrush victims** even launched legal action over compensation delays (Gentleman, 2021). One member of the Windrush generation, Vaughan, would like to be able to use the compensation money to help his children: “I’ve been waiting almost two years. It does feel like maybe they are waiting for me to die. We’re old, we don’t have 20 or 30 years ahead of us,” he said. In many cases, victims do die before justice is restored. As Florence Eshalomi MP put it in the House of Commons, referring to the Infected Blood Scandal, “One person dies every four days. Every day that we delay the compensation is justice denied to those people.” (Hansard, 2022) Yet, the Government has failed to give any certainty about the timeline for payment.

Sadly, examples of victims dying before they can access redress are rife, and underscore how crucial it is that efforts to create a redress mechanism be speedy. Luis Alvarez, **a 9/11 first responder**, used his final days to speak up in support of reauthorizing the 9/11 Compensation Scheme: “You made me come down here the day before my 69th round of chemo and I’m going to make sure that you never forget to take care of the 9/11 first responders” (Levenson, 2019).

It is important to consider timeliness when it comes to adversity that indirectly affects victims’ health. Adeep Sethi, the son of **subpostmasters** whose lives were turned upside

down by the faulty IT system introduced by the Post Office, eloquently highlighted the toll the wait has taken on his parents: “These people are in their 70s and 80s, they’re sick and tired of fighting,” he says (BBC, 2022). At least 33 victims of the scandal are now dead; at least four reportedly took their own lives (Hyde, 2022). Despite this lack of action, the Post Office has said it recognises the “importance of ensuring that postmasters receive timely and fair compensation “. However, Sir Wyn Williams said in September 2022 he was “disappointed with the apparent lack of substantial progress to date”.

## Positive lessons learnt

### *Interim payments*

Interim payments have been awarded in three of the compensation schemes considered here, though usually after significant public outcry and criticism on the delays in the scheme. Such interim payments are crucial to ensuring that victims are put back in as close as to that they had before the wrongdoing occurred, sooner rather than later. Redress schemes have often taken a long time to set up and have been plagued with criticisms of lengthy processes that fail to deliver swift remedy. Interim awards are an imperfect, but necessary part of restoring justice. Practically speaking, many claimants depend on the help an interim payment can give as they can spread their compensation out and cover costs when most needed. Interim payments appear to be a reasonable and practical stopgap which can make a massive difference to victims.

In December 2020, after severe criticism from stakeholders and Parliament, the Home Office’s cross-government working group highlighted to the Home Office that it risked failing to fulfil its public sector equality duty by choosing not to make interim payments to help ‘reduce or minimise the suffering of all members of the **Windrush cohort**’, and proposed introducing preliminary payments of £10,000 to claimants (National Audit Office, 2021). The Home Office made this change, increased its ‘impact on life’ payments, and made changes to awards for loss of access to employment.

In the case of **the Post Office**, the government has also announced a £19.5 million interim compensation package for postmasters who brought the landmark legal case, which exposed the scandal (Croft, et al., 2022). The compensation is aimed at 555 postmasters who brought the High Court lawsuit in 2019, which was settled by the Post Office for £57.75 million. The postmasters received little compensation because most of the money was swallowed up in legal costs. This measure only came after public outcry, and was heralded as “a long overdue step in the right direction,” by Jo Hamilton, a former postmaster who had her criminal conviction quashed in 2021.

However, **insolvent postmasters are not entitled to interim compensation**. Heather Williams, a sub-postmaster from Birkenhead was told that she would receive an interim payment but was then told she was ineligible because she was in an Individual Voluntary Arrangement (IVA). Her debt in respect of the IVA is less than £2000 (Howe and Co, 2022). Ms Williams cannot afford to heat her home and only eats every other day. She had a bad fall at

home because she was tired and weak - “in so much pain, cold, hungry and all alone”. She remains in hospital, and is desperate to receive an interim payment, which would “sort out all my problems”. She has not received any compensation.

In the case of **the Infected Blood Inquiry**, Sir Brian Langstaff published a report on interim compensation (Langstaff, 2022). It called for an interim payment of £100,000 to be paid to all those infected and all bereaved partners currently registered on UK infected blood support schemes, and to those who registered between 29 July and the inception of any future scheme. Interim compensation was one of the recommendations in Sir Robert’s study. All the interim payments were made by the end of October 2022. However, criticism has emerged from the interim payments not being extended to family and carers. Joyce Donnelly, the convener of the Scottish Infected Blood Forum, says: “Most infected people and their family/carers have endured hardship and poverty for many years.” (Siddique, 2022) She adds “The fear lingers of death running faster than the inquiry process can, followed by the ensuing government considerations before it acts.”, underscoring the urgency.

### *The risk of incurring costs as a motor for fairness*

All schemes are motivated by the need to avoid expensive litigation and other costs. Several schemes were conceived as an alternative to litigation. In the **9/11 case**, claimants cannot have an active 9/11-related lawsuit at the time they submit an application, and even waive their right to be party to a future lawsuit even before the VCF determines whether or not they are entitled to compensation (VCF, 2022). The risk of massive litigation against the firm, in this case against the airline industry, acts as a motor for fairness, in that it provides a motivation for the firm to set up a scheme.

In the case of **the Tesco Compensation scheme**, it may have been the threat of a larger penalty that motivated Tesco’s cooperation with the FCA and relative swiftness in setting up the scheme. Tesco was found guilty of market abuse and was therefore required to set up a compensation scheme by the FCA (under section 384 of FSMA) (FCA, 2017). The FCA stated that in light of Tesco accepting responsibility for market abuse and agreeing to the first compensation order under S384, an additional financial sanction would not be imposed (FCA, 2017). Avoiding expensive litigation works for both parties. In the case of the Post Office Horizon scandal, the Post Office notes that the Historical Shortfalls Scheme “removed the requirement for legal action against the Post Office which would have come with obvious legal, financial and emotional pressure” (Post Office, 2022).

# Developing the building blocks of a compensation framework

The scandals and reasons for compensation studied here vary widely. The design of a scheme needs to be adapted to the circumstances of the reason for redress. For instance, not everything that might apply to a high-volume, low-value scheme, such as the Tesco or LCF schemes (which involved 10,000 claimants), will apply to a higher value scheme, such as 9/11 or the Post-Office. However, some key principles, the “building blocks” of a good, fair, and reasonable compensation scheme emerge from the lessons learned from the cases studied in this report.

How can we continue to reinvent the wheel each time a scandal emerges? These key ingredients take stock of what we have learned from the study of past redress schemes, to improve a compensation framework that has often proved lengthy and costly, for both victims and the taxpayer.

- **A collaborative approach and process**

The Government has recognised that the scheme utilised, in the case of the Infected Blood Scandal, must be collaborative and sympathetic, and as user-friendly, supportive and free of stress as possible, unlike many schemes set up by private actors, and Government agencies in the past.

The design of the scheme should be a collaborative process, in which victims are consulted and their concerns are taken into account. It is important to have a clear set of rules and there must be agreement between the perpetrator and victims on the detailed Terms of Reference (TORs), before the scheme is launched. In this sense, the administrator must involve potentially eligible persons and their representatives in the review and improvement of the scheme, for example, by way of an advisory forum.<sup>1</sup>

Also, establishing eligibility for the scheme should avoid legalistic and adversarial concepts of the burden and standard of proof. If evidence is required, this should be collected through a process where the victim is sympathetically supported by the scheme in obtaining any required information and documentation. In the absence of relevant and reliable documentary evidence, a low evidential threshold should apply to an applicant’s testimony in general a presumption is applied that statements of fact made by an applicant are correct; applicants are not required to repeat information already provided to the support schemes (Francis, 2022). The burden of providing proof, in this sense, must be minimised.

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<sup>1</sup> This type of forum was used in a scheme that was not considered by this study. Amigo, the subprime lender, set up a compensation scheme which had a customer committee. Eight consumers were chosen at random from the eligible customers. This committee then provided feedback on the design of the scheme, although it is unclear whether this feedback influenced the rules of the scheme.

- **Timeliness, both in set-up and adjudication**

It is essential that the redress scheme be set up in a timely manner, as soon as the adversity is revealed, in order to limit the continued effects of the adversity, and restore harm caused as soon as possible.

Timeliness in the design and implementation of a compensation scheme is vital, but so is timeliness in the process of administration and adjudication of the scheme. In other words, it is not only important that a scheme be set up quickly after gross misfeasance is revealed, but that it resolves cases in a timely manner. There is an inherent tension between the scheme reaching a speedy resolution, and thoroughness and offering a detailed compensatory recognition for harm which would serve as a visible sanction and deterrent. A balance should be sought: timeliness should be maximised, but not at the expense of a recognition of the harm caused.

- **Independence**

It should go without saying that the organisation responsible for compensating victims should not get to decide how much redress they actually pay, but as we've shown, it does need to be said. It is essential to verify that there are no conflicts of interest.

Having an entirely independent adjudicator, with no links to the offending organisation, is essential to guaranteeing that the outcomes are fair, and that victims trust the process and engage with it. As the Cranston review highlights: "Procedures are essential in ensuring independence in practice, as well as the appearance of independence. Checking to ensure that there are no conflicts of interest is the first step. Separateness is crucial." (Cranston, 2019). The need for such absolute independence is evidenced by the number of appeals, and difference in award amounts discussed in the cases of RBS GRG, the Post Office, and HBOS Reading. The importance of this principle is also demonstrated by the lack of trust from participants, and from those who chose not to participate, for instance in the Windrush scheme. Such independence needs to be guaranteed throughout the process of administration and adjudication: from the gathering of evidence to decision-making.

There are however challenges in ensuring that the adjudicator of the scheme is entirely independent from the perpetrator. Those with significant and relevant expertise will have experience in the industry, and potentially links to the perpetrator, especially when we consider levels of concentration in some sectors, such as the financial services sector in the UK, which is dominated by a few big firms (Davidson, 2017). Furthermore, there is a trade-off between the timeliness discussed above, and keeping costs low, which ensures that the pot is maximised for claimants. In other words, to guarantee that there are more funds available to be awarded to victims in the form of compensation, the cost of administering and adjudicating the scheme cannot be too high. However, this trade-off must not compromise the fairness of the outcomes.

- **A recognition of adversity, and putting individuals back where they would have been**

The aim of the scheme should not be to minimise costs, or to keep them at a reasonable level for the perpetrator, as is the case in the SWPS compensation scheme. Rather, the fundamental principle behind the set-up of a scheme should be the recognition of adversity which should not have happened. The driving force behind a scheme should be to put the victim in the position they would have been had this adversity not happened (Francis, 2022). Indeed, research has shown that what is at stake for claimants is not just financial or physical loss, but recuperation of their identity as responsible and worthy citizen-consumers (Gilad, 2008). Claimants want to be heard, understood, taken seriously, offered satisfactory explanation, and responded to with respect.

How the sum of money that would put the individual in this hypothetical situation is calculated represents a considerable challenge. How redress is calculated varies widely across the schemes considered in this report. It ranges from:

1. an automatic calculation based on a formula (e.g. Steel workers pension scheme compensation scheme), which is sometimes automated, such as in the Tesco case;
2. to a tariff based approach, as recommended by Sir Robert Francis KC, the Health Service Ombudsman and redress for personal injuries, and as is the case in the 9/11 compensation fund;
3. to the standardised Ogden tables used to calculate the lump sum compensation due in personal injury and fatal accident cases;
4. and finally, to an entirely case by case determination of award.

We recommend that a panel of independent experts, composed of lawyers, accountants, loss adjusters and industry experts, should be used to determine what damages should be considered, and how much to award for each type and level of damage. This was “one possibility” suggested by Sir Ross Cranston: “independent panel which would proceed in a non-legalistic manner to conduct the assessments” (Cranston, 2019). We also concur with Sir Robert Francis’ recommendation that a common law approach to how damages are assessed should be used, as a useful starting point to guide the formulation of the scheme (Francis, 2022). As above, this process should be collaborative and involve consultation of victims to ensure that the full range of harm experienced is taken into account. Indeed, taking both direct and consequential losses into account is also crucial.

As Sir Robert Francis recommends in the case of the Infected Blood Inquiry, the ideal system would be to develop a “framework which allows for a standardised approach, based on preset ranges of possible awards, while at the same time allowing a more bespoke approach to the assessment of at least some financial losses.” (Francis, 2022) There will

be cases that fall outside a standardised table for damages and awards<sup>2</sup>, so there must be systems in place to account for these special circumstances, which are no less deserving of compensation.

- **Transparency of processes and outcomes**

In order to address the problems of accountability raised above, transparency of both processes and outcomes should be guaranteed by the redress mechanism. All pertinent information must be available to the public and to claimants, including, but not limited to: the scheme rules, procedures, organisational structures, panel composition, any tariff bands used to calculate redress, number of claimants, processing speeds, amounts awarded (and detail of the rationale behind the decision for the claimant) and the number of appeals. To ensure that the adjudicator is held accountable for the decisions it makes and its treatment of claimants, it should present an annual report to Parliament to allow for effective scrutiny of the procedure.

It is essential that evidence used to calculate awards is available to claimants, as well as the methodology employed. As the Cranston review highlighted, by refusing to disclose bank records and the methodology used to calculate compensation, “The Bank’s approach to disclosure did not provide a reasonable basis on which to deliver fair outcomes for customers.” (Cranston, 2019) If victims do not have access all of the evidence how can they be expected to make their case? How can a scheme then be expected to deliver a fair outcome?

- **Broad eligibility**

The scheme should actively seek to identify who is eligible for redress rather than who isn’t. In the IRHP case, rather than setting out to proactively identify all customers eligible for redress and quantify their loss, the scheme took a negative approach, seeking first to eliminate a tranche of customers - the “sophisticated”, then to identify those for whom limited redress with an alternative product was applicable. While over 90% of the sales reviewed were found to be mis-sold, less than half (47.7%) of the total scheme cohort of 30,784 product sales resulted in an offer of some form of redress. Similarly, the SWPS Compensation Scheme excludes “insistent clients”, which is not a salient distinction either. These are clients who transferred out of the BSPS after being advised not to, and wrote a letter explaining that they were aware of the risks and were still choosing to transfer out, are not eligible for this scheme (FCA, 2022). Yet, some IFAs drafted or dictated the letters justifying the member’s choice, making it difficult to create such a distinction.

Indeed, the process of determining eligibility should be made as accessible as possible for victims. As Sir Robert Francis recommends, eligibility should be accepted “if the information available points towards eligibility and there is no strongly persuasive evidence which

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<sup>2</sup> The Ogden tables, actuarial compensation tables for injury and death, could be used as guidance, although many of the gross misfeasance considered here falls outside cases of personal injury and fatal accident cases (Government Actuary’s Department, 2022).

contraindicates eligibility” (Francis, 2022), rather than placing a huge burden on the victim to provide large swathes of information that is difficult to obtain (and costly for the scheme to process).

It is also crucial to ensure that the eligibility criteria posited in the rules of the scheme are adhered to, using the transparency and accountability mechanisms highlighted above. For example, the Post Office is allegedly refusing to entertain applications from people who are plainly entitled to apply<sup>3</sup> (Howe and Co, 2022).

To this end, proactively reaching out to eligible victims is essential, and by having an “opt-out” mechanism rather than requiring victims to “opt-in” a scheme is likely to capture a higher number of those who are eligible. The Tesco scheme did this well, by reaching out to all eligible claimants by email, with an estimate of the award, which the claimant could then contest. The Home Office was much less successful on this point, perhaps because they did not have a record of all eligible victims, as they do not know how many people were affected by the Windrush scandal. The fact that victims still worried that the scheme was a way to “round people up” in 2020 is particularly concerning (Gentleman, 2021). In response, the Home Office launched a £500,000 Windrush Community Fund in December 2020 to help raise awareness of the Windrush schemes.

- **Accessibility, simplicity of process and legal costs**

There are multiple cases in this report of schemes that are incredibly complex for victims to navigate. For instance, in the HBOS Reading case, according to the Cranston review, “the Bank’s approach to evidence in relation to claims for direct and consequential (D&C) loss was not fair and reasonable” (Cranston, 2019). The Bank treated the customer as an adversary, by placing the burden of proof in claiming a D&C loss on the customer and requiring the customer to prove their case, with documents that they often did not have access to. The D&C evidential threshold which was imposed by the Bank was higher than the standard applied by courts in civil proceedings. The Bank required all claims to be reflected in the documentary record, and the Bank gave little to no weight to the evidence of the individuals involved. It is essential that a scheme does not place an undue burden on the victim.

These schemes are so complex that legal assistance is often required. Yet the schemes rarely cover the expensive legal costs that are therefore necessary for claimants to access redress. For instance, Sir Wyn Williams, who led the Post Office Horizon IT Inquiry, said “appropriate legal assistance and advice in respect of most of the claims yet to be determined” in the Scheme was “likely to be essential” (Williams, 2023). The Post Office contributes only a sum of £1,200 towards the cost of such independent advice. In the Windrush case, legal representation is not mandatory, but many individuals have said they needed legal support

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<sup>3</sup> Howe and Co, a law firm representing sub-postmasters, lists a series of examples of claimants that have been told that they do not fall within the scope of the scheme, despite clearly being eligible. One such example is Sibhain Rainey, who was deemed ineligible as she did not have a direct contract with the Post Office, although she was acting sub-postmaster and was just as affected by the Horizon scandal as any sup-postmaster who did.

to access and engage with the scheme, and the scheme's former independent adviser, Martin Forde KC, said applications completed with legal assistance would speed things up "dramatically" (House of Commons Home Affairs Select Committee, 2021). The Home Office has not guaranteed access to legal assistance for all claimants who require it.

It is essential that legal costs, if they are needed, be paid for by the scheme. At the very least, legal fees could be capped, as in the 9/11 Victim Compensation Fund. Indeed, the law limits the fee the lawyer may charge (maximum 10% of the award) (VCF, 2022). Furthermore, victims of the scandal should be proactively supported by the administrator throughout the process. For instance, some schemes have chosen to set up phone lines (e.g. Windrush), to support victims throughout the claims process.

- **Appeals mechanism**

Where applicants are dissatisfied with their assessment, they should have access to an internal review and after that an independent appeal panel. This appeals process should follow the same principles as the compensation scheme itself. It should be collaborative, swift, independent, maintain the full recognition of adversity suffered, transparent, broadly eligible, and easy to navigate.

Furthermore, there should be no waiver of litigation rights when engaging with a compensation scheme. It should not be made a condition of an award under the scheme that it be accepted as in full and final settlement of any legal claim, as recommended by Sir Robert Francis (Francis, 2022). That freedom of choice to seek a further court-based award should be preserved.

- **Fairness and efficiency**

Fairness and efficiency must be at the heart of the objectives of any redress scheme. The perpetrator, the offending body responsible for the harm caused, should be the first point of call to provide the funding for the compensation scheme. This principle has its limitations. As in the case of the IFAs who gave unsuitable advice, it is questionable whether the whole profession should pay for the mistakes of some unscrupulous members. As Philippa Hann said, "it is incredibly unfair to visit the sins of a few on the rest of the industry". She goes further by saying "there are some excellent financial advisers out there who make a real difference to people's lives, and we should not be penalising them for the failures of the FCA, the failures of TPR and the failures of those people who were involved in the decision making around the BSPS." It is indeed on the shoulders of those responsible for the harm that costs should be borne.

If perpetrators are insolvent or unable to cover fair and reasonable compensation for all eligible claimants, the Government must step in to ensure justice is restored. For instance, there is some consensus that there is "a strong moral case for a publicly funded scheme". Government funding should be accompanied by a proportionate punishment of the perpetrator.

# Conclusions and recommendations

Ad hoc compensation schemes that “reinvent the wheel” each time a scandal emerges do not lead to optimal outcomes. These single issue schemes have often led to unfair outcomes and created significant strains on claimants. Multiple schemes have been created in response to a single scandal, which leads to a fragmented landscape that is even more difficult for claimants to navigate. The cases studied in this report illustrate that all too often the road to redress takes far too long and places too great a burden on victims.

A cross-departmental working group has now been established on compensation and there is considerable work going on within government on the issue (Spotlight on Corruption, 2022). This work has focussed on the draft Victims Bill currently in pre-legislative scrutiny (Ministry of Justice, 2022). Notably, the civil society organisation Spotlight on Corruption has been working to ensure the victims of international corruption caused by UK PLC are represented and compensated in UK courts (Spotlight on Corruption, 2022). This important work by the Government must also consider victims of corporate wrongdoing in the financial sector and beyond.

## Recommendation 1: Clear and compulsory guidelines for setting up a redress scheme

These suboptimal outcomes are due to redress schemes not being consistently designed to obey fundamental principles. At the very least, the Government must urgently publish a handbook establishing a compulsory set of basic guidelines by which any public agency (such as the FCA or the Home Office), or any private firm or organisation (such as a bank or the Post Office), must abide when setting up a redress scheme. These rules must be made compulsory to ensure that there is at least some level of consistency in the way that adversity is recognised, and redress is administered, although the specific processes and outcomes will vary depending on the circumstances of the wrongdoing.

These guidelines should include the formulation of 9 key building blocks:

- a collaborative approach,
- timeliness of set-up and adjudication,
- Independence throughout the process,
- transparency of processes and outcomes,
- recognition of adversity,
- broad eligibility,

- simplicity or the funding of legal costs,
- an independent appeals mechanism,
- Fairness and efficiency as guiding principles.

### Recommendation 2: Creating an arms-length body (ALB) responsible for setting up and overseeing redress schemes

Creating an arms-length body will ensure an independent process which is accountable directly to Parliament for the expenditure of public funds and the fulfilment of its terms of reference. The only way to truly ensure the independence of administration of the scheme is to create a body that is entirely separate from the perpetrator. Setting up an ALB was one of Sir Robert's key recommendations to the Infected Blood Inquiry. This ALB would be composed of expert panels, including legal, accountant, and industry experts.

The ALB does not need to be a permanent body, as this might represent a strain on the public purse. Rather it could be dormant until such time as is it needed, when a significant scandal emerges. Furthermore, the firm or institution responsible for the egregious misconduct would be required to finance its operation, at least in part.

The Government has recognised the importance of independence in that case, but has not yet committed to creating an ALB (Hansard, 2022). They have said that they will create a "body that will have the trust and respect of those whom we are seeking to support". An ALB would by definition have the trust and confidence of those that it is seeking to support, as it provides a level of distance from the perpetrator.

A neutral body is both able to "reach around representatives" from the evidence gathering to the decision-making stages, and involve both parties in the design and implementation of the scheme (Gilad, 2015). Consequently, the scheme will have a collaborative nature, one of the key "building blocks" of a fair and reasonable compensation scheme.

Furthermore, an ALB would facilitate the democratic holding to account of public and private bodies, as it would have to report to Parliament. This feature is also the source of an important objection to creating such a body: that it would not be efficient or timely, as it would require bureaucratic sign off. However, an ALB would operate independently from Parliament and would only be required to report annually.

### Recommendation 3: Creating a Financial Services Tribunal (FST) and extending section 138D to firms

Although this Tribunal would mainly deal with dispute resolution, which is not the primary focus of this report, its creation would have a significant impact on the redress framework. Firstly, by offering a forum for accessible and expert dispute resolution, many scandals could be avoided. Indeed, as individuals and businesses seek to resolve disputes, unfair business practices also come to light, which could provide an impetus for financial service

providers to improve their service standards. Secondly, repeated and systemic cases should automatically trigger the redress process outlined in the first two recommendations. When the Financial Services Tribunal arms-length body notices significant clusters of cases indicating that there is a pattern of corporate wrongdoing, the “ALB” process, applying the key “building blocks” above, would automatically be triggered.

Taken together, all of the UK redress schemes studied in this report that are either active or completed have cost billions of pounds. If we just take the IRHP scheme for which redress totalled £2.2 billion, the skilled persons review alone cost £420.7 million in total. The skilled persons review alone cost £420.7 million in total (Financial Conduct Authority, 2022), and this does not include the cost to each bank of running their own review.

Setting up a permanent body to adjudicate disputes in the financial sector, where businesses of all sizes and individuals would be eligible to participate would be far more cost effective. The Financial Services Tribunal would be funded by the Treasury in the same way as other tribunals. However, it would introduce a small levy on financial services companies to meet the cost which would require legislation.

# What does good look like?

Tables summarising the key features of all schemes

Figure 1: Table summarising performance of redress schemes in the financial sector

Data	Tesco Compensation Scheme	LCF Compensation Scheme	Foskett	IRHP	RBS GRG
<b>Timeliness</b>	Timely	Timely	Not timely for full adjudication, improved after modification	Not timely	Not timely
<b>Eligibility</b>	Very broad	Very broad	Narrow	Narrow	Narrow
<b>Independence</b>	Fully independent	Fully independent	Independent. Question's raised about appointment of advisors	Not independent	Not independent
<b>Transparency</b>	Very transparent	Very transparent	Transparent	Not transparent	Not transparent
<b>Victim Representation</b>	Victims not represented in design	Victims not represented in design	Victims represented in Cranston Review	Victims not represented in design	Victims not represented in design
<b>Legal Representation Necessary?</b>	No	No	Not in theory, but often Yes.	Not in theory, but often Yes. Discouraged	Not necessary but not discouraged
<b>Legal Costs Covered?</b>	N/A	N/A	Partially and by negotiation	No commitment to cover costs	Where agreed
<b>Appeals process and independence</b>	Independent appeals process	Independent appeals process	No appeals process	Unofficial/informal Not independent	Limited independent appeals process.
<b>Waiver of Litigation Rights?</b>	Yes	Yes	Yes	Yes	Yes
<b>Funding</b>	Tesco funded the scheme	HMT funded the scheme	Lloyds fund the scheme	Banks funded the scheme	RBS funded the scheme
<b>Was compensation perceived as fair?</b>	N/A	N/A	Varying. Trust undermined by perception of conflicts of interest	Largely no, but depends on claim size and outcome	No
<b>Evidential Burden</b>	Light	Light	Heavy burden on claimants	Varying. Very heavy for consequential loss	Heavy for consequential loss

Figure 2: Table summarising performance of redress schemes outside the financial sector

	Post Office	Windrush	Infected Blood (as recommended)	9/11 Fund
<b>Timeliness</b>	Not timely	Not timely	N/A	Timely
<b>Eligibility</b>	Narrow	Broad	Very Broad	Initially narrow. Broader later.
<b>Independence</b>	Independent. Questions raised about HSF	Not independent	Fully independent	Fully independent
<b>Transparency</b>	Somewhat transparent	Somewhat transparent	Very transparent	Very transparent
<b>Victim Representation</b>	Victims not represented in design	Victims partially represented in design	Victims represented in design	Victims not represented in design
<b>Legal Representation Necessary?</b>	Yes	Yes	No	No
<b>Legal Costs Covered?</b>	up to £1,200	No	If necessary, yes	If victims choose to. Cost limited to 10% of award
<b>Appeals process and independence</b>	Independent Dispute Resolution Process (DPR)	No appeals process	Independent appeals process	Independent appeals process
<b>Waiver of Litigation Rights?</b>	Yes	Yes	No	Yes
<b>Funding</b>	Post Office and Government	Government	Government	US Government funded
<b>Was compensation perceived as fair?</b>	No	No	N/A	Initially no, later yes
<b>Evidential Burden</b>	Heavy burden on claimants	Heavy burden on claimants	Light	Heavy burden on claimants

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# Annex 1: Post Office Scheme – Detailed Assessment

- Underlying principles: The Historical Shortfall Scheme Independent Advisory Panel was set up by the Post Office to assess eligible claims, on a case by case basis (Post Office, 2022). The Government believes it is appropriate that the Post Office itself takes responsibility for making amends to the postmasters affected. The Post Office itself is not the judge and jury in assessment of individual claims, as the panel is composed of legal, forensic accounting and retail specialists, to assess the claims.
- Victim representation: According to Richard Moorhead, an academic studying the scandal, “the Post Office and Government have adopted a somewhat adversarial approach, containing a conflict of interest.” (Moorhead, 2022) This conflict of interest emanates from the Post Office using lawyers that came with prior involvement in the Post Office case. According to Paul Marshall of Cornerstone Barristers, an advisor of some of the victims, “HSF is unable to escape the appearance of bias.” (Rose, 2022) He expressed concern that “HSF purports to exercise an independent oversight role in connection with the HSS scheme while simultaneously performing a partisan and adversarial role in connection with the Post Office preserved malicious prosecution claims and their settlement.”
- Complexity: The scheme was originally set up on the basis that claimants would not need to use a lawyer. The Post Office contributes a sum of £1,200 towards the cost of such independent advice, were the claimant to require such advice to consider the terms of the offer made to them (House of Commons BEIS Committee, 2022). Sir Wyn Williams, who led the Post Office Horizon IT Inquiry, said “appropriate legal assistance and advice in respect of most of the claims yet to be determined” in the Scheme was “likely to be essential”.
- Independence: The Scheme is being operated by Herbert Smith Freehills (HSF). Claims will be assessed initially for eligibility by people who have no previous knowledge of the cases (by the Independent Advisory Panel) (Post Office, 2023). There are concerns, as HSF were involved in the Lloyds scheme (House of Commons BEIS Committee, 2022). Unlike that scheme, consequential losses are clearly in scope, this scheme accounts for evidential issues, and there are clear mechanisms in place to resolve disputes (House of Commons BEIS Committee, 2022).
- Evidential burden: The burden of proof is on the postmaster to provide sufficient evidence in support of their claim to demonstrate that on the balance of probabilities that: (a) such losses have been suffered and (b) as a consequence of a Horizon Shortfall (Post Office, 2023). However, the Post Office itself hasn’t kept appropriate records, including itemisation of which postmasters paid what amounts to individual suspense accounts. They also seized evidence from victims when first pursuing them for alleged shortfalls, depriving them of evidence. HSF carries out this initial legal assessment. The Panel then reviews the assessment and the facts of the application.
- The fact that these funds were merely added to the overall profits of the Post Office during those years should be sufficient to agree that claimants must be given a significant level of benefit of the doubt when

compensation is being calculated (House of Commons BEIS Committee, 2022). The Panel has a degree of discretion to award 'fair offers' based on the facts of each case, where the postmaster is unable to satisfy the burden of proof.

- Transparency: There is limited information available on how awards are calculated, this is done on an entirely case by case basis.
- Appeals mechanism: The Scheme has a detailed appeals mechanism, a Dispute Resolution Process (DRP). 6% of claimants to whom offers had been made have entered this process, of which almost half have accepted an offer before reaching the mediation stage (Post Office, 2023).
- Funding: There is a £153 million estimated cost of settlement compensation. (Post Office, 2021) This includes c.£89 million from the Post Office. According to Professor Richard Moorhead: the scheme is "resourced to the nines for the powerful; as careful with corporate (or taxpayer) funds as it can be when it comes to paying compensation or lawyers fees for the vulnerable, less chary when it comes to legal fees for the government or the corporates." (Moorhead, 2022)
- Timeliness: There have been significant concerns about the delays in awards, and the impact of this speed of progress on the claimants. According to Sir Wyn Williams, "the plain fact is that there are a significant number of applications unresolved more than 2 years after the applications were made." (Williams, 2023) He remains unconvinced that "complex applications within the HSS are being processed with sufficient vigour," even given, "a balance has to be struck between speed of decision making and ensuring that offers in settlement are full and fair."
- Victim satisfaction: According to written submissions to the Post Office Horizon IT Inquiry, almost every shortfall compensation has been undervalued. Lawyers pushed one claim up by £100,000 (Post Office Horizon IT Inquiry, 2022). This undervaluing has been driven by the 'independent' panel failing to even consider some elements.

## Annex 2: SWPS Compensation Scheme – Detailed Assessment

- Underlying principles: There is an inherent lack of assumption of the responsibility of the perpetrator in the way the scheme is organised. IFAs have not taken accountability for their unsuitable advice, and the impact it has had on members' lives. During an FCA consultation, most industry respondents thought there had not been widespread regulatory failure, despite almost half of the advice having been deemed unsuitable (FCA, 2022).
- Victim representation: Victims were not represented, as the FCA elaborated the rules of the scheme. It subsequently consulted on these rules, and received 132 responses from 28 consumers, 84 firms, 7 trade bodies, 2 insurers, and 11 others (including law firms and compliance consultants) (FCA, 2022). The vast majority of the responses, and therefore potentially of the influence on the design of the scheme, came from firms.
- Independence: The FCA administers the scheme, but the firms responsible contact the members, assess whether advice was unsuitable, and calculate the awards (according to an FCA tool) (FCA, 2022). In essence, IFAs are checking their own homework. The FCA says that they “will also be watching firms closely to make sure they are reviewing advice properly.” However, they do not have a dedicated team to monitor IFAs' compliance.
- Calculation of awards: There are reports that advisors are not factoring in the cost of the advice they gave the IFA in the calculation of the award, thereby minimising the amount of redress they pay. Indeed, the FCA says it has seen evidence of a “small number of firms” not accurately calculating redress which may have resulted in consumers receiving less than they should have (FCA, 2022).
- The FCA tool makes various assumptions about things like future inflation and investment returns. Redress is calculated based on the money needed to top up a personal pension, so the consumer can purchase an annuity at retirement that provides an income similar to what they would have received had they stayed in the BSPPS (FCA, 2022). If the cost of the annuity today is greater than the current value of the member's personal pension, then the firm should make up the difference.
- Legal representation: There is no requirement to have legal representation when dealing with the Financial Ombudsman Service or FSCS, or participating in this scheme. However, 72% of complaints to the Financial Ombudsman and 40% of claims to FSCS being made through third party representatives such as claims management companies and solicitors (National Audit Office, 2022). This points to the general complexity of the redress system and the FCA's failure to recognise the specific vulnerabilities of BSPPS members that prevent them from seeking compensation directly. Legal costs are not covered by the scheme.
- Complexity: Beyond the challenge and weight of choosing which avenue of resolution to choose (FOS, FSCS or this scheme), there is also the difficulty of choosing the time at which to claim. The payment received depends on when the calculation is done, as the value of the award may differ due to changes in the economy (included in the calculation of awards, as redress calculations use complex financial

assumptions that change every three months), and to the change in the methodology in how redress is calculated (FCA, 2022).

- **Eligibility:** “Insistent clients”, who transferred out of the BSPS after being advised not to, and wrote a letter explaining that they were aware of the risks and were still choosing to transfer out, are not eligible for this scheme (FCA, 2022). This distinction is not necessarily salient, as some IFAs drafted or dictated the letters justifying the member’s choice.
- **Funding:** As it now costs less to buy an annuity, the FCA now expects the average redress payout in the scheme to be lower than originally estimated, at £45,000 (FCA, 2022). As markets’ expectations can change when economic conditions change, redress calculations done at different times can result in different payments. A main cause is annuities becoming cheaper because of changes in the economy, such as rising interest rates.
- Firms themselves are funding the scheme, the FCA is temporarily banning the firms who gave the advice from paying shareholders dividends or giving bonuses to directors in order to ensure they do not shift money out of the business before compensation is paid. They will be forced to make payouts totalling £49m by February 2024 (down from £71mn earlier this year) (Makortoff, 2022).
- **Appeals process:** Unsatisfied claimants can appeal to the FOS, with the delays and pitfalls this option represents.
- **Victim satisfaction:** BSPS members have expressed their view that the redress values have been “significantly” reduced in the current economic climate, as well as modelling by consultants OAC, which shows since mid-2022 the value of redress for a typical BSPS members has been nil (Hickey, 2022).
- “Steel workers have been subjected to lottery-like compensation system ridden with delays and inconsistencies in redress methodologies. This scheme won’t be fair and relevant to those too young to buy an annuity”, according to Al Rush, an independent financial adviser and principal of Echelon Wealthcare (Cumbo, 2022).
- Taking supervisory or enforcement action against every company that provided BSPS transfer advice “would not be practical” or an “effective use” of limited resources, according to the FCA. “Many bad advisers will now avoid justice,” said Rush (Cumbo, 2022).

# Annex 3: IRHP Scheme – Detailed Assessment

- Underlying principle: Its stated aim was to swiftly achieve fair and reasonable outcomes for customers by “putting the customer back in the position they would have been in had the regulatory failings not occurred, including any consequential loss.”
- Eligibility: Over one third of sales - 10,577 out of a final scheme cohort of 30,784 - were excluded as they were to businesses deemed to be “sophisticated”, despite falling within the category of ‘private customers’ or ‘retail clients’ (depending on the sale date) towards whom banks had the same duty to meet the required regulatory standards as all scheme participants (FCA, 2016). An Independent Review was highly critical of the concept of “sophistication” and the criteria used to define it
- Independence: Each bank ran its own review, including gathering and selection of information and evidence and decision-making. Although not statutory, it involved the use of Section 166 ‘skilled persons’ acting as “Independent Reviewers” to oversee all aspects of the review of each banks’ sales of IRHPs to eligible customers, “confirm the appropriateness” of all redress outcomes and report to the regulator, but did not make decisions on cases (FCA, 2015). Customers’ access to the Independent Reviewer was limited and only through the bank, and firms fulfilling the role, including Deloitte and KPMG, were bank appointed and had past and potentially future commercial relationships with banks.
- Victim representation: Victims do not appear to have had any significant role in the design of this scheme and Swift confirms that “while the FSA had regular contact with a range of stakeholders, including some customers and their representatives, they were not afforded a proper opportunity to give meaningful input on key changes before these were agreed. Rather, the changes to the Scheme – which made it considerably less favourable to customers – were negotiated in last-minute discussions behind closed doors with the banks. The only other stakeholder to be consulted on these at the time was HMT – then the main shareholder of two of the first tier banks.” (Swift, 2021)
- Complexity: Banks did not commit to fund expert/legal costs (FCA, 2016); customers were told that the scheme was straightforward and that no advice or representation was needed.
- Timeliness: Redress was not timely. The mis-selling occurred 2001-2009 and the full scheme did not begin until Q2 2013 (FCA, 2016).
- Evidential burden: Each sale was assessed against a set of “sales standards”, based upon relevant regulatory rules and guidance, with the onus mostly on the bank to produce positive evidence that the IRHP sale had complied with the relevant requirements rather than on the customer to show that it had breached them. A non-compliant sale did not necessarily lead to redress; banks undertook a subjective counterfactual assessment of what the customer would have done differently if there had been no breaches of regulatory requirements. However, the methodology used to determine this assessment does not fully address the circumstances in which a customer should retain their original product and receive no redress, and nor is it clear how any alternative product was selected. The Consequential loss process remains opaque but it appears that the evidential burden on the customer was extremely high (FCA, 2012) (FCA, 2013) (FCA, 2013).
- Determination of damages and corresponding awards: The calculation of basic redress was not necessarily related to the customer’s actual or perceived loss; it was calculated as the difference between the costs of the original product, including any break charges incurred and the costs of any replacement product. In respect of Consequential Loss, customers were told “The banks will use an established legal approach to determine consequential losses, which will involve a consideration of whether the loss was caused by the breach and whether the loss was reasonably foreseeable at the time of the breach of the regulatory requirements.” (Financial Services Authority, 2013).
- Appeals mechanisms: There was no independent appeals process.
- Funding: Banks funded their own review process.
- Satisfaction of victims: Customers with low value IRHPs and little or no consequential losses who received full tear ups or caps as alternative products were likely to be broadly satisfied with the quantum of redress if not the long wait to receive it. Dissatisfaction was far more likely among customers who received either no redress or alternative products other than caps as well as those who were not able to secure meaningful redress for high value consequential losses. Over 2000 customers “opted out” of the scheme and the FCA recorded high levels of complaints from customers (FCA, 2015) as well as from MPs, who also continued to engage on behalf of constituents in Parliament and directly with banks (Hansard, 2016).

# Annex 4: RBS GRG Scheme – Detailed Assessment

- Underlying principles: The stated objective was “to deliver fair outcomes for Customers” but eligibility was restricted to a subset of SME customers under the control of GRG (RBS, 2018).
- In-scope RBS SME customers were able to submit written complaints about their experiences within GRG. An RBS team would assess and decide whether to uphold each complaint and if so whether to make an offer of redress for Direct Loss and/or a Goodwill payment after which the customer had the option to appeal any aspect of the decision and/or amount of redress offered to an “Independent Third Party” (ITP) (RBS, 2018).
- Victim representation: The scheme was designed by RBS and agreed by the FCA without involvement or representation from potential complainants or claimants.
- Independence: The information-gathering, assessment and decision-making processes in respect of both direct loss and consequential loss were conducted or directed in-house, behind closed doors by RBS. The ITP and an associated team adjudicated on appeals and RBS agreed to be bound by those decisions. The ITP provided a further “assurance” role with respect to the processes and running of the overall scheme, but was accountable to RBS rather than to either the FCA or to Parliament (Blackburne, 2017).
- Complexity: The scheme was described as “summary” in nature and presented as just a matter of submitting a complaint, but it involved significant challenges for participants and for those carrying out assessments and adjudications. Sir William Blackburne, ITP, commented: “I have the sense that, in order to demonstrate to me as Independent Third Party that it had gone about matters in the right way, the bank adopted processes which in some important respects were over-elaborate and could not handle the anticipated volume of Complaints within any reasonable time-frame” (Blackburne, 2017)
- Timeliness: It took until the end of 2020, so up to 4 years, to deliver final outcomes in respect of all categories of loss to all participating in-scope customers, meaning that some may have been waiting up to 10 years for a chance of redress.
- Evidential burden: Although scheme ‘principles’ were published at an early stage, these were relatively high level and the general lack of transparency of the assessment and decision-making process precludes an informed assessment of the extent and strictness of the evidential burden on complainants. There are indications in ITP reports that there may have been limited leeway to accept the validity of statements and arguments put forward customers if these were not well evidenced by the customer and/or corroborated by bank records. In addition, participants could not see what information and evidence the bank itself held on their case. The data on uphold rates for consequential loss claims points to strict eligibility criteria and a high evidential bar for success in this part of the process. The highest uphold rate (and also uphold rate for appeals) for heads of loss other than those in respect of ‘Claim Preparation Fees’ and ‘Legal & Professional Fees’ is just 11% (Blackburne, 2022).
- Determination of damages and corresponding awards: There were 2 categories of loss in respect of which customers could attempt to make a claim through the complaints scheme – direct loss and consequential loss.
- Appeals mechanisms: A High Court Judge, Sir William Blackburne was appointed by RBS to the role of ITP.
- Funding: RBS funded the scheme, including remunerating the ITP and his associated team.
- Satisfaction of victims: Over 50% of complaints in respect of Direct Loss and claims for Consequential loss were upheld but the total redress flowing from complaints (including that offered on appeal) was far less than the £115m that RBS originally stated it provided as automatic refunds (Blackburne, 2022) (Blackburne, 2021) (RBS, 2022). Redress for Consequential loss was particularly very low considering the extent of inappropriate treatment found by Promontory. Furthermore, more than 1 in 3 of the 2693 complainants appealed one or more aspects of their outcome to the ITP and almost half of all those who made Consequential Loss claims also appealed (Blackburne, 2022).

# Annex 5: Foskett Panel – Detailed Assessment

- Underlying principles: The original customer review, The Griggs Review, did not succeed in providing fair or reasonable offers of compensation to all victims (Cranston, 2019), as determined by the Cranston Review. The Cranston Re-Review established a framework for a compensation scheme to properly compensate victims (Cranston, 2020). Sir David Foskett was subsequently selected to chair the panel determining compensation awards (39 Essex Chambers, 2020).
- Victim representation: In Sir Ross Cranston’s Re-Review, the APPG on Fair Business Banking, the SME Alliance, and at least 71 victims who had been involved in the original customer review submitted evidence (Cranston, 2020). Victims and associated groups therefore did have the opportunity to comment on Sir Ross Cranston’s proposals, and Sir Ross stated that he did take some of these views into account in his final proposals (Cranston, 2020). However, in practice many victims feel that the Foskett panel is quite different to the one envisaged in the Cranston Re-Review (Keats, 2022).
- Independence: The panel and their advisors are independent of Lloyds Bank. There have been questions from some victims surrounding the role of FTI consulting, which advises the panel on pay-out policy, as its senior managing director of restructuring “... had been named on several insolvency jobs where Lloyds was the main secured creditor, including a case that overlapped with the re-review process” (Hurley, 2022). The role of FTI consulting and the appearance of a conflict of interest has resulted in a lack of trust in the process from some victims (Hurley, 2022).
- Complexity: The process was meant to be non-legalistic and common-sense. In practice, the process is complex for victims. The APPG has heard that the process is complex and stressful, and in many cases requires professional assistance (Keats, 2022).
- Timeliness: The process has not been timely. Until the introduction of Fixed Sum Awards (FSA) on 3rd August 2022, the panel had made 19 decisions in 18 months. Since the introduction of the FSA, the panel has made a further 102 decisions (Foskett Panel, 2022). The initial frauds took place between 2002 and 2007, meaning that some victims have been waiting over 20 years for redress.
- Evidential Burden: In theory evidential burden is on neither party as the process is inquisitorial, meaning the panel gathers the evidence available to it and makes a decision. In practice, many victims feel that the burden is on them to prove that they are victims (Keats, 2022).
- Determination of damages and corresponding awards: When claimants are found to be victims, they have the option to accept the £3 million net of tax FSA. If claimants choose to stay in the process, the Panel and its advisors try to work out the position the business would have been in if the fraud had never occurred. In practice, there is a lack of clarity about how the Panel makes these calculations and the Panels calculations are often much lower than the calculations made by claimants’ independent advisors (Keats, 2022).
- Appeals mechanisms: During the process, after the minded to decision (MTD), both Lloyds and claimants have an opportunity to challenge the MTD and present new evidence. Further funding for appropriate professional support is then available at this stage. After the final decision of the panel, there is no appeals process in place (Foskett Panel, 2020).
- Funding: Lloyds are funding the scheme.
- Victim satisfaction: Victims have perceived the process as onerous and burdensome. They report having waited a long time for compensation and whilst there have been significant awards, the process has lasted years and reportedly taken a toll on victims. In addition, disagreements about amounts awarded have increased perceptions of a conflict of interest of those involved in award calculations.

# Annex 6: Windrush Scheme – Detailed Assessment

- Underlying principles: “Payment of compensation under the Scheme does not reflect an acceptance on the part of the Home Office of any legal liability for the losses in respect of which the compensation is being paid.” (Home Office, 2023)
- Victim representation: The Home Office carried out a government consultation to better understand what happened and individuals’ personal stories. The consultation received criticism from respondents for being too long and excessively complex (National Audit Office, 2021). It also disregarded issues raised in the consultation by claimants .
- Independence: The perpetrator and the adjudicator were both the Home Office. Many victims are still too fearful of the Home Office to apply for compensation (Hansard, 2022).
- Complexity: Parliament and the media have criticised the complexity of the claim process and the length of time it takes for claimants to receive compensation, with many claimants dying before receiving payment (National Audit Office, 2021).
- Timeliness: Long delays in processing applications and making payments, and inadequate staffing of the scheme, have been highlighted (House of Commons Home Affairs Select Committee, 2021).
- Evidential burden: Parliament and the media have criticised the amount of documentation claimants must provide to support their claims, with an excessive burden on claimants to provide documentary evidence of the losses they suffered (House of Commons Home Affairs Select Committee, 2021).
- Determination of damages and corresponding awards: Even when claimants have been successful, they have perceived the value of payments as insufficient to compensate for the harm suffered (National Audit Office, 2021).
- Appeals mechanisms: There is no demonstrably independent, single-stage review process, such as a judge-led panel was available to victims (House of Commons Home Affairs Select Committee, 2021).
- Funding: The Home Office has spent much less than its budget running the scheme (National Audit Office, 2021).
- Satisfaction of victims: Some respondents to a Home Office commissioned survey reported they did not trust the Home Office or believe they would be helped or were eligible (National Audit Office, 2021).

# Annex 7: 9/11 Fund – Detailed Assessment

- The VCF ended 2021 having awarded a total of over \$9.3 billion to nearly 42,000 individuals. Over 70,000 claims have been submitted. 40,000 of these were from first responders, 30,000 from victims. 67,000 were for personal injury, 4000 were deceased claims (VCF, 2022).
- Underlying principles: Three principles guide the scheme. First, the VCF strives to be fair to all claimants. This means that it considers both fairness to the individual claimant as well as fairness to the entire claimant population, with priority given to those who suffer from the most debilitating physical conditions. Second, everything they do must be faithful to the statute that governs their work. And third, because the fund involve spending public funds, they must ensure that every aspect of the award is adequately justified and documented (VCF, 2022).
- Victim representation: Victims were not represented in the design phase, but the Special Master of the scheme listened and evolved procedures to adapt how the scheme worked (Kushlefsky, 2015). The Civil Division of the Department of Justice administers the VCF.
- Legal assistance: Claimants do not need a lawyer to file a claim, but if they choose to do so, the law limits the fee the lawyer may charge (maximum 10% of the award) (VCF, 2022).
- Evidential burden: Claimants have to prove that they suffer from an illness that has been determined to be an “eligible 9/11-related physical condition”, and that they were present in the New York City exposure zone at that time (VCF, 2023). This burden is challenging to bear for claimants, especially with regard to finding documentation supporting their presence at an eligible location after so many years have passed.
- Calculation of damages: The claims made under the VCF only related to eligible physical injuries and their economic consequences (VCF, 2022). Calculations of damages are limited: capped non-economic loss that results from a cancer are capped at \$250,000.
- Appeals process: A claimant dissatisfied with the special master’s decision on his or her claim may file an appeal and request a hearing before a VCF-appointed hearing officer (VCF, 2022). There is no further right of appeal or judicial review of VCF decisions.
- Funding: The scheme is funded by the federal government, as stated by the Act, which “appropriates such funds as may be necessary to pay all eligible claims” (VCF, 2015)
- The fund website provides detailed information about how the Fund generally evaluates and calculates compensation for non-economic and economic loss (VCF, 2022). Given the volume and variability of claims, and the legal requirement that the Special Master consider individual circumstances in each case, however, it is not possible to cover every potential situation.

# Annex 8: Infected Blood Recommendations – Detailed Assessment

- Underlying principles: The main objective is to offer fair and proportionate compensation for the suffering and losses of the infected and affected. Sir Robert recognises that compensation is not just a matter of money, but includes the provision of support, and above all, restoration of dignity (Francis, 2022).
- Independence: A cross-Government working group, co-ordinated by the Cabinet Office, is taking forward work strands informed by Sir Robert's recommendations (Hansard, 2022). Work is going on as to how the scheme will best be constituted, but there is a recognition of independence as key behind the principles of the recommendation of an Arms Length Body (ALB).
- Victim representation: For Sir Robert, it is important to involve potentially eligible persons and their representatives in the review and improvement of the scheme, for example, by way of an advisory forum (Francis, 2022). Evidence of consultation and involvement of victims in the development of the rules remains to be seen.
- Evidential burden: There is concern that people affected by the infected blood scandal are falling through the gaps in the present frameworks for financial assistance and compensation, including those whose medical records have been lost and destroyed (Hansard, 2022). For Sir Robert, proof of eligibility should be made automatic, and should include both affected persons and carers.
- Determination of damages and corresponding awards: According to Sir Robert, the Government should set out a framework of tariff based compensation for eligible infected and affected persons, at rates which broadly reflect comparable rates of common law damages and other UK compensation schemes, and in addition allowing an assessed basis for defined financial losses (Francis, 2022). The rates of compensation should be based on the advice of independent clinical and legal panels. He recognises that there is a tradeoff between a bespoke model of individual assessment, where the process would be complex and burdensome for applicants, uncertain in outcome and productive of disputes, and a simpler, tariff based model (Francis, 2022).
- Complexity: Sir Robert also recommends that there be a commissioned advice and advocacy service to assist applicants navigate the process and ensure that their needs and claims were fully articulated and understood (Francis, 2022).
- Litigation rights: Sir Robert recommends that there be no waiver of litigation rights. It should not be made a condition of an award under the scheme that it be accepted as in full and final settlement of any legal claim. The freedom of choice of the infected and affected to choose to seek a further court based award should be preserved (Francis, 2022).

## Annex 9: LCF Scheme – Detailed Assessment

- Underlying principles: The Scheme paid 80% of bondholders' principal investment in eligible bonds, up to a maximum of £68,000. Where bondholders had received interest on their bonds, distributions from the insolvency administrators, Smith & Williamson, or compensation from the FSCS for LCF bonds, this reduced the amount of compensation payable under the Scheme (HM Treasury, 2021).
- Victim representation: FSCS designed and administered the scheme. Victims were not represented in the process.
- Independence: The process was independent from the perpetrator, LCF, being both designed and implemented by FSCS (Glen, 2021).
- Complexity: The scheme was not complex for claimants. FSCS contacted as many eligible bondholders as possible. Bondholders not contacted by FSCS expecting compensation could contact FSCS (FSCS, 2022).
- Timeliness: The scheme was relatively timely. LCF went into administration in January 2019. Compensation scheme began contacting people on 25th November 2021. The scheme closed on 31st October 2022.
- Evidential burden: For claimants not contacted by FSCS, the evidential burden was on claimants to show that they held eligible bonds.
- Determination of damages and corresponding awards: The scheme paid 80% of bondholders original investment, up to a maximum of £68,000 (Glen, 2021).
- Appeals mechanisms: Eligible claimants can appeal to the scheme operator (FSCS) regarding the amount of compensation awarded on the basis that it was incorrectly calculated within 3 months of the first offer of compensation. Claimants not offered compensation may appeal to the scheme operator (FSCS) to make an offer of compensation within 9 months of the commencement of the scheme (HM Treasury, 2021).
- Funding: The scheme was funded by Her Majesty's Treasury.
- Satisfaction of victims: Not widely reported. FSCS say that 99.5% of eligible bondholders have been compensated.

# Annex 10: Tesco Scheme – Detailed Assessment

- Underlying principles: The scheme aimed to reimburse investors who experienced financial loss as a result of the market abuse (FCA, 2017).
- Victim representation: Victims were not involved in the scheme design. There was a high quantity of cases and most claims were low value. In schemes like this, it is not practical to ask victims to have a high level of involvement.
- Independence: KPMG administrators were independent of the perpetrators (FCA, 2017). Licensed insolvency practitioners supervised the scheme, and as officers of the court, have statutory duties, as well as being supervised and regulated by the FCA. This arrangement meant that checks and balances were in place, to provide comfort to investors. In contrast, in the USA, the incentives are different, as claims management firms make their business from these schemes.
- Complexity: The scheme was designed to be straightforward for claimants. Legal representation was not necessary and the relevant information was intended to be accessible for claimants. KPMG tried to contact all eligible claimants by email. Claimants not contacted by the scheme could make a claim by providing evidence of their share and bond purchases and evidence of any sales during the relevant period (Horne, 2018).
- Timeliness: The scheme ran from 23rd August 2017 - 22nd February 2018 (6 months). The initial fraud took place in 2014. There were complaints that the scheme took too long to set up. However, designing the scheme involved a significant complexity, as it involved compensating both shareholders and bondholders.
- Evidential burden: Evidential burden is on the claimant but the evidence required was intended to be relatively easy for claimants to provide.
- Determination of damages and corresponding awards: Compensation calculations were plain and simple and deliberately so. Those who could demonstrate they bought shares in the specified time period were entitled to compensation of 24.5p per share purchased, plus interest of 4% for retail investors and 1.25% for institutional investors (FCA, 2017).
- Appeals mechanisms: During the process claimants were able to dispute the initial determination, the claimant is then required to provide further information to evidence details of their claim. After the final determination, no appeals mechanism exists (FCA, 2017).
- Funding: Tesco funded the compensation scheme.
- Satisfaction of victims: There has been limited media reporting, no victim support groups and no public data on number of appeals. It is also challenging to go out to a large enough number of people, in order to get sufficiently representative feedback.

## Annex 11: Interviewees

In the writing of this report, we interviewed a series of experts on each redress scheme:

- Richard Moorhead, Professor of Law and Professional Ethics at the University of Exeter. He is researching the Post Office Scandal.
- Philippa Hann, head of litigation at law Firm Clarke Willmott LLP and specialises in financial services law, she has particular expertise in running group action litigation. She has acted for clients in claims against defendants such as Barclays Bank, EY, UBS and HSBC. Philippa and her team act for over 1100 steel workers who were transferred out of the British Steel Pension Scheme.
- Sir Robert Francis, KC is a barrister who before his recent retirement from full time practice at the Bar, specialised in medical law, including medical and mental health treatment and capacity issues, professional discipline, and claims for damages in clinical negligence cases. Sir Robert was appointed by the Government to carry out a study which examined options for a framework for compensation for victims of the infected blood scandal. (From GOV.UK)
- Al Rush, former RAF serviceman who retrained as an Independent Financial Advisor from Port Talbot who, like Phillipa Hann, is working to get redress to British Steel Workers who were transferred out of the British Steel Pension Scheme on the back of bad advice.
- Andy Keats is CEO of the SME Alliance. The SME Alliance (SMEA) was formed in 2014 to assist SMEs with serious banking complaints. SMEA has been a stakeholder in the set-up of the Business Banking Resolution Service and the Foskett Panel redress scheme for the HBOS Reading bank fraud victims.



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